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C A S E S

DECIDED IN

THE COURT OF SESSION,

FROM

NOV. 12, 1831, TO JULY 12, 1832.

REPORTED BY

PATRICK SHAW, ALEXANDER DUNLOP, AND
J. M. BELL, ESQUIRES, ADVOCATES.

VOL. X.

EDINBURGH :
PRINTED FOR WILLIAM BLACKWOOD.

1832.



EDINBURGH : PRINTED BY BALLANTYNE AND COMPANY, PAUL'S WORK.

J U D G E S
OF THE
COURT OF SESSION
DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President HOPE.
Lord CRAIGIE.
Lord BALGRAY.
Lord GILLIES.

PERMANENT LORDS ORDINARY.

Lord NEWTON.*
Lord COREHOUSE.
Lord FULLERTON.

SECOND DIVISION.

Lord Justice-Clerk BOYLE.
Lord GLENLEE.
Lord CRINGLETIE.
Lord MEADOWBANK.

* On his death Lord Fullerton was removed from the Second to the First Division.

PERMANENT LORDS ORDINARY.

Lord MACKENZIE.

Lord MEDWYN.

Lord FULLERTON.*

LORD ORDINARY ON THE BILLS.

Lord MONCRIEFF.

JOHN HOPE, Esquire, Dean of Faculty.

FRANCIS JEFFREY, Esquire, Lord Advocate.

HENRY COCKBURN, Esquire, Solicitor-General.

* On the death of Lord Newton his Lordship was transferred to the First Division.

INDEX OF NAMES

IN

VOLUME X.

<i>Pursuers.</i>	<i>Defenders.</i>	<i>Page</i>
A. B.	C. D.	425
— —	— —	523
— —, Petitioner,		673
— —		
Aitchison and Co.	A. B.'s Creditors	771
Aitken and Others,	Burnside's Trustees,	296
Allan,	Reid,	535
— —	Tait,	46
Anderson,	Scott,	619
— — and Childs,	Anderson,	696
Anstruther and Husband,	Pott and M'Millan,	534
Archibald,	Anstruther,	185
Atholl, Duke of,	Bridges,	815
Attwood and Others,	Anderson and Others,	49
	Kinnear and Sons,	817
Baillie's Trustees,	Crosse or Stewart,	617
Baird,	Officer,	146
— —	Polmont, Minister of, &c.	752
Balerno Distillery Company,	Brown,	177
Balfour,	Lyle,	853
— —	Tweeddale's Commissioners & Others,	427
Ballendene and Husband,	Chrystal,	168
Barclay and Others,	Magistrates of Montrose, &c.	859
Barnet,	Duncan,	128
Barr,	Clyne,	408
Beattion and Spouse,	Gaudie,	286
Beck,	Learmonth and Co.	81
Bell (Smith's Trustee,) — —	Bank of Scotland,	100
		265
Bellis and Thundercliffe,	Bell's Creditors	495
Bennie,	M'Gregor,	96
Berford,	Mack,	255
Berry,	Brown,	609
Bignall,	Lamb,	792
Binnie,	M'Millan,	679
Bifffwhistle's Trustees (Gill, &c.),	M'Ra,	642
		552

INDEX OF NAMES.

<i>Pursuers.</i>	<i>Defenders.</i>	<i>Page</i>
Black,	Auld,	205
Blackett and Others,	Gilchrist and Others,	590
Blantyre (Lady) & Others, Petitioners,		702
Blyth,	Maberly's Assignees, &c.	796
Bogle and Others,	Henderson and Others,	104
Borthwick, Petitioner,		620
Bousie (Wallace's Trustee),	Harvey,	355
Bowes or Wallace,	Fergus or Deas, and Husband,	164
Boyd,	Lang,	213
Bridges (Manners's Trustee),	Willison's Trustees,	43
Brock (C. Gillespie's Trustee),	Brocket, &c. (J. Gillespie's Trustees),	562
Brodie,	Sinclair,	99
Broughton,	Fraser (Cameron's Trustee),	418
Brown, Petitioner,		45
_____ (Alex. and Co.),	Rollo and Others,	667
Brownlee and Others,	Ure (Scott's Trustee),	737, 806
Bruce (Rennie's Trustee),	Waddell and Others,	39
Buchan and Others,	Hamilton,	250
Buchanan and Gray,	Harper,	486, 838
or Forbes,	Zuilles,	235
_____		289
Burbridge and Co., and Mandatory,	Glassford,	352
Burntisland Whale-Fishery Co.	Yuills,	555
	Sturrock,	520
	Leven and Morrison,	181
Calder,	Calder's Creditors,	795
Calderhead's Trustees,	Fyfe and Marshall,	582
Caledonian Iron Company,	Clyne,	138, 141
Cameron,	Stewart, Pott, and Co.	37
Campbell,	Campbell or Thomson,	373
_____ and Others,	Hamilton or Westenra, &c.	734
Canal Co., Edin. and Glasgow Union,	Laurie and Others,	62
Canal Company, Forth and Clyde,	Paul,	229
Cantach or M'Donald,	Johnston,	505
Carswell, &c. (Hunter's Assignees),	Tennant and Co.	383
Caven,	Rose and Fowler,	477
Cheyne,	Munn's Trustees,	677
Clarkson,	Mackie,	550
Clyne,	Smith or Thomson,	622
Cogan,	Cheyne,	202
Coldstream and Scales,	Ball and Mandatory,	17
Cook and Paul,	Caledonian Iron Company,	132
Cox (Stead and Paterson's Trustee),	Kinnoull (Earl),	836
Craig,	Lyon and Others,	267
Craigie,	Threshie,	356
Creightons,	Jeffrey (Cuthill's Trustee),	75
Crawford and Others,	Stead and Others,	122
Crawfurd,	Hill and Sinclair,	219
Crowder or Turnley,	Scobie,	6, 510
Cullen or M'Kenzie,	Croall and Morrison,	315
Cuming's Trustees,	Deans,	695
Curtis and Mandatory,	Bennet (Crawford and Co.'s Trustee),	537
	Hodge,	11
	Watsons	29
	Ewing,	497, 748
	Cuming,	804
	Sandison,	72

INDEX OF NAMES.

iii

<i>Pursuers.</i>	<i>Defenders.</i>	<i>Page</i>
Darling and Others,	Adamson and Watson,	119
Denovan,	Johnstone,	206
Dick,	Taylor's Trustees,	19
Dixon and Others,	Dixons,	178
<hr/>	Watson and Others,	209
Dougalls,	M'Cartney,	719
Douglas,	Jones,	379
—— &c. (Stein's Assignees)	Gibson-Craig, &c. (Stein's Trustees),	647
Drummond,		216
<hr/>	Gilmour,	266
Drysdale,	Drysdale or Gordon, and Husband,	98
Drysdale and Others,	Wood,	198
Duddington, Kirk-Session of,	Halyburton and Others,	196
Dudgeon,	Forbes,	810
Duguid,	Caddall's Trustees,	149
Dundee Railway Company,	Miller, Soots, and Others,	269
Dunn or Mason,	Merry,	555
<hr/>	Longlands,	542
Easton,	Johnston,	505
Edin. and Glasgow Union Canal Co.,	Downe and Others,	404, 557
Edinburgh and Leith Shipping Co.,	Officers of State,	25
Edinburgh, Magistrates of,	Clyne,	723
Edinburgh Oil Gas Light Co.	Finlayson,	345
Ellice and Co.	Wight,	109
Ewing,	Commercial Bank,	249
<hr/>	Thomson (Mason and Co.'s Trustee),	526
Farquharson,	Fergusson and Others,	140
Fergusson,	Walker and Others,	317
Ferrier,	Gartmore's Creditors,	616
—— (White's Trustee),	Donaldson's Trustees,	813
Findlay,	Scott,	192
Fisher,	Dixon and Others,	55
—— and Others,	Findlay, James and Co.	739
Fleming,	Lawson,	472
Flockhart,	Florence,	326
Florence,	Livingstone,	341
Forbes,	Hume,	410
—— (Lord) and Others,	Leys, Mason, and Co.	851
—— and Co.,	Edinburgh Life Assurance Company,	451
Forman, Nicholson, and Roberts,		365
Forrest,	Duffus, Lord,	10
<hr/>	Clyne,	121
Foryth, &c. (Phillips' Trustees),	Fergusson,	646
Fortune,	Luke,	115
Fraser and Others,	Johnstone, &c.	104
Freen and Others,	Beveridge,	727
Fyffe,	Fraser,	381
<hr/>	Rosses,	315
Gallie,	Hammermen of Perth,	755
Garvie,	Geikie's Creditors,	744
Geikie,	Scott,	443
George,	Stephenson and Others,	554
Gibson,	<hr/>	
—— (Wilson and Son's Trustee),	M'Ra,	711
Gill, &c. (Birtwhistle's Trustees),	Donaldson's Trustees,	552
Glenquoit and Others,		174

INDEX OF NAMES.

<i>Pursuers.</i>	<i>Defenders.</i>	Page
Gillespie's (C.) Trustee (Brock),	Brocket, &c. (J. Gillespie's Trustees),	562
Gillies,	Smith,	636
Glas,	Stewart,	351
Glasgow's Trustees,	Allan,	438
Goldie (agent in Ranking of Parton),	Napier,	437
Gordon,	Trotter,	47
_____, and Others,	Dunn,	338
_____, 's Trustees,	Gunn,	742
_____, and Stewart,	Innes,	616
Gow,	Lawrence,	643
Gowans,	Napier,	812
Gracie,	Oswald,	144
_____,	Ferguson,	363
Graham and Others,	Hannay's Representatives,	628
Greig,	Aitken and Others,	65
Guthrie and Others,	M'Farlane,	382
Gye and Co.,	Colvil and Others,	515
	Hallam,	512, 710
Hagart,	Inglis,	506
Hamilton,	Bridges,	262
_____,	Bennet and Others,	830, 426
	Russel,	549
Harper,	Balfour,	248
Henderson,	Burns and Others,	467
_____, and Others,	Reid,	632
Henry,	Greig and Others,	239
_____,	M'Ewan,	572
	M'Dougall's Trustees and Others,	615
Hogg and Husband,	Watt and Others,	644
Home,	Smith,	808
Hopetoun, Earl of,	Lundie,	508
Hotchkis and Meiklejohn,	Agent in Locality of Inverkeithing,	361
How,	Kirk and Others,	289
Howison,	Mein,	7
Hume,	Stewart,	630
Hunter,	Stewart,	95
_____,	George's Trustees,	561, 604
	Creightons,	588
	Dodds,	833
Inglis,	Lane and Co.,	368
_____, 's Trustee (Paul) and Others,	Harper,	486
Innes,	Gordon, Duke of,	173
Jackson's Trustees,	Black,	597
Jardine,	Brown,	479
Jobson,	Reid or Robertson,	594
Johnson,	Johnston and Others,	70
Johnston,	Elder,	195
_____,	Inglis,	260
	Carlyle and Others,	657
Johnstone,	Clark,	330
_____, and Others,		341
Kay,	Rodger,	831
Kay and Morton,	Dundee, Magistrates of,	378
Keith,	Smart,	514, 824

INDEX OF NAMES.

v

<i>Pursuers.</i>	<i>Defenders.</i>	<i>Page</i>
Kemp,	McKenzie,	389
Kerr and Co.,	Thomson,	554
——— and Ingles,	Woods, &c.,	774
Kibbles and Others,		341
Kincaid,	Agnew,	473
King,	Hunter and Others,	544
———'s Advocate,	Kirkwall, Magistrates of,	328
Kirk,	Hotchkis and Meiklejohn,	655
Kirkland and Others,	Slater (Rowley's Trustee),	169
——— and Sharpe,	Gibson (Wilson and Son's Trustee),	167
——— and Sharp,	Wilson's Creditors,	377
Knox,	Malcolm,	215
Laing,	Cheyne,	200
Laird,	Middleton,	84
Lang,	Bruce,	777
Laurie,	Black,	1
Lawrie, or Graham and Others,	Graham,	196
———	Donald and Others,	771
Lawson,	Ogilvy,	531
———	Fairie and Co.,	572
Learmonth,	Trotter,	810
Leslie,	A. B.	315
Livingston,	Beveridge and MacLarty,	52
Lockhart and Others,;	Lanark, Magistrates of, and Others,	243
Lowrey or Maxwell,	Donald and King,	98
Luke and Others,	Brown and Others,	307
Lundie or Compton,;	Home,	125
McCallum and Dalgliesh,	Christie,	770
McCartney,	Edinburgh, Magistrates of,	705
McCosh,	McCosh and Others,	579
McDonald,	Fraser,	235
———	Farquharson and Others,;	236
———	Brunton and Others,	299
——— (Stevenson's Trustee,) and		
Others,	Macdonald, Lord,	341
——— and Others,	McFee's Creditor,	584
McFee,	Donaldson,	1215
McGhie,	Melvin,	604
McGill,	Lamb,	69
McIntyre,	Stewart,	414
McIver,	Allan and Simpson,	119
Mack,	Cleland,	349
———	Robertson,	850
McKay and Co.,	McFarlane,	813
McKechnie,	Johnstone and Syme,	126
McKenzie,	Reid and Nicolson,	21
——— or Cullen,	Ewing,	89
MacLaren,	Breadalbane, Marquis of,	497
McLaurin,	Stewart,	333
McLean,	Shirreffs (Wilson's Trustee),	163
McLellan and Husband,	Chalmers' Trustees,	217
——— and Son,	Finlay,	375
McLeod,	McKenzie,	771
———	Dudgeon,	206
———	Smith,	674
———		794

INDEX OF NAMES.

<i>Pursuers.</i>	<i>Defenders.</i>	<i>Page</i>
McMillan,	Campbell,	220
M'Nab,	Hamilton,	180
M'Neill,	Lockhart,	806
M'Queen and Husband,	Nasmyth,	470
M'Ra and Others,	Macartney,	300
Marjoribanks,	Amos,	79
Manson, &c.,	Clyne,	811
Matheson,	Fodderty, Kirk-Session of,	183
—	M'Kinnon,	825
Meek,	Smith, &c.	652
Megget,	Scoular,	233
Meggett and Christie,	Spence,	207
Menzies,	Livingstone,	203
— C. and J.	Menzies,	581
Mercer,	Peddie and Alexander,	405
Millar,	Fisher,	70
Miller,	Mills and Vary,	295
—	Miller,	362
Minto, &c.	Kirkpatrick,	479
Mitchell,	Morrison and Others,	190
—	Mitchell's Creditors,	230
and Spouse,	Rankine and Spouse,	811
Montrose, Magistrates of,	Scott,	716
Moodie or Anderson,	Harley (Anderson's Tutor),	211
Morrison,	Turnbull and Others,	128
— and Others,	Anderson,	204
Mortimer,	Lord Clerk Register, &c.	259
Morton,	Braidwoods,	743
Muir,	Munro,	162
Manro,	Wyllie and Noble,	83
Murdoch and Brown,	Miller, &c. (Ducat's Trustees),	811
Murray, &c. (Murray's Trustees),	Murray, Strachan, and Others,	445
Murrays,	Blackwood and Others,	706
Myrne and Others,	Heath,	276
National Bank,	Thompson,	430
Neilson,	Dundee, Kirk Session of,	694
Nicoll,	M'Alister's Trustees,	466
Nicholson, Roberts, and Forman,	Stuart and Others,	670
Nicolson,	Northumberland, Duke of, and Others, Harris, Bell, &c.	365
Nimmo,	Graham,	759
Northumberland, Duke of, and Others, Harris, Bell, &c.	Vallance and Others,	844
Officers of State and Others,	Brown,	366
Orr,	Stewart,	427
— and Others,	Phaup,	135
Osborne,	British Commercial Insurance Co; &c.	618
Palmer and Co.	Harper,	606
Pattison,	Pender's Trustees,	496
Paul,	—	252
— (Inglis's Trustee),	Irving, and Magistrates of Annan,	486
— and Others,	—	19
Pender,	—	192
Philp, Jervis, and Others,	—	199
— and Others,	—	152
Peel,	—	—

INDEX OF NAMES.

vif

<i>Pursuers.</i>	<i>Defenders.</i>	<i>Page</i>
Pulteney and Others,		362
Rae,	London and Edinburgh Shipping Co.	303
Raeburn,	Baird,	761
Raleston,	Farquharson and Others,	410
— or Alison,	Rowat,	848
Ramsay,	Roberts,	192
—	Cunningham's Trustees,	745
Renton,	Campbell,	38
Reynoldson or Laidlaw,	Laidlaw and Others,	745
Ridgway, Nephew,	Brock,	105
Richardson,	Williamson and Others,	607
—	Wyld (James) and Co.,	744
Ritchie,	Robertson or Marshall, &c.	621
Roberts, Forman, and Nicholson,	Walker,	365
Robertson,	Allan,	35
— &c. (Glasgow's Trustees),	Millar and Baird,	438
Ross,	Davidson,	95
Russell,		557
Sandeman and Miller,	Thomson,	4
Scheniman, &c.,	Willison's Trustees,	759
Schuurmans and Son,	Stephen and Sons,	889
Scott	King or Baillie, and Others,	67
—	Scott,	253
—	Fisher,	284
— and Livingston,	Gregory's Trustees,	875
— and Curators,	Donaldson,	107, 174
Scotts,	Anderson,	761
Scouller,	Oliver,	16
Shand,	Pollock,	241
—	Duff,	269
Sharpe,	Shand,	384
Shields and Others (Shields' Trustees),	Black,	561
Sim,	Sharpe and Others,	747
Simson and Others,	Clark,	282
Slade, or Hammond,	Graham,	85
Sloan,		66
Smith,	Cuthbertson,	167
—	Stark,	150
—	Robertson,	807
— and Others,	— and Trustee,	829
— and Others,	Hogg and Husband,	808
Smitton,	Wylie,	431
Smyth,	Taylor and Others,	531
Sorley's Trustees,	Rogerson,	298
Steele,	Grahame and Gilmour,	433
Stephen and Dairs,	Oliver and Boyd,	319
Stevenson,	Pirie,	857
Stewart,	M'Ilwham and Co.	279
— and Curators,	Stewart,	887
Tait,	Baikie and Scot,	674
Tait's Trustee,		392
Tate, &c.,	Tait and Others,	803
	Ballandene and Husband,	415
	Pringle,	772

<i>Pursuers.</i>	<i>Defenders.</i>	<i>Page</i>
Taylor,	Binnie or Taylor,	18, 680
____ Trustees,	Queensberry's Executors,	19
____	Binnie or Taylor,	
Thomas,	Walker's Trustees,	43
Thomson,	Moffat,	124
____	Thomson,	289
Thorburn,	Ranken,	380
____	Pringle and Caldwell,	822
Tierney,	Court,	664
Torrance,	Crawfurd and Others,	198
Torrie,	Munsie, &c.	597
Tough, &c.	Smith,	619
Trotter and Others,	Farnie, &c.	423
Turcan and Others,	Cox and Others,	352
Turnbull,	Forsyth,	228
Turner (Tait's Trustee),	Ballandene and Husband,	415
Tweeddale's (Lord) Commissioners, and Others,		427
Ure,	Pollock,	450
Walker,	M'Nair,	672
____ and M'Williams,	Neilson's Trustees,	766
Wallace,	Taylor and Murdoch,	364
____'s Trustee,	Harvey,	355
Wark,	Wotherspoon,	317
Watson and Others,	Blair,	12
____	Glasgow Police Commissioners, &c.	481
Weir,	Glenny and Others,	290
Whitson and Crone,		268
Williams, Foster, and Co.	M'George,	283
Williamson, &c.	Goldie and Others,	413
Willis,	Howden and Others,	185
Wilson,	Webster and Others,	66
____	Beveridge,	110
____ and Others,	Taylor,	631
Wood's Trustees, &c.,	Sinclair,	640
Wordie,	Ferrier,	773
Workman,	M'Donald,	142
Wright and Others,	Smith and Muir,	525
Wyld and Co.,	Arthur,	139
	Richardson,	538
Yates's Trustee,	Yeats and Others,	565
Young,	Pollock,	8, 570
____	Smarts,	130
____	Cleghorn,	248
____ and Co.,	Cunningham,	502
____	Hutchison,	643
____ or Thomson,	Colt's Trustees,	666
	Pollock,	769

INDEX OF NAMES.

ix

<i>Defenders.</i>	<i>Pursuers.</i>	<i>Page</i>
A. B.	Leslie,	315
Adamson and Watson,	Darling and Others,	119
Agnew,	Kincaid,	473
Aitken and Others,	Graham and Others,	65
Allan,	Robertson, &c. (Glasgow's Trustees,)	438
— and Simpson,	Mack,	349
Amos,	Marjoribanks,	79
Anderson and Others,	Atholl, Duke of,	49
Anderson,	Anderson,	696
—	Mortimer,	743
Anstruther,	Scott and Curators,	761
Arthur,	Anstruther and Husband,	185
Auld,	Wright and Others,	139
—	Black,	205
Baikie and Scot,	Stewart and Curators,	392
Baird,	Raeburn,	761
Balfour,	Harper,	248
Ball and Mandatory,	Clarkson,	17
Ballandene and Husband,	Turner, (Tait's Trustee,)	415
Bank of Scotland,	Bell, (Smith's Trustee,)	100
—	—	265
Bennet, (Crawford and Co's Trustee,)	Crawford and Others,	537
— and Others,	Hamilton,	330, 426
Beveridge,	Wilson,	110
—	Freen and Others,	727
— and MacLarty,	Livingstone,	52
Binnie or Taylor,	Taylor,	18, 680
Black,	Lawrie,	1
—	Shand,	561
Blackwood and Others,	Jackson's Trustees,	597
Blair,	Mylne and Others,	430
Braidwoods	Watson and Others,	12
Breadalbane, Marquis of,	Muir,	89
Bridges,	MacLaren,	163
—	Hamilton,	262
British Commercial Insurance Co., &c. Paul,	Archibald,	813
Brock,	— (Inglis's Trustee,)	496
Brocket, &c. (J. Gillespie's Trustees,)	Ridgway, Nephew,	618
Brown,	C. Gillespie's Trustee, (Brock,)	105
—	Jardine,	562
—	Osborne,	479
— and Others,	Balerno Distillery Company,	546, 578
Bruce,	Berford,	177
Brunton and Others,	Luke and Others,	609
Burns and Others,	Lang,	307
Burnside's Trustees,	M'Donald,	777
Coddall's Trustees,	Henderson,	299
—	Aitchison and Cq	467
—	Duguid,	296
—	—	149

INDEX OF NAMES.

<i>Defenders.</i>	<i>Pursuers.</i>	<i>Page.</i>
Caledonian Iron Company,	Clyne,	132
Campbell,	Renton,	38
_____ or Thomson,	M'Millan,	220
Carlyle and Others,	Campbell,	373
C. D.	Johnston,	657
_____	A. B.,	425
Chalmers' Trustees,	_____	523
Cheyne,	M'Lellan and Husband,	375
_____	Laing,	200
Christie,	Cheyne,	202
Chrystal,	M'Callum and Dalgleish,	770
Clark,	Ballandene and Husband,	168
_____	Sim,	85
Cleghorn,	Johnstone,	330
Cleland,	Young,	248
Clyne,	Mack,	850
_____	Forrest,	121
Colt's Trustees,	Caledonian Iron Company,	133, 141
Colvil and Others,	Barr,	408
Commercial Bank,	Edinburgh Oil Gas Light Co.	723
Court,	Manson and Goldie,	811
Cox and Others,	Young,	666
Craufurd and Others,	Guthrie and Others,	515
Creditors, (A. B.'s)	Ewing,	249
_____ (Bell's,)	Tierney,	664
_____ (Calder's,)	Turcan and Others,	352
_____ (Geikie's,)	Torrance,	193
_____ (M'Fee's,)	A. B.	771
_____ (Mitchell's,)	Bell,	495
Creightons,	Calder,	795
Croall and Morrison,	Geikie,	744
Crosse or Stewart,	M'Fee,	215
Cuming,	Mitchell,	811
Cuninghame's Trustees,	Hunter,	583
Cunningham,	Craigie,	315
Cuthbertson,	Baillie's Trustees,	617
Davidson,	Cuming's Trustees,	804
Deans,	Ramsay,	745
Dixon and Others,	Young,	502
Dixons,	Sloan,	716
Dodds,	Russell,	557
Donald and King,	Creightons,	695
Donald, &c.	Fisher and Others,	55
Donaldson,	Dixon and Others,	178
_____	Hunter,	833
_____ 's Trustees,	Lowrey, or Maxwell,	98
_____ 's Trustees,	Lawrie,	771
Doune and Others,	Scott and Livingstone,	107, 174
Drysdale, or Gordon and Husband,	M'Ghie,	604
Dudgeon,	Gillespie and Others,	174
Duff,	Findlay,	813
Duffus, Lord,	Shipping Co. (Edinburgh and Leith,)	557
Duncau,	Dryedales,	98
	M'Leod,	674
	Shand,	269
	Forrest,	10
	Barnet,	128

INDEX OF NAMES.

xi

<i>Defenders.</i>	<i>Pursuers.</i>	<i>Page</i>
Dundee, Kirk Session of,	Nicoll,	670
——— Magistrates of,	Kay and Morton,	378
Dunn,	Gordon,	398
Edinburgh, Magistrates of, and Others,	Macartney,	705
——— Life Assurance Company,	Sir W. Forbes & Co.,	451
Elder,	Johnston,	195
Ewing,	Cullen, or M'Kenzie,	497
		743
Fairie and Co.	Lawson,	572
Farquharson and Others,	M'Donald,	296
	Ralston,	410
Farnie, &c.	Trotter and Others,	423
Fergus or Deas, and Husband,	Bowes, or Wallace,	164
Ferguson,	Gracie,	363
Fergusson,	Forsyth, &c. (Phillips' Trustees,)	646
——— and Others,	Fergusson,	140
Ferrier,	Wood's Trustees, &c.	773
Findlay, (James) & Co.,	Fleming,	739
Finlay,	M'Lellan and Son,	771
Finlayson,	Ellice and Co.,	345
Fisher,	Millar,	70
	Scott,	284
Florence,	Florence,	326
Fodderty, Kirk Session of,	Matheson,	183
Forbes,	Dudgeon,	810
Forsyth,	Turnbull,	228
Fraser,	M'Donald,	295
	Fyffe,	381
——— (Cameron's Trustee,)	Broughton,	418
Fyffe and Marshall,	Calderhead's Trustees,	582
Gartmore's Creditors,	Ferrier, (White's Trustee,)	616
Gaudie,	Beattie and Spouse,	286
George's Trustees,	Hunter,	561, 604
Gibson, (Wilson and Son's Trustee,)	Kirkland and Sharpe,	167
Gibson-Craig, &c. (Stein's Trustees,)	Douglas, &c., (Stein's Assignees,)	647
Gilchrist and Wilson,	Blackett and Others,	590
Gillon,	Edinburgh and Leith Shipping Co.,	404
Gilmour,	Drummond,	266
Glasgow Police Commissioners,	Watson and Others,	481
Glassford,	Buchanan,	352
Glenny and Others,	Weir,	290
Goldie and Others,	Williamson, &c.,	413
Gordon, Duke of,	Innes,	173
Graham,	Simson and Others,	66
	Lawrie, or Graham, &c.	196
——— and Gilmour,	Orr,	135
Gregory's Trustees,	Sorley's Trustees,	319
Greig and Others,	Scott,	375
Gunn,	Henry,	239
	Gordon and Others,	742
Hallam,	Gye and Co.	512, 710
Halyburton, &c.	Duddingston, Kirk Session of,	196
Hamilton,	M'Nab,	180
	Bruce, (Rennie's Trustee,)	250

<i>Defenders.</i>	<i>Pursuers.</i>	Page
Hamilton or Westenra,	Campbell,	734
Hannay's Representatives,	Gracie,	628
Harley, (Anderson's Tutor,) _____	Moodie or Anderson,	128
Harper,	Buchan and Others,	486
_____		838
Harris, Bell, &c.	Paul, (Inglis's Trustee,) and Others,	486
Harvey,	Northumberland, Duke of, and Others,	366
Heath,	Bousie, (Wallace's Trustee,)	355
Henderson and Others,	National Bank,	694
Hill and Sinclair,	Bogle and Others,	104
Hodge,	Craig,	219
Hogg and Husband,	Crawford,	11
Home,	Smith,	808
Hotchkis, &c. Meiklejohn,	Lundie, or Compton,	125
Howden and Others,	Kirk,	655
Hume,	Willis,	185
Hunter and Others,	Forbes,	410
Hutchison,	King,	544
_____	Young and Co.,	648
Inglis,	Johnston,	260
_____	Hagart,	506
Innes,	Gordon's Trustees,	616
Inverkeithing, Agent in locality of,	Hopeton, Earl of,	361
Irving and Magistrates of Annan,	Pool,	152
Jeffrey, (Cuthill's Trustee,) _____	Cook and Paul,	75
Johnston,	Edinburgh and Glasg. Union Canal Co.	505
_____ and Others,	Johnson,	70
Johnstone, &c.	Fraser, &c.	104
_____ and Syme,	Denovan,	206
Jones,	M'Kenzie,	24
_____	Douglas,	379
King or Baillie, and Others,	Scott,	67
Kinnear and Sons,	Attwood,	817
Kinnoull, Earl of,	Clyne,	836
Kirk and Others,	Hotchkis and Meiklejohn,	289
Kirkpatrick,	Minto, &c.	190
Kirkwall, Magistrates of,	King's Advocate,	328
_____	Reynoldson or Laidlaw,	745
Laidlaw and Others,	Macintyre,	414
Lamb,	Berry,	792
_____	Lockhart and Others,	243
Lanark, Magistrates of, and Others,	Inglis,	368
Lane and Co.	Boyd,	213
Lang,	Campbell and Others,	62
Laurie and Others,	Gordon and Stewart,	643
Lawrence,	Flockhart,	472
Lawson,	Beck,	81
Learmouth and Co.	Burntisland Whale Fishery Co	181
Leven and Morrison,	Forbes, (Lord,) and Others,	851
Leys, Mason, and Co.	Menzies,	203
Livingstone,	Forbes,	341
_____	M'Neill,	806
Lockhart,	Rae,	303
London and Edinburgh Shipping Co.	Easton,	548
Longlands,		

INDEX OF NAMES.

xiii

<i>Defenders.</i>	<i>Pursuers.</i>	<i>Page</i>
Lord Clerk Register, &c.	Morton,	162
Luke,	Fortune,	115
Lundie,	Home,	508
Lyle,	Balfour,	853
Lyon and Others,	Cogan,	267
Maberly's Assignees, &c.	Blyth,	796
M'Alister's Trustees,	Nicolson,	759
Macartney,	M'Ra and Others,	300
 	Dougal,	719
M'Cosh and Others,	M'Cosh,	579
M'Donald,	Wordie,	142
 — Lord,	M'Donald and Others,	584
M'Dougall's Trustees, and Others,	Henry,	615
M'Ewan,	 	572
M'Farlan,	M'Kechnie,	126
 	Greig,	382
M'George,	Wilhams, Forster, and Co.	289
M'Gregor,	Bellis and Thundercliffe,	96
M'Illwham and Co.	Stevenson,	337
Mack,	Bennie,	255
Mackenzie,	M'Leod,	206
 — and Sharpe,	Kemp,	389
Mackie,	Sharpe,	747
Mackinnon,	Caven,	550
M'Millan,	Matheson,	825
M'Nair,	Binnie,	642
M'Ra,	Walker,	672
Malcolm,	Gill, &c. (Birtwhistle's Trustees),	552
Mein,	Knox,	215
Melvin,	How,	7
Menzies,	M'Gill,	69
Merry,	Menzies, C. and J.	581
Middleton,	Dunn or Mason,	555
Millar and Baird,	Laird,	84
 — &c. (Ducat's Trustees,) Soots, and Others,	Ross,	95
Mills and Vary,	Miller,	362
Moffat,	Murray &c. (Murray's Trustees),	706
Montrose, Magistrates of, &c.	Dundee Railway Company,	269
Morrison and Others,	Millar,	295
Munn's Trustees,	Thomson,	124
Munro,	Barclay, &c.	859
Munsie, &c.	Mitchell,	230
Murray, Strachan, and Others,	Carswell &c. (Hunter's Assignees),	677
 Napier,	Munro,	811
 Nasmyth,	Torrie,	597
National Bank, &c.	Murrays,	276
Neilson's Trustees,	 Goldie (Agent in Ranking of Parton,) Gow,	497 812
 Officer,	M'Queen and Husband,	470
Officers of State,	Blyth,	796
Ogilvy,	Walker and M'Williams,	766
Oliver,	 Baird,	146
	Edinburgh, Magistrates of,	25
	Lawson,	531
	Scotts,	16

INDEX OF NAMES.

<i>Defenders.</i>	<i>Pursuers.</i>	<i>Page</i>
Oliver and Husband, &c.	Reynoldson or Laidlaw,	745
— and Boyd,	Steele,	857
Oswald,	Gowans,	144
Paul,	Campbell and Others,	229
Peddie and Alexander,	Mercer,	405
Pender's Trustees,	Pender,	19
Perth, Hammermen of,	Garvie,	755
Phaup,	Pattison,	606
Pirie,	Stephen and Duirs,	279
Pollock,	Young,	8, 570
—	Scouller,	241
—	Ure,	450
—	Young or Thomson,	769
Polmont, Minister of, &c.	Baird,	752
Pott and M'Millan,	Anderson and Childs,	534
Pringle,	Tate, &c.	772
— and Caldwell,	Thorburn,	822
Queensberry's Executors,	Taylor's Trustees,	19
Ranken,	Thorburn,	380
Rankine and Spouse,	Mitchell and Spouse,	716
Reid,	Henderson and Others,	632
—	Aitken and Others,	535
— or Robertson,	Jobson,	594
— and Nicolson,	M'Kenzie,	89
Richardson,	Wyld and Co.	538
Roberts,	Ramsay,	192
Robertson or Marshall, &c.	Ritchie,	621
—	Smith,	807
— and Trustee,	M'Kay and Co.	813
Rodger,	Smith,	829
Rogerson,	Kay,	831
Rollo and Others,	Smyth,	433
Rose and Fowler,	Brown,	667
Rosse,	Cantach or M'Donald,	477
Rowat,	Gallie,	315
Russel,	Ralston or Alison,	848
Sandison,	Hamilton,	549
Scobie,	Curtis and Mandatory,	72
Scott,	Craigie,	6, 510
—	Fisher,	192
—	Scott,	253
—	George,	443
Scoular,	Allan,	619
Shand,	Montrose, Magistrates of,	211
Sharpe and Others,	Megget,	233
Shirreffs (Wilson's Trustee),	Shand,	384
Sinclair,	Sharpe,	747
Slater (Rowley's Trustee),	M'Lean,	217
Sisart,	Brodie,	99
Smarts,	Wilson and Others,	640
	Kirkland and Others,	169
	Keith,	514
	Young,	824
		130

INDEX OF NAMES.

xx

<i>Defenders,</i>	<i>Pursuers.</i>	<i>Page</i>
Smith,	Gillies, 209, 636	
—	Tough, &c. 619	
—	M'Leod, 704	
— and Muir,	Hogg and Husband, 808	
— and Rennie,	Workman, 525	
— or Thomson,	Meek, 652	
Spence,	Cheyne, 622	
Stark,	Megget and Christie, 207	
Stead and Others,	Smith, 150	
Stephen and Sons,	Cox (Stead and Paterson's Trustee), 122	
Stephenson and Others,	Schuurmans and Son, 839	
—	Gibson, 554	
Stewart,	(Wilson and Son's Trustee), 711	
—	Glas, 851	
—	Hume, 95	
— &c.	M'iver, 119	
—	M'Laurin, 333	
— Pott and Co.	Palmer and Co. 252	
— &c.	Stewart, 674	
Stuart and Others,	Cameron, 97	
Sturrock,	Howison, 630	
—	Nimmo, 844	
—	Burbridge and Co. and Mandatory, 520	
Tait,	Allan, 46	
— and Others,	Tait, 803	
Taylor,	Wilson, 631	
— and Murdoch,	Wallace, 364	
— and Others,	Smitton, 298	
—'s Trustees,	Dick, 19	
Tennant and Co.	Forth and Clyde Canal Co. 383	
Thompson,	Neilson, 466	
Thomson,	Sandeman or Miller, 4	
—	Thomson, 289	
—	Kerr and Co. 554	
— (Mason and Co.'s Trustee),	Farquharson, 526	
Threshie,	Coldstream and Scales, 356	
Trotter,	Gordon, 47	
Turnbull and Others,	Learmonth, 810	
Tweeddale's Commissioners & Others,	Morrison and Others, 259	
—	Balfour, 427	
Ure, (Scott's Trustee),	Brown, (Alexander) and Co. 737	
—		806
Vallance and Others,	Orr, 93	
Waddell and Others,	Brownlee and Others, 39	
Walker,	Robertson, 35	
Walker and Others,	Ferrier, 317	
—'s Trustees,	Thomas, 43	
Watson and Others,	Dixon and Others, 209	
—	Blyth, 796	
Watsons,	Crowder or Turnley, 29	
Watt and Others,	Henry, 644	
Webster and Others,	Wilson, 66	
Wight,	Ewing, 109	
Williamson and Others,	Richardson, 607	

INDEX OF NAMES.

<i>Defenders.</i>	<i>Pursuers.</i>	Page
Willison's Trustees,	Bridges (Manners's Trustee),	43
Wilson's Creditors,	Scheniman, &c.	759
Wood,	Kirklande and Sharpe,	377
Woods, &c.	Drysdale and Others,	198
Wotherspoon,	Kerr and Ingles,	774
Wyld, (James) and Co.	Wark,	317
Wylie,	Richardson,	744
— and Noble,	Smith and Others,	431
Yeats and Others,	Murdoch and Brown,	445
Yuills,	Yates' Trustees,	565
Zuilles,	Buchanan,	555
	Buchanan and Gray,	235

James Macdonald's—Inverary

C A S E S

DECIDED IN

THE COURT OF SESSION,

WINTER 1831—32.

THOMAS LAURIE, Advocate.—*Monteith.*
JAMES BLACK, Respondent.—*Jameson—Moir.*

No. I.

Sale—Retention.—Where a storekeeper made advances to the owner of a lot of grain deposited in the storehouse; and the owner sold the grain, and granted an order of delivery to the purchaser; and the order was intimated to the storekeeper, and several parcels of the grain were subsequently delivered to the purchaser's order; but no transfer was made in the storekeeper's books to the name of the purchaser; nor the grain measured over to him;—held, that the storekeeper was not entitled to withhold delivery of the remainder, on the ground of a lien for the advances to the original owner.

CAMPBELL placed 650 bolls of wheat in the storehouse of Laurie, who Nov. 12, 1831. made advances in money to Campbell; and various sales of this wheat were 1st DIVISION. afterwards effected, which reduced the quantity to 250 bolls. On 18th LD. Corehouse. February 1829, Campbell sold the remainder (stated at 300 bolls) to Black, a baker in Glasgow, and granted the following order, addressed to W. Orr, servant of Laurie, who was in the use of receiving such orders. “Deliver Mr James Black 300 bolls of my Haghill wheat.” Orr took the order, but explained that only 250 bolls remained. Black then granted a bill at four months for the price of the 250 bolls to Campbell. Six deliveries of parcels of this wheat, pursuant to orders by Black, for “my old British wheat,” were made in the months of February, March, and April. These deliveries, as they occurred, were duly reported by Orr to Laurie. Campbell then became bankrupt, and Laurie refused to give farther delivery to the order of Black, on the ground that he had made a special advance of £1000 on the security of the original parcel of 650 bolls; that he had a claim of £1058 farther, on a general account of store-rents, and other transactions with Campbell; that he was entitled to a special lien over the quantity remaining on hand for the £1000, and a

No. 1. general lien for his other claims; and that no real delivery had taken place in favour of Black, as the grain had never been weighed over, nor had it been transferred in his books from the name of Campbell to that of Black.

Nov. 12, 1831.
Laurie v.
Black.

Black then raised an action for delivery before the Sheriff of Lanarkshire, and contended, 1. that as he had made a bona fide purchase, and the order of delivery was given to the servant who was accustomed to receive such orders, and as repeated partial deliveries were subsequently made, pursuant to his orders, on "my old British wheat," he had a real right in the whole grain, so that Laurie was custodier for his behoof; and, 2. that, at all events, Laurie was barred, by personal exception, from now disputing the right, or availing himself of his alleged latent claim against Campbell.

The Sheriff found, "that the defender admitted and homologated the title of the pursuer, under the delivery note of Campbell, to the remaining quantity of the grain called Haghill, or old British wheat, whether such quantity amounted to three hundred bolls, or only to two hundred and fifty bolls, or thereby: and that the defender did, accordingly, duly honour the orders of the pursuer, to the extent of one hundred and twenty bolls of said wheat, which is described in these orders as 'my old British wheat': that after such acts of homologation on the part of the defender, and that, too, without his ever having thrown out the smallest hint that he had any claim against said wheat, on account of advances made to Campbell, on consignation of the original cargo, or on account of any balance which might be owing by Campbell to the defender on previous transactions, the defender cannot, now when Campbell is bankrupt, turn round to the pursuer and claim right to the wheat, on the allegation that he (the defender) had advanced a large sum of money to Campbell on the original cargo, and that Campbell is otherwise deeply indebted to the defender: that the sale of the said wheat by Campbell to the pursuer was a fair bona fide transaction, and that the pursuer paid the price thereof to Campbell, conform to the invoice and bill Nos. 6 and 7, and that the said transaction was acquiesced in and homologated by the defender in manner before stated; and without going further into the case, which appeared to be unnecessary, repelled the defences, and ordained the defender to deliver to the pursuer the remaining quantity of said Haghill or old British wheat, which was in the defender's store at the time when this action was raised, amounting to one hundred and thirty bolls or thereby, the pursuer, simul et semel with receiving delivery of said wheat, paying to the defender, or consigning in the hands of the clerk of court, whatever store-rent or granary dues may be chargeable by the defender as against the whole lot of two hundred and fifty bolls, purchased by the pursuer from Campbell, down to the 11th day of July last, being the date of the defender's citation to this action." On a reclaiming petition, the Sheriff-Depute found, "first, that it is unnecessary to decide here the questions argued at so much length in the reclaiming petition,

viz. whether the defender originally got possession of the wheat in question under the contract of pledge, or whether he held it in virtue of a special or general lien, because, second, that the defender, so far from intimating to the pursuer, a bona fide purchaser, that he, the defender, held the wheat under pledge, or any other right of retention, did actually, and in fulfilment of the contract of sale as between Campbell and the pursuer, give delivery by himself and storekeeper of four different parcels of said wheat, and otherwise acknowledged the pursuer as the purchaser thereof: therefore, the defender's case resolves into one of two points —either he wished to mislead the pursuer by concealing his intended claim against the wheat, or he acquiesced in the sale, and waived his said claim; as to the first, found that the defender cannot take advantage of any such deception, if intended; and as to the second, that he cannot throw a loss upon the pursuer, by reviving a claim which he had previously abandoned: Therefore, and for the reasons assigned in the interlocutor reclaimed against, refused the prayer of the said petition, and adhered to the interlocutor complained of."

No. 1.

Nov. 12, 1831.
Laurie v.
Black.

Laurie brought an advocation, in which the Lord Ordinary remitted simpliciter, and found him liable in expenses. Laurie reclaimed, and, in the meantime, the Lord Ordinary granted warrant to sell the wheat by public roup, ordaining, the price to be consigned and to abide the future orders of the Court. Against this interlocutor Laurie also reclaimed; but the Court, on July 8th, adhered to the order for the sale, and, on Nov. 12th, to the interlocutor on the merits.

LORD BALGRAY.—The question lies between the bona fide purchaser of this grain, and the defender Laurie, who was the mere storekeeper of the seller. The order of delivery, in favour of the purchaser, was duly intimated to Orr, the servant having charge of the store, and in use to receive such orders, and he swears that he reported to Laurie the subsequent partial deliveries of the grain, to the order of Black the purchaser. I cannot see that any other intimation to Laurie was requisite. After such intimation and delivery, Laurie homologated the sale by Campbell to Black, and cannot now be allowed, after Campbell's insolvency, to set up a claim of lien over the remaining lot of the wheat, to the prejudice of the purchaser. I am clear that the judgment of the Lord Ordinary is well founded.

LORD GILLIES.—The claim of lien by Laurie is placed on the footing that he is a creditor of Campbell. That might give him a right over the property of Campbell, but not over the property really belonging to and held by other parties. By the sale, and the intimated order for delivery, and the actual delivery of a large portion of the lot, the wheat which had been Campbell's became the real property of Black. Campbell was completely denuded. It is in vain therefore for Laurie, as the creditor of Campbell, to maintain a lien over property with which his debtor has no longer any concern.

LORDS PRESIDENT and CRAIGIE assented.

Advocator's Authorities.—2. Bell, 105, 108, 109, 114 and 117; and cases there referred to.
1. Bell, 186.

GRAHAMS and RICHARDSON, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

CASES DECIDED IN THE

No. 2. SANDEMAN and MILLER, Suspenders.—*D. F. Hope—Monteith.*

DAVID THOMSON, Charger.—*Robertson—G. G. Bell.*

Nov. 12, 1831.

Sandeman and
Miller v. Thom-
son.

Bill of Exchange—Notification of Dishonour.—1. Circumstances not sufficient to elide the necessity of drawers and indorsers establishing non-liability by writ or oath of the holder. 2. Accepting a renewal in security of a former bill retained, no discharge thereof. 3. Evidence held sufficient to establish notification of dishonour.

Nov. 12, 1831. TOWARDS the end of 1826, the charger Thomson, manufacturer in Selkirk, transmitted to one Richardson, commission agent in Leith, a parcel

2d DIVISION.
Ld. Mackenzie.

T.

of cloth for sale or barter. Richardson having bartered the cloth for a quantity of fish, intimated this to Thomson, stating: “I expect to get the fish off next week at cost, when I will make a remittance.” A few weeks thereafter Richardson gave Thomson, as proceeds of the fish, a bill for £22, 9s. 4d., drawn by Sandeman and Miller, merchants in Glasgow, upon, and accepted by one Hunter, fish-merchant there, and indorsed by Sandeman and Miller without any qualification. This bill was discounted by Thomson with the agent of the National Bank at Galashiels, but when it fell due it was dishonoured by Hunter. This was communicated to Thomson in a letter from Richardson, who stated that he had received information from Miller that Hunter was unable to retire the bill, but that Hunter had granted a renewal with security; and he accordingly enclosed a new bill by Hunter, with another party as cautioner, but without the names of Sandeman and Miller. The original bill (which Thomson retired from the bank) was not delivered up; and on the renewal being dishonoured, a charge was given on the former to Sandeman and Miller, who brought a suspension, alleging—

1. That they had been employed as agents by Richardson to dispose of the fish which they sold to Hunter, who granted the bill in payment of the price—that they did not guarantee his solvency—that, accordingly, in the account sales transmitted to Richardson, there was no del credere commission charged—and that they had indorsed the bill merely to facilitate its negotiation. These circumstances, so far as not proved by the account sales produced, they offered to establish by Richardson’s oath.

They therefore pleaded in point of law, that they had incurred no liability to Richardson, or his employer Thomson, there being no real ground of debt, as they had acted as agents, and had not guaranteed the solvency of Hunter; and that, at all events, they were discharged by Thomson having accepted the renewed bill from Hunter. And,

2. They averred that they had not received notification of dishonour.

In regard to the notification a proof was allowed—Mr Haldane, writer in Galashiels, agent for the National Bank, (and who had been employed by Thomson to recover the contents of the bill,) deposed, that he discounted the bill to Thomson, that he sent it to Glasgow for negotiation, that

No. 2.

Nov. 12. 1831.
Sandeman and
Miller v. Thom-
son.

it was returned to him dishonoured on the 29th March, 1827; "that he intimated the dishonour of the bill to the suspenders, Sandeman and Miller, by letter dated 5th April, 1827, being the day on which Thomson retired the said bill from the bank, and which letter was sent by the deponent by post, addressed to Messrs Sandeman and Miller, merchants in Glasgow; that the deponent cannot say that he personally put the letter into the post-office, but he has no doubt, that in the ordinary course of business, either he or his clerk did so; and that his recollection of having done so is more distinct, from his having been personally acquainted with Sandeman when resident in Glasgow; that he occasionally took his letters to the post-office himself, but more frequently his clerk did so; that according to the practice of his office, letters were taken to the post-office on the day on which they were written, and, in consequence, he has no doubt the letter of intimation above mentioned was sent to the post-office on the day of its date;" that there was no copy of such letter entered in his minute-book, but that in cases where there was one party of whose sufficiency the bank was satisfied, if he intimated to other parties, he sometimes did and sometimes did not enter the letters of intimation to them in his minute-book. A clerk of Haldane's deposed, "That he considers there was regularity and attention observed in putting letters into the post-office; that as far as he knows, he is not aware of letters being omitted to be put in the post-office; that to the best of his recollection, he remembers of a letter in the bank office being addressed to Sandeman and Miller; that he cannot speak as to the time when he saw the said letter; that he never saw but one letter addressed from that office to Messrs Sandeman and Miller; that the address on the above letter was in Mr Haldane's handwriting, but that there was nothing to make him recollect of that letter more than any other."

This proof Sandeman and Miller contended to be insufficient, while Thomson maintained that it amounted exactly to what was required by Lord Ellenborough in the case of *Hetherington v. Kemp* (4 Campb. 193); and as to the other reasons of suspension, he answered—

1. That Sandeman and Miller having become indorsers of the bill without qualification, it was incompetent for them to liberate themselves otherwise than by their writ or oath; and

2. That the second bill having merely been taken in security of the first, which was still retained, there was no discharge.

The Lord Ordinary found the intimation of dishonour proved, repelled the reasons of suspension, and found the letters orderly proceeded.

Sandeman and Miller reclaimed.

LORD CRINGLETIE.—I am satisfied that the interlocutor is right. There are two objections made. The first is, the want of intimation. Now it is clear, from the suspenders' letter to Richardson, that they had the best possible intimation of the dishonour, *viz.* from the man himself, and they took another bill in security. Then as to the second plea, there may be a great deal of truth in what they say, that

No. 2. they were only employed to sell the fish. But there is no making out from the documents how the bill came to be granted. They must have been sensible that Nov. 12, 1831. Sandeman and Miller v. Thom- son. they became indebted for the sum, because they signed and indorsed the bill without qualification of "no recourse;" and how are we to get the better of that, except on a reference to oath that they did it by mistake?

Craigie v. Scobie. **LORD GLENLEE.**—The suspenders' averments—which result into this, that there was no original ground of debt against them—may be all very well; but when a party puts his name on a bill as drawer and indorser, I can't see how he is to establish non-liability but by writ or oath. As to the evidence of intimation, it is out of the ordinary case. To be sure, the suspenders themselves seem to have given the first information. But their private knowledge is not enough, as it does not show the intention of the charger to have recourse on them, and therefore the fact of the letter having been sent by post is very material. But it is incumbent on the charger to show this. Now it is remarkable that the first intimation is alleged to have been made so late as the 5th of April; and if so, could scarcely have been at the instance of the bank, as they were already paid, and the bill must have been in the hands of the indorsee, Thomson, who had also then received the other bill on which their names did not appear. But, on the whole matter, the Lord Ordinary may be right, that intimation is sufficiently proved; and if so, there is no ground to alter.

LORD MEADOWBANK.—I think the interlocutor right, and that, according to other cases, sufficient evidence of intimation has been adduced. It comes as near as possible to what was stated by Lord Ellenborough in the case of Hetherington. In the circumstances we could not expect more, and I am inclined to adhere.

LORD JUSTICE CLERK—I had no difficulty except on the point of intimation; and, on the whole, I think there is sufficient to support the interlocutor.

JAS. PATTISON, W.S.—JAS. USHER, S.S.C.—Agents.

No. 3.

JAMES CRAIGIE, Pursuer.—*Maidment.*
WILLIAM SCOBIE, Defender.—*Brown.*

Process.—In an ordinary action against the representative of a party, founded upon a decree in absence of the Sheriff against the deceased for payment of a bill—it is competent to admit objections to the bill, appearing ex facie, without a reduction of the decree.

Nov. 12, 1831. **JAMES CRAIGIE** obtained decree in absence, before the Sheriff of Perthshire, on the 28th July 1822, for the contents of a bill against the obli-gants. Catherine Scobie, one of these parties, (who was set forth on the 2d Division. Lord Medwyn. R. bill as having subscribed it by a mark,) died in 1826, the debt being unpaid; whereupon Craigie raised an ordinary action in the Court of Session against William Scobie as her representative, founding on the decree, and concluding for payment of the bill. The defender pleaded, *inter alia*, that the bill had not been authentically subscribed by Mrs Scobie; and the pursuer having objected to the competency of this plea, seeing that the decree had neither been reduced nor suspended, the Lord Ordinary found

COURT OF SESSION.

7

"it competent, in the circumstances of the case," to discuss this objection to the bill, "as the warrant of the decree in absence, by way of exception and defence," and appointed the cause to be called for that purpose,— adding this note, "As the decree in the Sheriff Court in 1822 was in absence, according to the form introduced since the passing of the Judicature Act, if the charge had been suspended, it would have been competent to remit to the Inferior Court to repon the defender. The original party having died, the cause could not come before this Court by a new charge and a suspension; but it has been necessary to raise an ordinary action against the representative of the original defender in the process. The decree in 1822 having thus been brought before this Court, the Lord Ordinary thinks it may be dealt with as in a suspension, and the objections to it founded on nullity of the document, or of the indorsation to it, as appearing *ex facie*, may be pleaded *ope exceptionis*, and without a reduction, as if the defender had been reponed against the decree in the Inferior Court."

No. 3.

Nov. 12, 1831.
Craigie v. Scobie.

How v. Mein.

The pursuer reclaimed, but the Court adhered.

ALEXANDER M. ANDERSON—MOWBRAY and HOWDEN, W.S.—Agents.

WILLIAM HOW, Advocator.—D. F. HOPE.
ALEXANDER MEIN, Respondent.—L'AMY.

No. 4.

Bankrupt—Sequestration—Jurisdiction.—A trustee on a sequestrated estate having paid a dividend to a party who had no mandate from the creditor; and the creditor thereafter raised an action in the Inferior Court against the trustee's successor for payment of the dividend; and the trustee raised an action of relief against his predecessor, and the party to whom the dividend had been paid, which was conjoined with the other action,—held, that the conjoined actions were not incompetent.

The estates of the Glasgow New Tanwork Company having been sequestered, and a dividend declared, a sum was allotted to a bill held by one Swan. The dividend on this bill was by the trustee paid to the advicator How, on the supposition that he was duly authorized to receive it. Thereafter Mein the respondent was elected trustee, and Swan, who alleged that How had no authority to draw the dividend, raised an action against Mein, in the burgh court of Glasgow, concluding for payment of it. Mein pleaded that he was not liable, as his predecessor had paid the dividend to How, and he brought an action of relief against both these gentlemen, which was conjoined with the original action.

How pleaded as a preliminary defence, that the action at the instance of Swan against Mein, as trustee, was incompetent in the Inferior Court, and that the action of relief being conjoined therewith, and forming one process, was incompetent also. The magistrates found, "That any right which the defender Mein may have had to object, as trustee on a bankrupt estate, to the jurisdiction of an Inferior Court, was personal to him-

Nov. 12, 1831.
2d DIVISION.
Lord Medwyn.
T.

No. 4. self, and is *jus tertii* to the defender How, and, therefore, repelled the Nov. 12, 1831. preliminary defence now urged by the defender How, and sustained the *How v. Mein.* competency of the action of relief against the said defender."

Young v. Pollock. How advocated and maintained his plea of incompetency upon the bankrupt act, and the case of *Mitchell v. Mein*, 7th July 1829, (ante VII. 841.)

To this Mein answered, that when the official management of a trustee is not brought into question ; and when the claim made against him is for the amount of an admitted dividend which has been regularly declared, and against payment of which no objection lies, it is competent to bring an action for payment before an Inferior Court. In the case of Mitchell, a question as to the trustee's management was involved, and the objection of incompetency was taken by the trustee.

The Lord Ordinary, "In respect it was not incompetent for Mr Mein to bring an action in the Inferior Court, against the advicator, for repayment of the dividend due upon Swan's bill, alleged to have been unduly received by him, repelled the reasons of advocation, and remitted the cause, simpliciter, to the Magistrates of Glasgow, to proceed therein."

How reclaimed.

LORD CRINGLETIE.—There is no dispute as to the fact that the dividends were set apart and paid to How—therefore How holds Swan's money. Then Swan says I gave you no mandate, and raises an action for his dividend against the trustee, who raises an action of relief against How, and it is in this action of relief that the question of competency is started. I cannot discover where the incompetency lies. The case quoted by the advicator, was one in which the conduct of the trustee was challenged ; but this is an action for a simple debt. I think the Lord Ordinary's interlocutor quite right.

LORD GLENLEE.—I think so too. That a trustee is not to pay a dividend without an action instituted in this Court to prove the party's right to it, is a doctrine which I cannot admit, and I see no incompetency here.

The other Judges concurring,

THE COURT adhered.

A. C. HOWDEN, W.S.—Geo. COMBE, W.S.—Agents.

No. 5.

MARGARET YOUNG, Advocator.—*Cunningham.*
JAMES POLLOCK, Respondent.—*Jameson—J. Paterson.*

Bill of Exchange.—The indorsee of bills past due, having raised action on them within the years of prescription, and no competent mode of proof of fraud or non-onerosity being offered—the representative of the acceptor found liable for their contents.

Nov. 15, 1831. **WILLIAM YOUNG** died in December 1824, and was represented by 1st Division. his sister, Margaret Young. In February 1829, Pollock raised an action Ld. Corahouse. before the Sheriff of Lanarkshire against her, founded on three of Wil-
s.

liam Young's acceptances, for £40, £30, and £16, respectively, in favour No. 5.
 of one M'Carter, which had fallen due, the first in June, and the two last Nov. 15, 1831.
 in August 1823. They had been discounted by M'Carter, with a bank Young v. Pol-
 lock.
 agent (whose indorsation was now scored), and Pollock alleged that
 M'Carter had retired them, and that he was the onerous indorsee of M'-
 Carter. The bills for £40 and £16 bore no mark of noting; the bill for
 £30 was noted, but no protest had been extended. On the back of this
 bill were certain jottings by the bank-agent's clerk, which, inter alia,
 stated "Two bills, £46," and deducted this amount from what was termed
 "Receipt, £100."

The defender did not deny that the bills were originally onerous, but
 alleged that they had been duly retired by Young; that, when the bills for
 £30 and £16 fell due, he had £100 lying in the bank, on a receipt; that
 the sum of these bills, being £46, was deducted by the bank from his receipt,
 and he was credited for the balance; and that M'Carter, after indorsing
 the bills to the bank, had never re-acquired them, unless by an improper
 access to the wrecks of Young when dying. She therefore pleaded, 1st, that
 it was to be presumed that Young had retired the two bills which bore
 no noting, and the third also, because no protest had ever been extended,
 and the jottings showed it to have been paid out of the bank receipt; and
 2d, that Pollock was not an onerous indorsee, nor was he entitled to plead
 in that character, as he had only acquired the bills after they were past
 due, and did not attempt to enforce payment of them till long after Young's
 death.

Pollock answered that the holder of bills must be presumed to have
 paid them, and the posterior indorsation by the bank agent being scored,
 M'Carter could effectually re-indorse them to the pursuer, who was en-
 titled to sue upon them at any period within the years of prescription.
 He denied that the jottings on the £30 bill had any reference to the set-
 tlement of it with the bank, but pleaded, that, as there was nothing ex
 facie to make him doubt its subsistence as a document of debt due to
 M'Carter, he was entitled to take it and enforce payment of it, as well
 as of the others.

The Sheriff decreed as libelled, with expenses.

The defender advocated, but the Lord Ordinary, "in respect the advo-
 cator has offered no competent mode of proof of fraud, or non-onerosity,"
 repelled the reasons of advocation, with expenses. She reclaimed, but
 the Court (after allowing a minute and answers on an alleged res noviter)
 adhered.

LORD PRESIDENT.—The respondent is an onerous indorsee, at least we must
 hold him to be so. When he acquired the bills, he knew nothing, so far as appears,
 of that alleged settlement to which the jottings are said to refer. He cannot
 be affected by them, and nothing is stated to shake the judgment of the Lord
 Ordinary.

No. 5. *Cunningham.*—Your Lordship sees how old the bills had become before action was raised on them.

Nov. 15, 1831. **LORD PRESIDENT.**—They were not prescribed, and we can draw no other limit.

Forrest v. Lord Duffus. *Advocator's Authorities.*—Thomson on Bills, 384.—Russell, Jan. 27, 1824.—Ante II . 648.
Respondent's Authorities.—Thomson on Bills, 427, 291, 294, 336, 340.

W. WADDELL, W.S.—WOTHERSPOON and MACK, W.S. Agents.

No. 6. **JAMES FORREST,** Pursuer.—*Sol.-Gen. Cockburn—Marshall.*
LORD DUFFUS, Defender.—*Buchanan.*

Process.—Action sustained against the grantor of a letter of guarantee of a bill accepted by a cautioner, without calling the representatives of the original debtor, or the cautioner, he having been discussed.

Nov. 15, 1831. **FORBES,** cautioner for Swanson, who was indebted to Forrest, having proposed to grant his acceptance for the debt, payable by equal instalments at 12, 18, and 24 months, Forrest agreed to this, upon condition that the payments should be guaranteed.

2d Division. Lord Medwyn F. obtained from Lord Duffus this letter to Forrest:—" Hempriggs, 20th July, 1829.—Sir, As I understand from Mr George Forbes that he was cautioner for the late William Swanson to you in the sum of about £57, and that he cannot at present meet it, and that you are willing to give him 12, 18, and 24 months to pay it, and he has now a good situation, and has been long in my employment, I hereby guarantee to you, that if you take his bill at the above periods, I shall answer for their being punctually retired."—Forrest took the bill upon this guarantee, but Forbes failed to pay the first instalment; and Forrest having applied to Lord Duffus, his lordship suggested that diligence should be executed against Forbes, which was done accordingly, without effecting payment. Forrest having then raised an action against Lord Duffus upon his letter, his lordship pleaded as a preliminary defence, that Swanson's representatives and Forbes ought to have been called as parties, on the ground that he was truly cautioner for Swanson, and so could not be sued without calling his representatives and the original cautioner.

To this it was answered, 1st, that as Forbes was the primary and sole obligant under the bill, it was not necessary to call Swanson's representatives; and 2d, that as the debt was constituted by the bill, and Forbes had been discussed, it was not requisite to call him.

The Lord Ordinary repelled the preliminary defence—" in respect of the terms of the letter of guarantee by the defender, Lord Duffus, of the sums contained in the bill granted by George Forbes to the pursuer, and that the pursuer has discussed Forbes by protest, horning, and caption on the said bill."

Lord Duffus reclaimed, but the Court adhered.

A. SNODY, S.S.C.—H. M'QUEEN, W.S., Agents.

JOHN CRAWFURD, Suspender.—*Maitland.*
WILLIAM HODGE, Charger.—*D. F. Hope—A. M'Neill.*

No. 7.

Nov. 15, 1831.
 Crawford v.
 Hodge.

Obligation—Agent and Client.—A party having lent money, and received the title-deeds of the borrower, under an assignation in an heritable bond; and the agent of the borrower, for the purpose of effecting a new loan, subsequently got the titles, on an obligation to return them on demand;—Held, that the agent was not relieved of his obligation to return the titles by the bond being paid up, but that the party, (who, as a writer, made a claim of hypothec for business done by him,) was entitled to have the titles restored to him without discussing the validity of that claim.

IN 1825, Wallace, the proprietor of some houses in Paisley, granted an heritable bond over them for £120, borrowed from the charger Hodge, then a minor, and under the curatory of Mr Hart, writer in Paisley. The bond contained the usual assignation to the writs and titles, and these were put into possession of Hart, as Hodge's curator. In January 1830, the houses were burnt down, and £106, recovered under an insurance, was paid to Hodge, in part extinction of the bond. Thereafter Wallace employed the suspender Crawford, writer in Paisley, to negotiate a new loan to enable him to re-erect the houses. For this purpose Crawford applied to Hodge, (who was now in partnership with Hart,) to lend the title-deeds, which was accordingly done, on this receipt by Crawford:—“ Borrowed from Mr Hodge, writer, titles of property belonging to Mr A. Wallace, sixteen in number, which I oblige myself to return on demand.” After some weeks, the titles not having been returned, Hodge presented a summary petition for re-delivery to the Sheriff of Renfrewshire, who decerned against Crawford for delivery, with expenses. Thereafter Crawford, for behoof of Wallace, paid the balance of Hodge's bond, which was accordingly discharged; and he offered to pay the expenses awarded by the Sheriff, but refused to give up the titles, on the ground that Hodge's right to retain them was extinguished by the discharge of the bond; and Wallace further addressed to Hart and Hodge a letter, freeing them from any obligation as to restitution of the titles. Hodge, and his partner Hart, alleged that they had a claim for business against Wallace, and a hypothec over the title-deeds, and gave Crawford a charge on the Sheriff's decree. Crawford thereupon brought a suspension, in which he pleaded that the claim of hypothec was unfounded, and that as the bond, in virtue of the assignation in which alone Hodge held Wallace's titles, was discharged, he had no longer any right to retain them, Wallace having agreed that they should be delivered to Crawford, who was now his agent. To this it was answered by Hodge, that the validity of the claim of hypothec could not properly be the subject of discussion in this process; that it was enough that he claimed such right of hypothec, and before discussing it with Wallace, he was entitled to enforce Crawford's clear and liquid obligation to restore the titles on demand, so as to place him in the same situation in which he stood before they were borrowed; that he would

No. 7. have been entitled to demand this in a question with Wallace himself, and still more, therefore, in one with Crawfurd, who could individually have no right to resist the enforcement of his own obligation.

Nov. 15, 1831.
Crawfurd v.
Hodge.

The Lord Ordinary repelled the reasons of suspension, and the Court Watson v. Blair. adhered.

ROD. M'KENZIE, W.S.—A. NAIRNE—Agents.

No. 8. MRS WATSON AND OTHERS, Pursuers—D. F. Hope—More—Maconochie.
ALEXANDER BLAIR, Defender.—Keay—Marshall.

Testament—Legacy.—Where a testatrix by a codicil bequeathed a legacy of “ £1000, presently vested in the five per cents,” declaring, that in the event of not being possessed of such stock at her death, then “ the sum of £1000 sterling,” with interest thereafter, should be a burden on her general estate, and that the codicil should be valid, unless revoked by a writing under her hand; and the testatrix, after the five per cents were converted into new four per cents, transferred £1000 of the new stock to the legatee, who ordered payment of the dividends to be made to the testatrix during her life; and the testatrix left no five per cent stock, and executed no written revocation—held that the legatee was entitled to the additional sum of £1000 sterling, with interest, from her death.

Nov. 16, 1831. MRS WATSON, wife of Mr Andrew Watson, W.S., and her sister Mrs Blair, wife of Mr Alexander Blair, W.S., were nieces of Miss Irvina Max-Ld. Corehouse. well. In 1810, that lady executed a testament in favour of Mrs Blair, her husband, and their family, in which Mr Blair was named sole executor. In 1822, Miss Maxwell, who was then 79 years of age, executed the following codicil:—“ I do hereby legate, bequeath, and devise to, and in favour of, the said Henrietta Maxwell or Watson, and to the children procreated of the marriage between her and her said husband, the sum of £1000 belonging to me, and presently vested in the five per cent government stock or public funds, their right thereto to commence immediately after my death, and the first dividend payable thereafter to belong to them; declaring that the said Henrietta Maxwell or Watson shall have full power, by any writing to be executed by her, to divide the said £1000 five per cent stock amongst her children, in such proportions as she shall deem proper; but that, failing her making such division, the said sum shall, upon her death, be divided equally amongst her said children; and that she shall also have full power to uplift and discharge, not only the dividends arising due on said stock after her succession thereto, but also the capital of the said stock itself, without the consent of her said children: and further, in the event of my not being possessed of £1000 5 per cent government stock at the time of my death, out of which theforesaid legacy may be paid, I do then legate, bequeath, and devise to the said Henrietta Maxwell or Watson, and to the children procreated,

S.

or to be procreated of the marriage between her and her said husband, under the declaration before specified, the sum of £1000 sterling, which sum, with the due and lawful interest thereof from the period of my death, I do leave a burden upon whatever property, heritable or movable, I shall be possessed of, wherever the same may be situated at the time of my death, but declaring that the said sum and interest shall be due and payable only to my said legatees, in place of the special legacy herein before left them: and in case said special legacy shall, from my having disposed of my stock in theforesaid sums, or any other cause, not be exigible by my said legatees, I hereby reserve full power and liberty to myself, at any time, and even on death-bed, to revoke or alter these presents in whole or in part; but in so far as this deed shall not be revoked or altered by a writing under my hand, I hereby declare that it shall be good, valid, and effectual, to all intents and purposes."

No. 8.
Nov. 16, 1831.
Watson v. Blair.

After the execution of this codicil, Mr Watson repeatedly visited Miss Maxwell, who resided at Clifton, near Bristol, and in September 1824, she gave £600 to Mrs Watson and her family. Thereafter in 1825, and during a visit of Mr and Mrs Watson to Clifton, Miss Maxwell ordered her bankers to transfer £1000, in the four per cents, to Mr and Mrs Watson; and after the transference was made, Mr Watson addressed the following letter to the bankers: "Please to pay the dividends arising on £1000, new four per cents, standing in the name of Andrew Watson, W.S., and Mrs Watson, my wife, as they become due, to Miss Irina Maxwell, during her life."

The new four per cents were a government stock, which had been formed by a financial measure, converting, on certain terms, the five per cents, in which Miss Maxwell held an investment at the date of her codicil in 1822. At that date Miss Maxwell had a much greater value in the five per cents than the amount of the legacy to Mrs Watson; and at her death a much larger sum of the new four per cents than the amount of the legacy belonged to her.

After her death, Mr and Mrs Watson, and their family, raised an action for payment of the sum of £1000, with interest, in terms of the codicil. In defence, Mr Blair pleaded that the legacy was a special one of £1000 of five per cent stock, and had been extinguished by the transfer of £1000 of the new four per cents, which came in place of the five per cents; that the object of the transfer was to save the payment of the legacy-duty, and that accordingly the dividends had been paid to Miss Maxwell during her life.

To this it was answered, that the legacy was not a special one, being declared payable out of the general funds, if Miss Maxwell had not at her death £1000 five per cent stock; that the sums paid and transferred during her life, were intended as gifts, and not to extinguish the legacy, which she had declared should not be revoked except by a writing under her

No. 8. hand; that she had never revoked it, and as she had no five per cent stock at her death, the legacy must be paid out of her general funds.

Nov. 16, 1831.

Watson v. Blair. The Lord Ordinary “repelled the defences, and found the defender liable to the pursuers for their respective rights and interests in the sum of £1000 sterling, with interest from the 17th day of August 1826, being the date of Mrs Irina Maxwell’s death, and decerned; And in regard no expenses of process were asked on the part of the pursuers, found no expenses due.”*

The defender reclaimed.

LORD GILLIES.—Was the £1000 in the new four per cents, of the same value with the £1000 in the five per cents mentioned in the codicil?

Dean of Faculty.—No; there was a difference of £200 in value.

LORD BALGRAY.—Every case like this depends upon its own circumstances. In this case there was a donation of £600 by Miss Maxwell to the pursuers, and that clearly did not affect the subsistence of the legacy in their favour. Had the £1000 which was afterwards bestowed on them, not been paid by a transfer of new four per cents, there could have been no room for contending that such payment had extinguished the legacy. But as the transfer was made in the new four per cents, the question arises, whether the stock so transferred was truly the stock legated? Was the legacy special, and extinguished by this transference? I do not think the legacy was special in the proper sense of the civil law; there is merely the designation of a special fund out of which, if extant, the legacy is to be paid, and failing which, the legacy is made a general burden on the succession. At the date of the transfer of the four per cent stock, I see nothing to make me doubt that Miss Maxwell was in full possession of her faculties. I must hold, therefore, that she was aware of the terms of her codicil, bestowing a legacy on the pursuers. But these terms are express, that the legacy shall subsist, unless revoked by a writing under her hand. She never executed such a revocation. We therefore cannot set up any conjectures of our own, or mere surmises, to warrant us in going

* “**NOTE.**—The legacy of £1000 in question, properly speaking, was not a special legacy. It was a legacy payable out of a special fund, namely, the five per cent stock belonging to the testator in the public funds. It is not asserted in the record, that at the date of the codicil, Miss Maxwell had only £1000 in the five per cent stock; on the contrary, it was candidly admitted at the debate, that she had a much greater value of five per cent stock, all which, however, in consequence of a measure of Government relative to that stock, was converted into four per cent stock before her death, and at her death a much larger sum of stock, so converted, belonged to her. The conversion, therefore, plainly does not affect the question. Farther, it was not a special legacy in this respect also, that there is a provision in the codicil, that if the testator had not £1000 of five per cent stock at the time of her death, the legacy should be paid out of the general funds. In these circumstances, it does not appear that any rule can apply to this legacy, which would not hold in the case of a general legacy. But a donation, *inter vivos*, of a sum equal to that bequeathed by an unrevoked mortis causa deed, is not to be considered as a revocation of the bequest, unless very pregnant evidence be adduced of the testator’s intention to revoke. It is thought that no such evidence exists in the present case.”

directly in the face of an express provision of her settlement. She has left no five per cent stock, and thus the alternative case has occurred, in which the pursuers are entitled to a general legacy of £1000. I am clearly of opinion that the interlocutor of the Lord Ordinary is well founded.

Nov. 16, 1831.
Watson v. Blair.

LORD GILLIES.—I concur in the opinion now expressed, and shall only add two observations. First, the defender says that the transfer of the £1000 in the four per cents, was an anticipated payment of the legacy, and that the pursuers are asking second payment of the same bequest. Now the legacy was either of £1000 in the 5 per cents, or, failing them, of £1000 sterling. But was the transfer of the £1000 in the 4 per cents, either the one or the other of these things? It certainly was not, literally, the transfer of £1000 in the 5 per cents, and it may in fact have been of very different value in the market from such an amount of that stock; and we are informed that it actually was so. Again, we cannot assume that the transfer of £1000 in these 4 per cents was precisely equal to £1000 sterling. Probably it was not the same; perhaps it was very far from being so. But in this way it appears, that though the legacy was to be either £1000 in the 5 per cents, or £1000 sterling, the transfer which was made, was not only in form a different matter, but may substantially have been of a very different value, from either of these alternatives. How then can it be said that such a transfer is proved to have been a mere anticipation of this identical legacy?—In the second place, I would ask, what purpose was the transfer to serve, if it did not import something more than the legacy already provided? The pursuers derived no instant benefit from it, as the dividends on the transferred stock were paid to Miss Maxwell during her life; and, therefore, unless the object of the transaction were to confer an additional benefit on the pursuers, over and above the legacy, it was altogether futile.

LORD CRAIGIE.—I do not think the case free from difficulty, and should have no objection to consider it more maturely, but I incline to the opinions expressed by your Lordships.

LORD PRESIDENT.—I concur without hesitation. I consider the general principle to be, as pointed at in the conclusion of the Lord Ordinary's note, that a donation, *inter vivos*, in favour of a party to whom a legacy is already provided, is presumed to arise from an increased regard to the legatee, and is not imputable in extinction of the legacy, without pregnant evidence that such was the intention of the testator. There are many cases which establish this. The burden of proof of such intention lies on the defender, and I think he has entirely failed. It is clear that the transfer of £1000 in the new 4 per cents, may have been a very different thing from either of the alternative bequests in the codicil, viz. the £1000 in the 5 per cents, failing which, the sum of £1000 sterling. In addition to this, when we see the express terms in which the codicil provides that the bequest shall be good, unless revoked by a writing under the hand of the testatrix, I am clearly for adhering to the interlocutor under review.

THE COURT accordingly adhered.

Defender's Authorities.—Mollison, 22d Feb. 1822, (Ante I. 385, and 2 Sh. Ap. Ca. 445.)—
Rennies, June 10, 1831, (Ante IX. 714.)

W. FINLAYSON, W.S.—H. BLAIR, W.S. Agents.

No. 9. WILLIAM and ANDREW SCOTT, Suspenders.—*Rutherford—G. G. Bell.*
 ANDREW OLIVER, Charger.—*D. F. Hope—Wilson.*

Nov. 16, 1831.
 Scott v. Oliver.

Poinding—Burgh Jurisdiction.—Magistrates of a burgh of barony, independent of the baron, are entitled to act under the bankrupt statute as “Judges Ordinary” in regard to the execution of poindings proceeding on letters of horning.

Nov. 16, 1831. OLIVER having obtained decree against Scotts for expenses in a process before the Sheriff of Roxburgh, took out letters of horning, on Ld. Mackenzie, 2d Division. T. which he charged them; and in August thereafter, executed a poinding of their effects within the burgh of barony of Hawick. This they reported to the bailies of that town as the judges ordinary, who granted warrant of sale accordingly.

Scotts, thereupon, brought a suspension and interdict of the warrant of sale, on the ground, *inter alia*, that the bailies of Hawick had no jurisdiction to receive the report of the poinding, or grant the warrant of sale.

The Lord Ordinary having found the letters orderly proceeded, Scotts reclaimed, whereupon the Court “appointed the parties to give in minutes of debate, as to the regularity of the proceedings before the Magistrates of Hawick.”

Oliver founded on the 4th section of the bankrupt statute, which enacts, that “the person employed in executing a poinding for debt, shall leave the poinded goods in the hands of the debtor, with a schedule of the poinded goods, and note of the appraised values, &c.; and shall forthwith report his execution of poinding to the Sheriff, or other judge ordinary, who shall give directions for keeping the goods poinded in safe custody, and selling them by public roup,” &c. And he contended, that the bailies of a burgh of barony, independent of the baron, prior to the jurisdiction act, (which had been decided was the case as to the burgh of Hawick, in Graham, 27th February, 1807,) fell under the description in the statute, “or other judge ordinary.”

Scotts, on the other hand, maintained, 1. that Hawick was not one of these burghs; and 2. that the statute could not be construed as authorizing poindings in all cases to be reported to any judge ordinary, but only the judge ordinary in the matter,—that is to say, the judge by whose warrant the poinding had been executed.

LORD JUSTICE CLERK.—Upon attending to the decision of the case of Graham in 1807, I don’t think we are warranted to interfere with what is there laid down, that this burgh is independent, and therefore the question just is, whether, under the terms of the sequestration act, these magistrates are to be considered judges

ordinary. I am decidedly of opinion that they are, and that the objections to the regularity of these proceedings ought to be repelled. No. 9.

The other Judges concurring,

THE COURT adhered.

Nov. 16, 1831.
Scott v. Oliver.

Clarkson v.
Ball.

Suspender's Authorities.—Act 20 Geo. II. c. 43.; Burgh of Kilmarnock, June 18, 1771, (7685); Town of Paisley, Nov. 30, 1790, (7687); Town of Greenock, May 27, 1794, (7714); Laird of Drumlanrig, Jan. 15, 1624, (2509); Scott, July 16, 1629, (6899); Thomson's Statutes, v. 7. p. 661. and v. 8. p. 617 and 618; Acts of Sederunt, 1748.

Charger's Authorities.—Act 20 Geo. II. c. 43.; Erak. 1. 2. 15., and 1. 4. 20. and 30.; Graham, Feb. 27, 1807.

WILLIAM DUNCAN, jun.—JOHN PATISON, jun.—Agents.

JOHN CLARKSON, Suspender.—D. F. Hope—Cuninghame.
PHILIP BALL and MANDATORY, Chargers.—Shene—Wilson.

No. 10.

Diligence, Legal—Bill of Exchange.—1. Where a messenger's execution of a charge was ex facie regular, but the schedule of charge was not only at variance with the execution, but inconsistent in itself—question raised, but not decided, whether the charge could be suspended as irregular, without a reduction.—2. Circumstances in which notice of the dishonour of a bill payable in England, after the lapse of six days, was held sufficient.

CLARKSON brought a suspension of a charge on a bill of exchange, on Nov. 17, 1831. the ground, 1. that the charge was irregular; and, 2. that he had not received due notice of the dishonour of the bill. The execution return-
ed by the messenger, bore that the charge had been given on the 5th of August, 1829; but the service copy set forth that the charge was given by virtue of letters of horning, dated 27th July last, and signed 3d August current; and, in conclusion, the messenger stated, “This I do on the 5th of July, 1829.” The objection taken by Clarkson was, that, as the service copy not only was inconsistent with itself, (bearing to be executed on 5th July, in virtue of a warrant dated on the 27th,) but also with the execution, the charge was irregular; and he contended that the analogy of a citation copy under a summons, could not apply to a question of diligence.

The charger answered, that summary diligence could not be staid on account of a discrepancy between the copy charge and the execution, when the execution was correct, and the discrepancy arose out of a palpable clerical error.

In regard to the objection to the notice of the dishonour of the bill, the facts were these:—The bill was drawn and payable in London. It passed through the hands of five indorsees, and, on being dishonoured, each indorsee gave notice and received payment from his own indorser. The suspender was the first indorser, and notice was sent to him on the sixth day, being the day after the charger retired it. This the suspender alleged was too late.

1ST DIVISION.
Lord Newton.
S.

No. 10. After the process of suspension had been for a considerable time in dependence, the suspender raised a reduction of the execution, and craved that the suspension should be remitted to it. The charger objected to such remit at so late a stage of the case. The Lord Ordinary repelled Taylor v. Taylor. the reasons of suspension, with expenses. The suspender reclaimed, and abandoned his objection as to the notice, and the Court not being unanimous as to the validity of the reason of suspension arising from the irregularity of the charge, remitted the process to the reduction.

Suspender's Authority.—Hamilton, Dec. 7, 1830, (ante IX. 143.)

J. G. BARR, S.S.C.—T. BAILIE, S.S.C.—Agents.

No. 11. GEORGE TAYLOR, Pursuer.—*Shene—Macallan.*
MRS TAYLOR, or BINNIE, Defender.—*Cunningham.*

Husband and Wife—Agent and Client.—Question raised, whether in an action of divorce, at a husband's instance, the account incurred by the wife to her law-agent, should be taxed against the husband, as between agent and client?

Nov. 17, 1831. TAYLOR raised an action of divorce against his wife. The Lord Ordinary, on 2d July, 1831, decerned against him for an aliment to her, at the rate of £1, 1s. per week, till the third sederunt day in November. His Lordship, on the 7th July, after a report by the auditor, also decerned against Taylor for £40, as an interim sum to account of the expenses of process incurred by his wife to her law-agents. Taylor reclaimed against these interlocutors, but, at the advising, objected only to the last of them, contending that the auditor should not tax the account as between agent and client, but as between opposite parties. The Court, without hearing the defender's counsel, adhered.

Their Lordships were understood, not to decide whether the account incurred by Mrs Taylor to her law-agents should be taxed against her husband, as on the principle of an account between agent and client, but to hold, that as the present interlocutor merely awarded an interim sum to account, it was unnecessary to fix on what footing the whole account should be finally audited. Their Lordships were understood, however, to intimate an opinion, that the taxation should be as between agent and client, with this modification, that improper or unreasonable disbursements and agency would not form a charge against the husband, though they might have been ordered by the wife.

AINSLIE and MACALLAN, W.S.—GREG and MORRON, W.S.—Agents.

JOHN PENDER, Suspender.—*Cuninghame.* No. 12.
JOHN FERGUSSON and OTHERS (PENDER's Trustees), Respondents.—*Houston.* Nov. 17, 1831.
 Pender v. Ferguson.

Interdict—Trust.—Where three brothers conveyed their estates, with powers of sale, to trustees, to realize funds and pay a debt of £634, and the sale of the late's Trustees' estates of two brothers produced above £1300 of gross proceeds; and the trustees, alleging the free proceeds of such sales to be only £283, advertised the heritable estate of the third brother for sale, the Court passed a bill of suspension and interdict at his instance, in respect the accounts exhibited by the trustees required further explanation as to the true amount of free proceeds arising from the sales. Dick v. Taylor.

In October 1828, three brothers, Penders, called a meeting of their creditors, who accepted a composition of 10s. per pound, amounting in all to £634. They then executed, severally, a trust-disposition of their estates to Fergusson and others, "with full power to them, at any time, to sell and dispose of said heritable and movable property;" and, at the same time, explained to the trustees that it was their wish that the heritable estate of John Pender should be last disposed of, as he had a right of relief against his brothers. The trustees sold the effects of the other brothers by public roup, and the gross proceeds were above £1300. The trustees, however, alleging that the free proceeds were only £283, advertised the heritage of John Pender for sale. He presented a bill of suspension and interdict, stating that the trustees had exhibited no satisfactory state of accounts to explain why the large proceeds from the sales were insufficient to pay the sum of £634. Lord Moncreiff refused the bill, and Lord Newton a second bill;—Pender having reclaimed,

The Court, considering that the accounts required investigation, altered and passed the bill.

A. P. HENDERSON—R. BURN—Agents.

WILLIAM DICK, Pursuer.—*Keay—Whigham.* No. 13.
TAYLOR'S TRUSTEES, Defenders.—*Maitland—G. G. Bell.*
 Also,
TAYLOR'S TRUSTEES, Pursuers.
QUEENSBERRY'S EXECUTORS, Defenders.—*Murray—Cay.*

Landlord and Tenant—Warrandice—Reparation.—The principal tenant in a lease under reduction, containing a power to subset, and clause of absolute warrandice, having subset the farm for a part of the period still to run, with an obligation to communicate to the sub-tenant, if ejected before the expiry of the sub-lease, a proportion of the damages to be recovered under the warrandice "effeiring to his possession"—Held, 1. That the representatives of the grantor of the lease were liable to pay to the principal tenant such damage as the sub-tenant could instruct he had sustained by premature removal; and, 2. That the sub-tenant was therupon entitled to recover the amount from the principal tenant.

No. 13. THE late John Taylor held a lease of a farm, called Castle of San-quhar, part of the Queensberry estate, containing power to assign and subset, and an obligation of absolute warrandice. In 1806, he executed a trust-deed of settlement, in favour of the pursuers as trustees, conveying to them inter alia this lease. He died shortly afterwards; and in 1810

Nov. 17, 1831. 2d DIVISION. Lords Cringle-tie and Fullerton. F.
Dick v. Taylor's Trustees.

the trustees obtained from the Duke of Queensberry a renewal of the lease for nineteen years, in the same terms with the original, but for the uses and purposes declared in the trust. In 1814, by virtue of powers in the trust-deed, they subset the farm, with the crop, stocking, and implements, as steelbow, to Robert Taylor, the second son, who accepted it in full of certain provisions in the trust-deed. This sub-lease was to subsist for nine years from Whitsunday 1814; and as at its date the Duke of Buccleuch had instituted reductions of the several Queensberry leases, there was introduced into it the following clause:—"And it is hereby declared, that if the Duke of Buccleuch and Queensberry shall succeed in reducing the original lease, that we and the other trustees are bound only during the validity of said lease. But in such event, the damages that may be recovered from the executors of the late Duke of Queensberry, shall be proportionably appropriated to your behoof, effeiring to your possession." Thereafter Taylor assigned the sub-lease to the pursuer Dick, who, on the Duke of Buccleuch's succeeding in his actions of reduction, was removed from the farm in 1822, and was obliged to dispose of his stock. Claims of damages against the executors of the Duke having been made, the rule adopted, where the farm had been subset, was to allow the principal tenant damages calculated according to the excess of the sub-rent drawn by him over the rent paid by him; and also, to allow the sub-tenant damages calculated according to the excess of the value of the farm over the sub-rent,—this last excess being termed tenants' profits. Taylor's trustees raised an action against the executors, under the warrandice in their tack, in which they obtained interim decree for damages for the years of the principal lease still to run, estimating its value to them by the amount of the sub-rent. Dick, in like manner, raised an action against Taylor's trustees, in which (besides damages for alleged loss by premature sale of stocking, &c.) he claimed, under the stipulation in his sub-lease, a participation in the amount of the damages recovered, to the extent of one-seventh, on the ground that the meaning of that stipulation was, that he should draw the whole damages awarded for the years during which his sub-lease had to run, and consequently, that as damages effeiring to seven years had been obtained, and as one year of his sub-lease was unexpired at his removal, he was entitled to a relative proportion of the damages. The trustees, on the other hand, contended that it was only in the event of their obtaining damages for tenants' profits, that they were to communicate to him these as the damages effeiring to his possession, but that having drawn no such

damage, he had no claim on them, but must endeavour to make good any competent to him against the executors themselves. No. 13.

The Lord Ordinary (Cringletie) having assailed the trustees, adding the subjoined note,* Dick reclaimed.

Nov. 17, 1831.
Dick v. Tay-
lor.

* "It is distinctly proved, that the lease of the Castle of Sanquhar was held by John Taylor, father of Robert Taylor, in whose right the pursuer Mr Dick claims. John Taylor held various other leases, and conveyed the whole of his property to the defenders, as trustees for behoof of his family; with directions to them how to act in the division of his estate, but, at the same time, vesting them with discretionary powers in the exercise of their functions. They, at Robert Taylor's desire, sub-let to him the farm of Sanquhar at a rent of £180 yearly, and he accepted of it in full of all that he could demand of his father's means and estate. In the sub-lease to him, which was for nine years after Whitsunday 1814, they expressly stipulated, 'that if the Duke of Buccleuch and Queensberry shall succeed in reducing the original lease, that we and the other trustees are bound only during the validity of said lease; but in such event, the damages that may be recovered from the executors of the late Duke of Queensberry shall be proportionally appropriated to your behoof, effeiring to your possession.' The Duke of Buccleuch having prevailed in setting aside the lease, the sub-tenant was removed in 1822, a year before the sub-lease expired in its natural course. It is thus clear, that no claim of warrandice could arise from the reduction of the lease against the defenders, for it was expressly declared that they were bound only during the validity of the lease; but in addition to this, the Lord Ordinary thinks it highly questionable, whether, although no such declaration had been made by the defenders, they would have been liable in absolute warrandice, unless they had positively given it. The sub-lease was not given as in an ordinary transaction between man and man. It was given by the defenders as trustees in distributing a succession, and accepted by Robert Taylor as his share thereof, and therefore could not be meant to be absolutely warranted to him by the trustees, but to be granted *tantum et tale* as it stood. With respect to the pursuer, it is equally clear that he is placed identically in the same situation with, and no other than that in which Robert Taylor stood. He is identified in the transaction, by having been a party in the sub-lease to Robert Taylor, and a cautioner for him for the rent; and as it was a part of the bargain, that the right to the sub-lease should be assigned to him, so he accepted the assignment, under all the conditions and qualities that were inserted in that sub-lease.

"It being then indisputable, that the defenders were not bound for a minute after their original lease was set aside, and consequently not liable for damages for the reduction of that lease, except in so far as they agreed to communicate a share of what might be recovered, the only question is, what is the meaning of the stipulation that 'the damages that may be recovered from the executors of the late Duke of Queensberry, shall be proportionally appropriated to your behoof, effeiring to your possession'?"

"The Lord Ordinary's idea is this. That the parties had in contemplation that the defenders would recover from the executors damages, in name of tenants' profits, over and above their sub-rent; and that they would communicate these profits to Robert Taylor for all the years during which he might be deprived of possession under his lease. He was to get a proportion of these damages, effeiring to his possession; meaning the time that he might be deprived of it. There seems no other interpretation consistent with good sense; for the defenders never can be supposed to have meant that they were to pay him the surplus sub-rent, if they got no more to themselves, as that in fact would be depriving themselves of any damage arising

No. 13. The Court, on the cause being put out for advising, delayed giving judgment till the action by the trustees against the Queensberry executors, in which a claim was made for tenants' profits, should be brought before them. This was accordingly done; but in the meantime a judgment had been pronounced in the House of Lords reversing that of this Court in the case of Maxwell,¹ and determining that sub-tenants, without special assignation to the clause of warrandice in the original lease, had no direct action of damages against the executors. The executors then contended, that unless Taylor's trustees were liable to Dick in warrandice and damages, these trustees could have no claim of relief against the executors, and that under the sub-lease there was no warrandice, and no liability on the part of the trustees. To this it was answered, that any arrangement in a family settlement as to the division of the damages, could not relieve the executors of the full claim which lay against them under the absolute warrandice in the original lease; and that being bound under it to pay the full damage for tenants' profits, the trustees were entitled to recover this, in order to communicate it to the sub-tenant, in terms of their obligation to that effect in the sub-lease.

from the reduction of the original lease. The damage, therefore, that was to be appropriated for Robert Taylor's behoof, must have been tenants' profits, expected to be recovered over and above the sub-rent; and as it is not disputed, that they did not get any other damage than the surplus rent from the executors of the late Duke of Queensberry, and indeed could not get more for the year, from 1822 to 1823, as the surplus sub-rent was all they lost, it appears quite clear to the Lord Ordinary, that the defenders are not liable to the pursuer for any part thereof. If the pursuer shall say that the clause in his sub-lease, relative to damages, entitles him to recover damages from these executors, he may try the question with them, but in the present action with the defenders he can recover none.

"With regard to the pursuer's claim, on account of his being obliged to part with his stock and cattle, and implements of husbandry, in the year 1822, instead of the year 1823, the Lord Ordinary considers it to be so untenable, that he is surprised at its being advanced.

"In the first place.—By the sub-lease, no person can doubt that he was bound to deliver to the defenders all these commodities at the expiry of his sub-lease. The words of it won't bear another construction than actual re-delivery of them,—and as the expiry of his lease was the period of the expiry, or rather the reduction of the original lease which happened in 1822, it is evident that he was bound to deliver the whole in that year, and could not retain them, unless with consent of the defenders, till the year 1823. It is then impossible that he can claim damages from the defenders for his being obliged to implement his obligation to them in 1822.

"2dly.—Even in the cases, while the tenants brought the question of damages arising from the reduction of their leases to trial by jury, which was done in many instances, no damage was ever given on account of loss by an alleged premature sale of stocking. It was claimed in every case, but was refused, and most justly, for no one can tell what the stock might have been in a year after it was sold; in what condition it might have been, or what the demand for it, or the prices at the time, or what losses upon it might have occurred in the course of the year."

¹ July 11, 1827, (*ante*, V. 935.) Reversed Oct. 12, 1831.

LORD JUSTICE CLERK.—We are, in the first place, to consider if Dick, having possessed his farm except for the last year, has any claim against Taylor's trustees. All depends on the clause in their deed, which is certainly not a clause of absolute warrandice, though the summons always calls it so; but still it is an obligation, and we won't throw the summons over the table because it misnames it. It is impossible to say that this is a nugatory clause, and we must discover its meaning if we can. Then, on consideration of it, I think Dick is entitled to say I am just in the shoes of Robert Taylor; and that while it is clear that there is no absolute warrandice on the trustees, or personal obligation to pay out of Taylor's own funds, they are entitled, and bound, to enforce against the Queensberry executors the absolute warrandice in the original lease, which contained power to subset; and as the sub-tenant was turned out before the end of the lease, they are entitled to recover damages from the executors, and bound to hand them over to the sub-tenant. The extent of damages is clearly to be the same with those adopted in the other cases. Then as to the stock, the claim will only apply to that part not steelbow; but as to the rest, the sub-tenant is entitled to damages in respect of it, as in the other cases; that is, he is just to get the loss and damage sustained by his premature removal. It is clear Dick is not to be in a worse situation than any other sub-tenant.

LORD CRINGLETIE.—If the case of Maxwell had been decided in the House of Lords, when I pronounced my interlocutor in this case, I would not have given the judgment I did; but as, according to that case, sub-tenants cannot go for the tenants' profit directly against the executors, I now agree that the trustees are bound to recover from the executors, and communicate to Dick.

LORD MEADOWBANK.—This party is entitled to recover from the trustees, who, though not personally liable, are bound to go against the executors who don't appear, in the action between Dick and Taylor's trustees, to oppose our arriving at that conclusion. I would find them liable, reserving their relief.

LORD GLENLEE.—I would only find them liable to the extent of pursuing the executors, and recovering the damages if they can, and then communicating them to Dick.

THE COURT, in the action at Dick's instance, recalled the Lord Ordinary's interlocutor, and found, "that in virtue of the absolute warrandice contained in the principal tack in favour of the defenders, and the unlimited power conferred on them to assign and subset, and also in virtue of the obligation in the original sub-lease in favour of Robert Taylor, the right to which was acquired by the pursuer, the pursuer is entitled to recover from the defenders, as trustees of the late John Taylor, whatever loss and damage he can instruct he has sustained as sub-tenant of the farm of Castle of Sanquhar, in consequence of his removal therefrom at Whitsunday 1822, one year before the expiry of his sub-tack, over and above the sub-rent, and other casualties and prestations payable by him under his sub-lease," and quoad ultra remitted to Lord Fullerton, Ordinary;—and to the same extent decreed in the action at the instance of Taylor's trustees against the Queensberry executors.

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No. 13.

Nov. 17, 1831.
Dick v. Taylor.

No. 14.

MURDO M'KENZIE, Suspender.—*Keay—Penney.*
JOHNSTONE and SYME, Chargers.—*Moir.*Nov. 17, 1831.
M'Kenzie v.
Johnstone.

Process.—A.S. 11th July, 1828, § 18.—Where a bill of suspension and interdict on caution, against certain parties for salmon-fishing, was offered on 10th May 1830, and, after discussion, passed on 12th May 1831; and a certificate was afterwards issued that no caution had been found, and that the letters had not been duly expedie; and another bill was offered on 22d June 1831, against the same parties, concluding with the same prayer as the first, but complaining of continued proceedings down to the date of its presentation—held, that this was not “a new bill to the same effect,” in the sense of the A.S.; and that it was not imperative on the Lord Ordinary to require the complainer to pay to the chargers the expenses of the first bill before having the second received.

Nov. 17, 1831. By the 18th section of the A.S. 11th July 1828, it is enacted, “that where a party shall delay to expedie his letters, and a certificate shall be duly obtained from the signet-office, after the above period (ten days) is elapsed, bearing that the letters are not expedie, it shall not be competent thereafter to present any new bill to the same effect, unless upon payment of the expenses incurred by the opposite party under the former bill, which shall be modified and decerned for by the Lord Ordinary, to whom the new bill is presented. And the Lord Ordinary shall not give any deliverance on the new bill, until evidence is produced that the expenses have been paid.”

On 10th May 1830, M'Kenzie presented a bill of suspension and interdict on caution, against Johnston and Syme, and others, praying to have them prohibited from killing salmon in a part of the Kyle of Dornoch. After considerable discussion and expense in the Bill Chamber, the bill was passed of consent, and an interim interdict granted on 12th May 1831. The clerk of the bills granted, on 13th June, a certificate that M'Kenzie had failed to find sufficient caution; and on the 25th June, a certificate was granted by the keeper of the Signet, that from 12th May to 24th June, the letters had not passed the Signet.

A new bill of suspension and interdict was presented at M'Kenzie's instance on 22d June, concluding with the same prayer as the first, against the same parties, and on the merits substantially the same, with this difference, that the date of this complaint was above a twelvemonth later than the other, and it complained of new and continued acts down to the time of its presentment.

Johnston and Syme objected that this was truly “a new bill, to the same effect” with the first, in which the letters had not been duly expedie, and that it could not be entertained at all, without previous payment of the expenses incurred under the former bill.

M'Kenzie answered, that as there was a lapse of a twelvemonth between the date of the two complaints, and the last one embraced proceed-

ings which could not be set forth in the first, it was a different complaint, and not a mere renewal, so that the act of sederunt did not apply. No. 14.
 He also lodged a minute, consenting that the whole expenses incurred in the discussion under the first bill should be open for discussion in the present one. Nov. 17, 1831.
 M'Kenzie v. Johnstone.

The Lord Ordinary pronounced this interlocutor:—“ In respect that this bill relates to continued acts of possession down to the present date, as distinct from the acts of possession complained of by the former bill; Finds that this bill is competent, and allows the same to be received; Finds that it is not imperative on the Lord Ordinary to require the complainer to pay the expenses incurred under the former bill, as a condition of the present bill being received; And in respect of the minute for the complainer, consenting that all the said expenses incurred in the discussion under the former bill shall be open for determination under the present bill, appoints the bill to be seen and answered within fourteen days; and, in respect of the previous judgment of the Court, in the meantime grants the interdict, and to be intimated.” *

Magistrates of Edinburgh v. Officers of State.

Johnston and Syme reclaimed, but the Court adhered.

S. GORDON, W.S.—INGLIS and DONALD, W.S.—Agents.

MAGISTRATES OF EDINBURGH, Pursuers.—D. F. Hope—L' Amy—Tawse. No. 15.
 OFFICERS OF STATE, Defenders.—Sol.-Gen. Cockburn—Brown.

Jurisdiction—Admiralty.—1. Inferior Admiralty jurisdictions, independent of the Great Admiral, not cut down by the act 1681. 2. Question raised, how far the Magistrates of Edinburgh, having an Admiralty jurisdiction with reference to the port of Leith, can exercise it in their own persons, and sitting in the city of Edinburgh.

By Royal Charter, dated 3d April 1616, King James VI. granted to the Magistrates of Edinburgh an Admiralty jurisdiction in the following terms: “ Igitur nos fecimus constituimus et ordinavimus præpositum balivos et consules burgi de Edin. eorumque deputates præsentes et futuros eligend. judices omnibus nautis magistris ac navigatoribus frequentantibus vel qui ad dictam villam de Leith tempore a futuro frequentare contingerent tam nostris subditis quam peregrinis de quacunque patria vel natione in omnibus maritimis (lie seyfaring) aliisque actionibus et causis quibuscumque prosequendis,” &c. This grant was confirmed by a

2d Division.
 Ld. Fullerton.
 T.

* “ There is probably some expense created by the complainer's omission to find caution at the proper time, to which he ought to be subjected immediately. But as the Lord Ordinary sees difficulty in adjusting this under the present bill, in the Bill-Chamber, consistently with the justice of the case, in giving an immediate interdict; and as he does not think that it depends on any consent by the respondent, whether the bill is to be received or not, without payment of the previous expense, he thinks it better to pronounce an interlocutor in the above terms, against which the respondents may, if so advised, at once reclaim to the Court.”

No. 15. charter of Charles I. of date 23d Oct. 1636, in these words: " *Una cum carta concessa per dictum quondam nostrum charissimum patrem, sub suo magno sigillo, dictis proposito, balivis, consulibus et communitati dicti nostri burgi de Edinburgh de jurisdictione portus et lie harborie de Leith facien. et constituen, ipsos judices inter naucleros, magistros et nautas in Leith, et omnes alios naucleros magistros et navigatores tam subditos nostros, quam extraneos existen. cum ipsorum navibus et cimbis lie barkis pro tempore infra dictam villam de Leith et portum ejusdem in omnibus maritimis actionibus et causis lie seyfaring causses et aliis causis quibuscumque cum potestate ipsis acta et statuta faciendi, pro incremento navigationis infra dictam villam de Leith.*" The several rights granted by these charters, including the Admiralty jurisdiction, were specially confirmed by a statute of Charles II., bearing date 22d March 1661.

In virtue of the jurisdiction thus conferred, the Magistrates of Edinburgh have been in use, down to the present day, of annually electing a Water-bailie, or Admiral-depute, who holds a regular court at Leith, and exercises there an Admiralty jurisdiction. Besides this mode of exercising the jurisdiction, the Magistrates alleged that the Bailies of the city had been in use, as Admiral-deputes in virtue of their office, to decide in maritime causes sitting in Edinburgh. In consequence of an objection to a decree so pronounced by them, on the ground that they had no right to exercise the jurisdiction in this manner, and of their right to any such jurisdiction being also questioned in respect of the act 1681, they, in 1823, instituted the present action of declarator against the Officers of State, concluding to have it declared, that " the pursuers, in virtue of the foresaid charters from the crown, and other grants ratified in Parliament, and of the immemorial exercise of the rights of Admiralty jurisdiction following thereon as aforesaid, have an undoubted right to exercise and enjoy this jurisdiction as heretofore, not only by means of an Admiral-depute of Leith, and one or more Admirals-substitute there appointed for that purpose, and as in no respect affected or done away by the act 1681, cap. 16, but that the pursuers are likewise entitled to exercise their Admiralty jurisdiction aforesaid at Edinburgh, by means of one or more of the Bailies of the said city of Edinburgh, acting as Admirals-depute, in the same manner and to the same effect as the said Bailies have hitherto been in the use to exercise the same."

The Lord Ordinary (Cringletie) found that the Magistrates were entitled to enjoy an Admiralty jurisdiction as heretofore; but the Officers of State having reclaimed, the Court, (December 14, 1825,) recalled his Lordship's interlocutor, and remitted to have the cause prepared in terms of the Judicature Act. A record was accordingly made up, containing contradictory accounts as to the usage, especially as to the exercise of any jurisdiction otherwise than by the Admiral-depute at Leith. Various productions, however, were made, which clearly established the regular and continued exercise of such jurisdiction at Leith by a person appointed for that special purpose, and called the Water-bailie or Admiral-depute.

Nov. 18, 1831.
Magistrates of
Edinburgh v.
Officers of
State.

The Lord Ordinary reported the cause.

No. 15.

Pledged for the Officers of State—

1. The act 1681 was intended to cut down, and did cut down, all Admiralty jurisdictions, except those flowing from the Great Admiral, and this was determined in the case of *Rothsay*.¹ If so, then no length of usage will confer such jurisdiction, because to give effect to usage there must be some title; but the title of the Magistrates being taken away by the act, no length of possession alone could give them such jurisdiction. 2. At all events, the charters themselves confine the exercise of it to the town of Leith, and there is no practice established of holding Admiralty courts elsewhere.

Pledged for the Magistrates—

1. The object of the act 1681 was merely to deprive the Court of Justiciary of the cumulative jurisdiction which that Court claimed with the High Court of Admiralty,² but not to affect inferior Admiralty jurisdictions, which the statute, on the contrary, assumed were still to subsist, as it declared the decrees of "all other inferior Courts of Admiralty" to be subject to the review of the High Court—those having merely deputations from it, being necessarily so without express provision. But even if the statute were ambiguous, the uninterrupted usage since its date must afford the best interpretation of it,³ and it is impossible that the Magistrates of Edinburgh could have been allowed to exercise this jurisdiction within the immediate cognizance of the High Court, had the statute borne the construction now attempted to be put upon it; and besides, the subsistence of such jurisdiction has been recognized in various British statutes, as the 28 Geo. III. c. 58 (§ 23), 39 Geo. III. c. 44 (§ 16), 47 Geo. III. c. 3 (§ 24), and William IV. c. 69; and it has also been sanctioned by decisions of this Court.⁴ As to the case of *Rothsay*, several of the judges thought the original charters there did not confer any Admiralty jurisdiction, and there had been no exercise of it even prior to the act 1681. 2. The jurisdiction being granted to the Magistrates, they are entitled to exercise it at any place within the limits of the burgh; and at all events they would be so entitled, if they established the usage averred by them.

LORD CRINGLETIE.—The pursuers say, that the act 1681, was against the concurrent jurisdiction of the Court of Justiciary. But they need not have confined themselves to that, as the Court of Session had also a cumulative jurisdiction, and

Nov. 18, 1831.
Magistrates of
Edinburgh v.
Officers of
State.

¹ June 22, 1820, (F. C.)

² Erik. I, 2, 35; 1 Hume, 479, and 2 Ibid. 35.

³ Erik. Pr. I. 1, 16, and Inst. I. 1, 45; Bank. I. 1, 60; Stair. I. 1, 16; Magistrates of Paisley, Nov. 30, 1790 (M. 7687); Innes, Dec. 8, 1622 (M. 3100-1); Blair, July 1730 (M. 3099); Dowie, May 30, 1817, (F. C.)

⁴ Craig, March 5, 1772 (M. 7518); Munro, Feb. 20, 1781 (M. 7529); and Hailes, (884); Bruce, May 16, 1827 (*ante*, V. 668.)

No. 15. the Judge Admiral sat with them on maritime cases. The object of the act undoubtedly was to remove the interference of these Courts. It could not have entered into the view of the legislature that Inferior Courts could interfere with the Great Admiral, and therefore he is put over "other" Inferior Courts, and I can't conceive that this meant his own deputies. But further, *optima legum interpres est consuetudo*, and it is indisputable that this jurisdiction would not have been allowed to subsist in the face of the statute, if it had been intended to put them down. By 28 Geo. III. c. 58, and others, their Admiralty jurisdiction has been sanctioned, and also often by this Court. Then so far as respects usage—no usage can be set up where jurisdiction is not given. And I would have thought usage of no consequence, if the statute did not admit of a construction in favour of Inferior Courts. But usage shows the construction; and as the judge and clerks of the High Court were paid by fees, (the late Baron Cockburn having been the first Admiralty Judge who received a salary,) they would not have suffered an exercise of a jurisdiction under their eyes, to their own prejudice; and therefore I have no doubt that the Magistrates are entitled to exercise their jurisdiction as hitherto exercised. There is, however, another question, where they are to exercise it—if in Edinburgh as well as in Leith. Now, by the words of the charter, I think they cannot exercise it except in Leith, "Within the village of Leith." I think the acts are to be made in the village. Possession is here disputed, but I don't think possession, contrary to title, can warrant its continuance; and taking that view of the charter, I think they can only exercise it in the town of Leith, and not in the city of Edinburgh.

LORD GLENLEE.—The whole tenor of the statute is nothing more nor less than a ratification of the powers given to the High Court of Admiralty, by the prior act of James VI., with certain additions, for giving it more effect, and additional powers, as that of reviewing their own judgments, and those of inferior Admirals. But there is no declaration that all other jurisdictions not depending on the Admiral are to be abolished, though such a declaration is made with regard to certain of their powers, as, for instance, that of giving protections. I am not moved by the decision in the Rothesay case, notwithstanding what is said by the reporters of the Court having held the jurisdiction there abolished by act 1681. I don't think that was the case. It was a very old grant, and there had been no exercise of it for a long time; it was also of an extraordinary nature, and we thought it contrary to the policy of the act 1681, to allow them to take up, at a recent period, an antiquated claim. That was totally different from saying, that a body like the Magistrates of Edinburgh shall be deprived of a jurisdiction which has been constantly exercised by them. But there is another question, whether the Magistrates, as such, in their own persons, are entitled to judge in maritime cases, or only by a judge appointed by them, as Water-bailie, and on this point there is some difficulty. I would have wished to see how the facts stand, for if there was a constant and habitual usage of exercise in one mode only, I doubt if they would be able to do it in any other way even within the words of the statute. As to the first matter, however, I am of opinion that the jurisdiction is not abolished by the act 1681; and as to the other, I am not sufficiently prepared to decide.

LORD MEADOWBANK.—As to the second point, I agree we must have more information. As to the other, if the question had occurred immediately after the act 1681, I would have doubted if the Inferior Courts were not abolished; but, as my brother has stated, custom is the best interpreter of statutes; and as usage has placed the construction on it, that it has not abolished these courts, we are pre-

Nov. 18, 1831.
Magistrates of
Edinburgh v.
Officers of
State.

vented from putting any other, even if the words were more express than they are, No. 15.
 because I hold it fixed that statutes fall into desuetude—a principle, without question, founded on the law of Rome; and therefore if, though expressly abolished by the act 1681, they had exercised their jurisdiction in the face of the statute, I would have been for sustaining it. When I was in Parliament I had occasion to consider, along with Sir Ilay Campbell, the question of desuetude of statutes, and his opinion coincided with mine, that it is not, properly speaking, desuetude, but that the acts are repealed by contrary consuetude, being a virtual repeal by the same consent of the people which enacted them. And though we held consuetude could not repeal a British statute, it undoubtedly can a Scotch one; and therefore, on the first part, it is clear the Magistrates have established their right. Though I would not rest much on the mention made in the recent statutes, assuming what is the law; on the contrary, I care nothing for that whatever.

LORD JUSTICE-CLERK.—I agree there is not sufficient ground for finding the Magistrates have not made out their right. Great stress has been laid on the case of Rothsay. I have notes of the case. Some of the Judges went on the statute 1681, yet not on that alone, and the Court divided, three to two. Several of the Judges held there was no precise jurisdiction conferred by the grant, and it is no authority in the present case. Although, therefore, I was clearly in favour of the decision in the Rothsay case, I am of opinion that usage is the best interpreter of the clause in the act 1681; and, besides, other inferior jurisdictions are there recognised. But then, as to the second question, how the jurisdiction is to be exercised, before we can determine that we will require more perfect evidence of usage than we have, to support the second branch of the declarator.

LORD MEADOWBANK.—I would wish to notice as to one plea of the defenders, that the act, *salvo jure*, only applies to private statutes.

THE COURT found that the Magistrates had right to an Admiralty jurisdiction, as concluded for; but as to the mode and place of exercising it, and the limits within which it might be exercised, remitted to the Lord Ordinary to hear parties further.

M'RITCHIE, BAYLEY, and HENDERSON, W.S.—G. STODART, and W. FRASER, W.S.—Agents.

ELIZABETH CROWDER OF TURNLEY, Suspender.—Jameson—Robertson—No. 16.
Simple.

J. and R. WATSON, Chargers.—D. F. Hope—Penney.

Meditatio Fuga—Foreigner—Personal Exception—Husband and Wife.—Where a domiciled Englishwoman was brought to Scotland under a criminal warrant to stand trial for a robbery, and was acquitted; but immediately apprehended on a mediatione fuge warrant at the instance of the party whose money had been stolen; and a bill of suspension and liberation was passed, on an alleged irregularity in the warrant, which was passed from, and a second warrant obtained, under which she was incarcerated—Held, 1. That she was not protected from apprehension, as being a foreigner about to return to her own country, nor as having been brought to Scotland under a criminal warrant. 2. That the creditor was not barred from executing the second warrant in respect that her being then in Scotland had been occasioned by the previous alleged irregular proceedings. 3. That she was not protected by an

Nov. 18, 1831.
 Magistrates of Edinburgh v.
 Officers of State.

Crowder v.
 Watson.

No. 16.

Crowder v.
Watson.

allegation of her being a married woman ; and, 4. That the oath of the creditor was not objectionable on the grounds of his not setting forth his belief of her participation in the robbery, to be founded on his own personal knowledge.

Nov. 18, 1831.

2d Division.
Bill-Chamber.
Ld. Fullerton.
F.

IN the month of December 1830, the bank of Messrs James and Robert Watson, bankers in Glasgow, was broken open, and a large amount of money, in bank notes and specie, carried off. Mrs Crowder or Turnley

(whose place of permanent residence was London) had been living in Glasgow for a short time immediately previous to the robbery, but about the period of its being effected (and before it, as she alleged) she had returned to London. Suspicion having attached to her as guilty of the robbery, with certain other persons, she was apprehended in London, and sent, under a criminal warrant, to this country, where, along with a man named Heath, she was brought to trial at the Circuit Court of Justiciary, held at Glasgow, in September last. The jury brought in a verdict of guilty against Heath, who was accordingly condemned, and subsequently executed; but as to the complainer, the verdict was in these terms—" Find that the panel, Elizabeth Crowder or Turnley, alias Allan, was in the previous knowledge of the theft, but had no participation therein." In respect of this verdict, the Court assailed her simplifier, and dismissed her from the bar, and she was set at liberty accordingly. Next day she was apprehended, as in meditatione fugæ, on a warrant from the Sheriff of Lanarkshire, obtained by Messrs Watson. After some procedure (which it is unnecessary to detail) she was committed by the Sheriff till she should find caution de judicio sisti. She then presented a bill of suspension and liberation, founding on certain alleged irregularities in the procedure before the Sheriff; on advising which, with answers, Lord Cringletie (Sept. 24) passed the bill, and granted liberation—adding a note, to the effect that the bill had been passed solely in respect of the oath having been made by "*Gilbert Watson*, one of the partners of Messrs James and Robert Watson, the petitioners," while the application was in name of "James and Robert Watson," and the Sheriff had appointed the oath to be emitted by "the petitioners, or either of them." In the meantime Messrs Watson, to avoid any risk consequent on the alleged irregularities, on the same day on which the bill was passed, but before intelligence of it could have reached Glasgow, lodged with the keeper of the jail a letter, consenting to the suspender's liberation so far as concerned the warrant already obtained, and passing from all procedure thereon. They had previously, however, presented a second petition to the Sheriff, on which they had obtained the usual warrant to apprehend her, and bring her up for examination; and this warrant they accordingly put into execution before she left the jail. This second petition was in name of Robert Watson and *Gilbert Watson*, carrying on business under the firm of James and Robert Watson; and after narrating the breaking open of the bank, and the abstraction of the notes and specie, it set forth as follows:—" That the said crime was perpetrated,

planned; and carried into execution by William Heath, alias Lee, sometime residing in London, presently incarcerated in the jail or tolbooth of Glasgow, and who having been tried, was found guilty of the said crime, and is now under sentence of death therefor. That Elizabeth Crowder or Turnley, alias Allan, sometime residing in London, presently in Glasgow, aided, abetted, and assisted the said William Heath, or Lee, in planning and executing the said housebreaking and theft, and in stealing and abstracting the said money; or at least she was accessory to, and assisting in the same, and in the guilty knowledge thereof, and has now in her custody, or under her control, the whole of the money belonging to the petitioners, and stolen or abstracted as aforesaid. That in consequence whereof she is liable to restore, redeliver, and repeat to the petitioners, the said several sums of money stolen or abstracted as aforesaid, or otherwise to repair and make good to the petitioners the loss and damage sustained by them in consequence of the said housebreaking, theft, and abstraction, by making payment to them of the said sum of £2185: sterling, the amount so stolen from them as aforesaid; and as it is the intention of the petitioners immediately to prosecute the said Elizabeth Crowder or Turnley, alias Allan, before a competent court, to restore, redeliver, and repeat to them the several sums of money stolen or abstracted as aforesaid, or otherwise to repair and make good to the petitioners the loss or damage sustained by them in consequence of the said house-breaking, theft, and abstraction, by making payment to them of the said sum of £2185 sterling; and as the said Elizabeth Crowder or Turnley, alias Allan, is a native of, or a resident in England, and in meditation fugae from this country, the petitioners have been advised to make the present application to your Lordships."

To the facts set forth in this petition, Gilbert Watson made oath in these terms:—"Depones affirmatively to what is set forth in this petition; and, in particular, depones, That the said Elizabeth Crowder or Turnley, alias Allan, mentioned in the petition, is justly resting, owing, and addebt-ed to the deponent and his said partner in trade, in the sum of £2185 stated in the petition, for redelivery and restitution of which, or otherwise for making good the damage and loss sustained by the deponent and his partner in trade, in consequence of the housebreaking, theft, and abstraction set forth in the petition, the deponent and his said partner are about, as copartners in trade aforesaid, to raise an action in the competent court against her: That the said Elizabeth Crowder or Turnley, alias Allan, is a native or resident in England, and the deponent believes that she will immediately proceed to England, or elsewhere abroad, whereby the deponent and his said partner in trade will be deprived of their legal recourse against her for the recovery, restitution, and delivery of the said sums, or the making good the said loss and damage: That the deponent's grounds for this belief arise from the circumstance of her having been brought

No. 18.
Nov. 18, 1831.
Crowder v.
Watson.

No. 16. ^{Nov. 18, 1831.} Either under a criminal warrant, accused of the crimes mentioned in the petition; her being now in possession of the stolen property; and farther, from his having received information from credible parties to the same effect; in particular, the said Elizabeth Crowder or Turnley, alias Allan, herself, stated in the presence of Archibald Macallister, writer in Glasgow, and of James M'Hardy, Esq. sheriff-clerk-depute of Lanarkshire, that she was about to leave this country and proceed to London, and which statement was communicated to the deponent."

On being brought up for examination, she declared, "that she is advised that the present proceedings are illegal, and she therefore declines to answer all questions." The Sheriff, therefore, granted warrant in common form to imprison her till she should find caution *d e judicio sisti*, and she was incarcerated accordingly. She immediately presented a second bill.

Pleaded for the suspender,—

1. The proceedings are invalid, in respect the former passed bill constituted *lis pendens*, and the Lord Ordinary's *interlocutor res judicata*.

2. The intended return to his own country, by a foreigner having no domicile in Scotland, and particularly when brought into Scotland by force, and contrary to his will, is not a proper *meditatio fugae*, that implying a fraudulent fleeing from creditors—and the various cases which have sanctioned the detention of Scotchmen not domiciled, proceeded on the doctrine, only recently overturned, that the *forum originis* conferred a jurisdiction.

3. The case of a foreigner brought to this country, under a criminal warrant, is peculiarly favourable. He is under the protection of the Court, and can as little be subject to apprehension on civil process, at the instance of private individuals, as a party brought up from the sanctuary, under such warrant, who enjoys a protection till restored thereto; and that, without any special protection granted, but in virtue of the warrant itself.¹

4. At all events, in the present case, the chargers are barred from availing themselves of their second warrant, because her detention, so as to be liable thereto, was occasioned by their own illegal act, in procuring her detention under the first irregular and invalid proceedings, just as if they had fraudulently and illegally induced a debtor to leave the sanctuary, and then apprehended him.²

5. She is a married woman, as appears from a certificate of marriage produced, and so is not liable to any action for a civil debt.³

¹ 2. Bell, 562-3-4, and cases there cited; Ibid. 572; Stewart's Ans. p. 228; Urquhart, Dec. 17, 1679, (M. 10470.)

² 2. Bell, 572; Archer, June 18, 1791, (M. 8894); Halyburton, July 21, 1709, (M. 2.)

³ Ersk. I. 6. 24; Chalmers, Feb. 19, 1700, (M. 6083.)

6. The oath is not an oath of verity to the subsistence of a debt, but a mere oath of credulity or suspicion, as it proceeds not upon personal knowledge of the party deponing.

No. 16.

Nov. 18, 1831.
Crowder v.
Watson.

Answered for the Chargers—

1. The former warrant was passed from before the second was executed, and so there can be no *lis pendens*;¹ and as to the plea of *res judicata*, an interlocutor on a bill cannot be so considered;² and besides, the interlocutor of the Lord Ordinary proceeded on an alleged irregularity, which has been corrected in the second application.

2. Whenever a party is liable to be cited before the Courts of Scotland, he may be apprehended, when about voluntarily to leave the country, as being in *meditatione fugæ*; and accordingly foreigners have been always in use so to be detained, and on repeated occasions the legality of their detention has been sanctioned by the Court.³ In the present case, the suspender, by having committed in Scotland the crime charged against her, (which must be here assumed,) has, independent of her admitted residence prior thereto, rendered herself amenable to the Scotch Courts, so that she might be validly cited when personally found in Scotland; and this being the case, her creditors are entitled to the ordinary remedy of detaining her to answer their actions, unless she find caution to that effect.

3. The chargers were no parties to bringing the suspender to Scotland. This was effected by the public prosecutor alone, and although while actually in the hands of the Court, she might not be liable to apprehension on a civil process, yet the instant she was liberated she became so, unless she had obtained a special protection for such time as would enable her to return to England.

4. Unless the chargers had been guilty of fraud, they could not be barred of their remedy, in consequence of the previous proceedings, even if these had been finally decided to be illegal, but this is not so decided by the mere passing of the first bill; and although ob *majorem cautelam* they presented a second application, they do not admit that the first was truly liable to objection.

5. It is denied that the suspender is a married woman; and the person whom she alleges to be her husband is a felon, outlawed in consequence of having returned to this country in violation of a sentence of transportation. But besides, although she were a married woman, she is liable to be sued for restitution of stolen property, or, in other words,

¹ M^cGregor, July 1. 1828 (*ante*, VI. 475.)

² Tait, June 4. 1831 (*ante*, IX. 680); Trotter, Dec. 7. 1830 (*ante*, IX. 144.)

³ An Englishman v. Angelo, Jan. 22. 1564 (M. 4825); Arnold, Dec. 1683 (M. 4843); Ayrie, July 6. 1701 (M. 4826); Hardie, Jan. 4. 1759 (M. 4830); Heron, Dec. 16. 1773 (M. 8550); Dickie, Dec. 20. 1811 (F. C.); 2. Bell, 564.

No. 16. *ad factum prestandum*; and, at all events, they are entitled to try the question of her liability.¹

Nov. 18, 1831.
Crowder v.
Watsons.

6. The oath is as clear and precise as possible, and is founded on the same sort of knowledge on which a merchant must found his belief of a customer being liable for the price of goods sold and delivered by his clerks or shopmen.

The Lord Ordinary reported the bill and answers.

LORD JUSTICE CLERK.—I entirely divest my mind of what I know of this case, in consequence of the proceedings in the Court of Justiciary, and confine myself to what we have before us. I am satisfied, however, that none of the grounds of suspension can be sustained. 1. There is no foundation at all for the plea of his alibi, for the detainer was given up, and besides, Lord Cringletie put his interlocutor on the single and narrow ground as to the parties. 2. As to the verdict, I pay no attention to it one way or other, as the case would be the same if the verdict had been not guilty, it being impossible that the verdict in the criminal trial should affect the civil question. 3. Then the question comes, how far the case is affected by the suspender being a foreigner. Now, we must take the statement not denied, that prior to the crime she did come to Glasgow for some uncertain period, and I cannot take it for granted there was no domicile, but I do not enter into that question, for there is no authority for holding domicile necessary in such a case. It is sufficient that the debt claimed was contracted in Scotland, *ex delicto*, which makes her responsible to our Courts. 4. Then she says she is a married woman. But the obligation alleged arises *ex delicto*, and I am not prepared to say, if her allegation were verified, that it would afford a good objection; but further, when we see it denied, and the other facts averred as to her alleged husband, we cannot pay any regard to it in this question. 5. Then as to her having been brought compulsorily to Scotland, this having been done by the public prosecutor alone, and these parties not being participant, I can't think it affords any protection. The cases of persons brought from the Abbey, are those where the Court by their warrant bring the parties and return them; and the time during which they are protected is generally limited in the warrant to a precise hour, and these cases don't apply to this. It is totally different also from the case of a party who by violence, or his own wrongous act, has brought his debtor within the jurisdiction. The moment she was set at large she became amenable to diligence. As to her detention under the first warrant, we can't listen to that as an objection to the second correct application. And then the only remaining point is, if the oath be sufficient, and I conceive it perfectly formal and complete, and with all jealousy as to the liberty of the subject, I can find no solid grounds for liberating this party.

LORD GLENLEE.—The only thing I thought required consideration, was her having been brought here against her will. But this was done without the concurrence of Watsons. There might have been a doubt, if they had brought her for a crime of which she was found not guilty, which would be in some degree analogous to decoying from the sanctuary; but the circumstances here are entirely different.

¹ Stair, 1. 4. 22; Erak. 1. 6. 24; Anderson, July 27. 1775 (M. 6081); Churnside, July 11. 1789 (M. 6082); 2. Bell, 167, Notes, 1. 2.

Then that being out of the case, it comes to the general question, that of seizing a foreigner. There have been cases of difficulty, as that of one foreigner against another, as to a foreign debt, though even in that situation it has been found good. But as to a Scotch creditor finding by whatever accident his debtor here, and having a claim not arising out of a peculiar rule of the law of the foreign country, but which he can sue him for in our Courts, he may apply for this remedy. The ends of justice require that the party in such a situation should have a remedy. And considering the nature of the debt here, and the situation of the parties, I think we ought not to interfere. As to the other grounds, it is unnecessary for me to add any thing to what has been said.

LORD CRINGLETIE.—Except for the objection as to the parties, I would not have passed the first bill. This bill, I agree with your Lordships, should be refused. Suppose an Englishman comes to one of our markets, and buys cattle, and going into a house for the professed purpose of granting a bill, escapes and runs off. If he were afterwards found in Scotland, there would be no question of domicile at all, yet he might be arrested as in *meditatione fugae* at once, and if even brought to this country as a witness, the Court would refuse him a protection, as he should never have left Scotland without paying his debt, and it is the same here. It is clear the bill should be refused.

LORD MEADOWBANK.—I entirely agree. It is quite unnecessary to think of the trial at all, and I view the case as if it never had occurred; but I am satisfied that there never was a clearer case for allowing this remedy, and I would have allowed it though there had been a verdict of not guilty. Even if this woman had applied for a protection, I could not have granted it sitting in the Court of Justiciary.

THE COURT accordingly refused the bill.¹

C. and F. Orr, W.S.—Smith and Kinman, W.S. Agents.

WILLIAM ROBERTSON, Suspender.—*Whigham.*
ARCHIBALD WALKER, Charger.—*Deas.*

No. 17.

Stamp—Stat. 56 Geo. III. c. 184—Sale.—A conveyance of heritage and moveables by a debtor to his creditor, for the purpose of the creditor selling the estate, and applying its proceeds in extinction pro tanto of his debt, is not a sale within the meaning of the stamp act.

JAMES ROBERTSON executed, in favour of Archibald Walker, a disposition of certain heritable and movable estate, and also an heritable bond which he held over the property of William Robertson, on the narrative that he was justly indebted to him for “certain sums of money contained in a list thereof, signed by me as relative hereto; and, for the more effectual and certain payment thereof,” he alienated and conveyed the above sub-

Nov. 19, 1831.
1st Division.
Bill-Chamber.
Lords Craigie,
Newton, and
Moncreiff.
S.

¹ Their Lordships at the same time refused another bill, presented in regard to a similar warrant obtained by the National Bank, a parcel of whose notes had been abstracted from Messrs Watsons' premises.

No. 17. jects. The relative list was docqueted and tested, and stated the debt to amount to £1229. The disposition concluded with this clause : " which whole subjects, heritable and movable, generally and particularly above Nov. 19, 1831. Robertson v. Walker. disponed, are conveyed to the said Archibald Walker, absolutely for the purpose of being sold and converted into cash, either by public roup or private bargain, &c., and the proceeds thereof applied in extinction of the debts due by me to him as aforesaid." The free proceeds were to be " applied allenarly in payment pro tanto of the debt due by me to him as aforesaid." The first sheet of the deed bore a stamp of 35s.; the others, of 25s.

Walker took infestment under the conveyance of the heritable bond for £100, and raised a summons of maills and duties against William Robertson and his tenant. He obtained decree before the Sheriff, in foro, and, a charge being given on the decree, William Robertson presented a bill of suspension, which was refused. In a second bill, he contended that the conveyance by James Robertson to Walker was null under the Stamp Act; because it was in reality a sale, or onerous and absolute conveyance for the sole behoof of Walker, but "the purchase, or consideration-money," was not "expressed in words at length upon the principal deed of conveyance," as required by the act: on the contrary, the deed merely referred to "certain sums of money contained in a list thereof, signed by me as relative hereto." Farther, if it had set forth the consideration-money, being £1229, the ad valorem stamp duty (being £12) should have been paid as on a sale.

The Lord Ordinary ordered answers in respect of the objection on the stamp laws, and added, in a note, that "if well founded, it infers a nullity, which it may be pars judicis to take notice of, at whatever time it is stated. The Lord Ordinary only means, however, that the peculiar form of the disposition and assignation, in relation to the Stamp Act, requires consideration."

Walker answered, that the deed was truly an heritable bond and disposition in security—that the subjects were equal to a very small proportion only of the debt of £1229—and that the stamps affixed were sufficient, as the deed was one in which an ad valorem duty was not necessary. The Lord Ordinary ordered minutes to the Court on the effect of the stamp laws.

Before they came to be advised, Walker transmitted the deed, along with the relative signed list, to the Stamp Office in London. The deed was there impressed with a stamp of £6, and the relative list with a stamp of £1, 5s. The first was the stamp for a disposition in security, of the value of £1229; the second was in terms of the provision, under the head "*Schedule*," in part first of the table annexed to the Stamp Act. It is there stated, that any "schedule, inventory, or catalogue, &c., which shall be referred to, in or by, and be intended to be used or given in evidence as part of, or as material to, any agreement, lease, tack, bond, deed,

or other instrument, charged with any duty in this schedule, but which shall be separate and distinct from, and not indorsed on or annexed to, such agreement," &c., shall bear a stamp of £1, 5s. No. 17.

Nov. 19, 1831
Robertson v.
Walker.

Robertson insisted that this was not the proper stamp, which ought to have been that applicable to a sale.

Cameron v.
Stewart.

Walker stated that he had left it to the Stamp-Office to affix the requisite stamp; and he was by them informed, that, as the conveyance had not fixed any value on the property conveyed, they could take no other measure of value than the amount of the debt in security of which the conveyance was granted; but that they had no hesitation in considering the transaction to be a conveyance in security, and not a sale, and therefore that it did not require the consideration-money to be set forth, nor did it require a higher stamp than £6.

The Court repelled the objection.

LORD PRESIDENT.—I am clearly of opinion that this transaction was not a sale.

LORD BALGRAY.—I must take the whole transaction into view, and it is obvious that this conveyance was not of the nature of a sale, but was really the granting of a redeemable security. If I lend a man £10,000, who conveys to me an heritable bond which he has for £100, am I to pay an ad valorem stamp, as for a sale, to the extent of £10,000? Certainly not.

Lords Craigie and Gillies assented.

Suspender's Authorities.—55 Geo. III. c. 184, § 2; Schedule (of the act), Part I. article Conveyance, and Note subjoined.

Charger's Authorities.—Campbell, 22d Feb. 1827 (ante V. 412); Pearce, 31st May, 1828 (ante VI. 900); A. S. 11th July, 1828, § 25.—Coates, 3 B. and B. 48; 3 Starkie on Evidence, 1368; 55 Geo. III. c. 184; Schedule, Part I. art. Mortgage and Schedule.

J. TAYLOR,—T. LEBURN, S. S. C.—Agents.

DUGALD CAMERON, Pursuer.—*Robertson—J. Paterson.*
STEWART, POTT, and Co., Defenders.—*Napier.*

No. 18.

Cessio Bonorum.—Circumstances in the conduct of a debtor warranting refusal of the benefit of cessio in hoc statu.

A DEBTOR having called a meeting of his creditors, and obtained from them a twelvemonth's indulgence, in order to realize his funds, and having thereafter absconded with what he could collect, and taken his passage on shipboard, where he was apprehended before the ship sailed for America; the Court unanimously refused his cessio upon these grounds, *hoc statu.* Nov. 19, 1831.
2d DIVISION.
T.

C. FISHER,—A. FERGUSSON, W. S.—Agents.

No. 19.

Nov. 22, 1831.
Renton v.
Campbell.

JAMES RENTON, Claimant.—*Walker.*
PATRICK CAMPBELL, Claimant.—*J. W. Dickson.*

Trust.—Circumstances in which the Court refused to permit a trustee, under a posterior voluntary trust, to interfere with the collection of rents by a prior trustee, acting under an onerous disposition and assignation.

Nov. 22, 1831. LADY ELIBANK, proprietrix of Pitheavlis, and other estates, executed
 1st Division. an entail of them in favour of her eldest son, and other substitutes, but
 Lord Newton. reserving right to the rents during her life. On this deed her son made
 S. up titles. By trust-disposition, in January 1823, her ladyship, with consent of her husband, conveyed her liferent right to the rents, in favour of trustees, for the purpose *inter alia* of paying annuities to the Phoenix Assurance Company, from which loans of money had been obtained. The trustees were infest, and thereafter, in 1824, they, with her ladyship's consent, devolved the trust by a new deed in favour of the claimant, Mr Renton, who was infest and entered into possession.

In 1828, Lady Elibank, with consent of her husband, executed another trust conveyance of her estates in favour of Mr Campbell, particularly of the free residue of the rents of Pitheavlis, after paying annuities preferably secured thereon. Peter Hepburn was tenant of part of Pitheavlis, at a rent of £240.

In April 1831, Mr Campbell remitted to the Phoenix Company the sum of £211, 13s. 4d., as one half year's annuity, due on 30th March, to the Company, and secured on Pitheavlis. He then claimed payment of the rent from Hepburn, to reimburse himself. Mr Renton also claimed payment, insisting that, in virtue of his prior and onerous conveyance, duly intimated, he was entitled to levy the rents directly, in security of the annuity, and was not bound to allow any postponed party to take this out of his hands, by ultraneously offering the amount of one half year's annuity. Campbell answered, that as all arrears of the annuity out of Pitheavlis were already paid, he was entitled, under the postponed trust-deed, to levy the rents which were, for the present, free of burden. The Phoenix Company offered to refund the advance of £211, 13s. 4d. to Mr Campbell, if he would withdraw all obstruction to their levying of the rents of Pitheavlis, but this he declined.

Hepburn raised a multiplepoinding, in which the Lord Ordinary “decerned at the instance of the claimant, Patrick Campbell, against Peter Hepburn, for the sum of £211. 13s. 4d. sterling, admitted to have been paid by Patrick Campbell to the trustees of the Phoenix Assurance Company of London, in full of the annuity due them out of the rents of Pitheavlis, on the 30th March last.”

Renton reclaimed.

Lord BALGRAY.—I conceive that Mr Campbell had no right to interfere with the collection of the rents by Mr Renton. If the latter, at any time, has surplus funds in his hands, Mr Campbell, under the posterior trust-deed, may call him to account. But repetition of the sum which he ultroneously advanced, is all that Mr Campbell can claim, and as that was offered to him, I would alter the interlocutor, and recall the interim decree.

No. 19.

Nov. 22, 1831.
Renton v.
Campbell.Brownlee v.
Waddell.

THE COURT accordingly, “in respect the Phoenix Assurance Company offered to repay Mr Campbell the sum remitted by him, altered the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed, &c., and found the claimant James Renton entitled to the expenses of the discussion,” &c.

WALKER, RICHARDSON, and MELVILLE, W.S.—J. YOUNG, S.S.C.—Agents.

GEORGE BROWNLEE and OTHERS, Pursuers.—Rutherford.
WILLIAM WADDELL and OTHERS, Defendants.—Skene—G. G. Bell.

No. 20.

Husband and Wife—Revocation—Delivery.—1. Where two spouses mutually disposed their estate to the survivor of them, “reserving power to alter, at any time of our life, as either of us shall think fit;” and afterwards, when the husband was on his death-bed, the wife executed a deed conveying a proportion of the estate, under burden of her liferent, to her husband’s relations, which deed proceeded on the narrative that it was from a desire to obey and fulfil the expressed wish of her husband—Held, 1. That, after her husband’s death, she could revoke the deed, because, if *inter vivos*, it was null without the husband’s concurrence as a party, and, if testamentary, it was revocable *sua natura*.—2. That although the deed was delivered to the agent for the husband, yet as he was also agent for the wife, it was not a delivered instrument as against her.

IN 1816, Mr and Mrs Denholm executed a mutual disposition and Nov. 22, 1831. settlement, whereby they disposed to the survivor of them, and the heirs, &c. of such survivor, the whole estate then belonging, or which should belong to them at the death of the party predeceasing. It contained an obligation to grant all deeds requisite to vest the estate in the survivor, (who was named sole executor,) and also the following clause:—“Reserving always to each of us, our liferent right of the heritable and movable subjects, and sums and others before respectively disposed, during all the days of our lifetime, and full power and liberty, at any time of our life, to alter these presents, in whole or in part, as either of us shall think fit; and we dispense with the delivery hereof, and declare that the same, though found lying by either of us, at the time of our death, or in the custody of any other person, shall be as valid and sufficient, as delivered in our own lifetime.”

Mr Denholm, after being for some time in bad health, died on 1st September, 1822. On the preceding day, Mrs Denholm executed a deed on the following narrative:—“Considering that since the date of the

1st DIVISION.
Ld. Corehouse.
H.

No. 20. mutual disposition, the means and estate of the said James Denholm have considerably increased; and he having, while in extreme bodily bad health, but in sound mind, expressed a wish, that the one half of the free residue and balance of his means and estate, household furniture excepted, subject to my liferent right, and under the declaration and provision after written, should be disposed and made over to the persons after named, being his nearest relations, and I, being desirous to fulfil and obey the wishes of my said husband, in all respects, do therefore hereby, under the provision and declaration after mentioned, dispone, convey, and make over, to and in favour of Mrs Helen Mann or Pender, spouse of Thomas Pender, &c. All and whole, one half of the free residue (household furniture excepted, which is hereby reserved for my own disposal), of the means and estate of my said husband, as the same shall be ascertained at my death, the same being always subject to my liferent use, as before mentioned; and declaring also, as it is hereby specially provided and declared, that in the event of its being thought advisable by the said Thomas Pender, &c. and Francis Wilson, W.S. (whose advice I am requested, by my said husband, to take), or to any two of them, to purchase a life annuity for my more comfortable subsistence, with part of the means and estate of my said husband, as they may stand at his death, that I shall be at perfect liberty so to do, notwithstanding these presents, and that the said Helen Mann, &c., shall have no right or title whatever to interfere with the purchase of the said annuity, or be entitled to any consideration therefor at my death, notwithstanding the one half of my said husband's means and estate, above provided for them, may be thereby diminished—under which declaration and provision these presents are granted, and no otherwise."

Mr Wilson was the agent of Mr Denholm, and also of Mrs Denholm. This deed was given to him when executed. On the 5th of September, after Mr Denholm's funeral, at a meeting of friends, where Mrs Denholm was not present, the following minute was drawn up. "Mr Wilson also stated to the meeting, that Mrs Denholm, upon Saturday last, executed a supplementary deed, which he produced, and which the meeting request Mr Wilson to keep in his possession for behoof of all concerned."

Mrs Denholm died in 1829, having executed a settlement in 1828, by which she conveyed to trustees her whole effects, including all that fell under the deed of 1822, which was thereby revoked. Brownlee and others, her husband's relations, (for whom a provision was made in the deed of 1822,) raised an action of declarator against the trustees, to have it found that this deed was irrevocable, and concluding for payment of that proportion of Mr Denholm's property which it conveyed to them.

In support of this action, they pleaded, 1. that the mutual deed of 1816 was revocable by either party during the subsistence of the marriage; that it was proved by the narrative of the deed executed by the wife (which those in her right could not dispute), that it was her husband's wish

Nov. 22, 1831.
Brownlee v.
Waddell.

to revoke to the effect there mentioned; that a simple revocation by him would have disposed of his succession in favour of his relations, whom he then expressed a wish so to favour, but he was prevented from actually revoking by his wife's execution of the deed of 1822, expressly bearing to be in fulfilment of his wish; and as he was allowed to die in the belief that his wish was thus to receive effect, his wife was barred from afterwards defeating the provision so made to his relations. The deed must be viewed, under the circumstances, as substantially having the husband's consent adhibited, as it bore to be in implement of his express desire; and, 2. that the deed 1822 had been delivered for behoof of Mr Denholm's relations, as it was in the possession of Mr Wilson, who was Mr Denholm's agent, and he was desired to keep it for behoof of all concerned.

Nov. 22, 1831.
Brownlee v.
Waddell.

The defenders answered, 1. that the deed 1822 being executed *stante matrimonio*, was, if to be regarded as a deed *inter vivos*, null, because it was without the husband's concurrence; and, if testamentary, was revocable, whether it was delivered or not; that there was no evidence of Mr Denholm ever having known its precise tenor, or that he would have executed any deed whatever, though Mrs Denholm had never executed this one; and 2. that it was never delivered, because Mr Wilson was the agent of Mrs Denholm, and she was not present at the meeting of friends where it had been produced.

The Lord Ordinary found, "that if the disposition executed by Mrs Denholm in August 1822 be considered as a deed *inter vivos*, it is not effectual, because it was not executed by the authority of her husband, nor was he a party to it; neither is there competent evidence offered that he knew or approved of the terms in which it is conceived: found, that if it be considered as a testamentary or *mortis causa* deed, it was revocable *sua natura*, and accordingly was revoked by Mrs Denholm's settlement in 1828: found, that no competent evidence is offered that Mr Denholm abstained from revoking the marriage settlement in 1816, on the faith that Mrs Denholm's disposition in 1822 was to remain effectual, and that no personal exception to Mrs Denholm's power of revocation has been raised on that or any other ground: found, that whether the said disposition in 1822 be held as a deed *inter vivos*, or of a testamentary nature, it is not proved to have been delivered, in respect that Francis Wilson, the custodier, was Mrs Denholm's ordinary agent, and prepared it by her directions; and although it was exhibited by him to the persons who met after Mr Denholm's funeral, there is no evidence offered that this was done by Mrs Denholm's authority, or with her consent; therefore, assailed the defenders from the conclusions of the libel, and decerned: found no expenses due to either party."

The pursuers reclaimed.

LORD CRAIGIE.—I consider this to be a very important question, and I cannot

No. 20. assent to the views of the Lord Ordinary. There was substantially an agreement formed between the husband and wife, on the subject of a provision to his relations. Nov. 22, 1831. It may have been to receive effect by a deed which was, in its nature, mortis causa; Brownlee v. Waddell. but still the execution of that deed was in implement of a mutual contract, and after the husband was allowed to die, without exercising his own power of disposing in favour of these relations, and in the faith that provision was made for them by this deed out of the very estate which he could have disposed, I cannot think the surviving wife at liberty to revoke such a deed to the effect of cutting off the husband's relations. Had he simply revoked the deed of 1816, the law itself would have carried a large proportion of the estate falling under that deed, to his relations. I hold that there is real evidence in the case, of his wish having been expressed in their favour. It was a wish which he had full power to carry into immediate effect. It related to his own property, and the expression of that wish was enough. What prevented him from giving effect to his wish by a deed of his own? The execution of this deed by his wife, which rendered his act of revocation unnecessary. She is therefore barred from revoking it after her husband's death.

I farther conceive that she delivered the deed, for behoof of the grantees, her husband's relations, by giving it to Mr Wilson, for he was the agent of her husband, and it was in that character that it was given to him for behoof of the relations. I therefore consider that this Court would open a door to imposition of the worst character, if it permitted Mrs Denholm, after her husband's death, to revoke a deed granted under these circumstances.

LORD BALGRAY.—I concur in every view which has been expressed by the Lord Ordinary. These views appear to me to be so sound, and so well supported in that judgment itself, that I do not think it necessary to deliver my own opinion at any length.

LORD GILLIES.—I concur entirely with Lord Balgray. I think the interlocutor speaks for itself. The main argument against it is rested on the narrative of the deed, that it was made in compliance with a wish expressed by Mr Denholm, then on death-bed, in favour of his relations. I feel averse to insist too much on a deed gratuitously granted by a woman under such circumstances of excitement, when she would be naturally prompted to offer to do whatever she believed to be agreeable to her dying husband. But it is said, that, if she had not executed the deed in 1822, her husband would have revoked his mutual settlement. Quomodo constat that he would have done so? Is it certain, that, although his wife had opposed the proceeding, he would nevertheless have taken away the fee bestowed on her, in order to give it to these relations? I think there is nothing to entitle us to hold this for certain. But then it is said, the deed narrates that it was done in fulfilment of the wish of the husband, and this supersedes the necessity of his being a concurring party. This argument has a plausible appearance, but it will not stand examination. If we sanctioned it, we should overturn an important branch of this department of the law of Scotland. A wife might then, at any time, dispose of her property by her own exclusive act, and without her husband's knowledge, if she only put into the narrative of her deed that she did so in compliance with the wishes of her husband. According to the plea now maintained, it would afterwards be impossible for her, or for any one through her, to challenge that deed. Such a doctrine cannot for a moment be sanctioned, and I am clearly for adhering to the Lord Ordinary's interlocutor in all its parts.

LORD PRESIDENT.—My opinion coincides with that of the majority. The in-

terlocutor very clearly expresses the grounds on which it is rested, and to these No. 20.
I entirely assent.

THE COURT accordingly adhered.

A. C. HOWDEN, W.S.—G. STODART, and W. FRASER, jun., W.S.—Agents.

Nov. 22, 1831.
Brownlee v.
Waddell.

Thomas v.
Walker.

Manners v.
Willison.

No. 21.

ROBERT THOMAS, Pursuer.—*Cunninghame—More.*

WALKER'S TRUSTEES, Defenders.—*D. F. Hope—W. Bell.*

THIS was a special case of accounting, and the sequel of that decided Nov. 22, 1831.
on July 4, 1829.¹ The Lord Ordinary decerned, in terms of the report of
an accountant, and the Court adhered.

1st Division.
Lord Newton.

G. Todd, jun.—

—Agents.

JAMES BRIDGES, (MANNERS'S TRUSTEE,) Pursuer.—*Skene—Marshall.* No. 22.
WILLISON'S TRUSTEES, Defenders.—*D. F. Hope—Boswell.*

Trust—Factor—Proof—Process.—1. Circumstances in which a transaction entered
into by a factor and commissioner for trustees, was held to be beyond his powers;
2. A demand for an issue on a question of special authority, or acquiescence, at the
latest stage of a cause, refused.

By trust-deed of settlement, of date April 1795, the late George Nov. 22, 1831.
Willison conveyed his whole estate and effects to the defenders as trustees,
with instructions to invest the trust funds on heritable security, for the 2d Division.
Ld. Mackenzie.
purposes therein declared. F.

In virtue of the powers conferred upon them, the trustees elected the
late Horatius Cannan, W.S., one of their number, to be their commis-
sioner, factor, and attorney, “giving, granting, and committing to him
full power, warrant, and commission for us, and in our names as trustees
foresaid, to grant, subscribe, and deliver all rights, conveyances, and
other deeds which shall be found necessary and expedient in the course
of the management and execution of the said trust; to call for, sue, and
uplift all debts, sums of money, principal and interest, heritable and
movable, dividends on government stock, and others due, or which shall
become due to us as trustees foresaid in any manner of way, renuncia-
tions, discharges, and acquittances; to grant in whole or in part, com-
pound, transact, and agree thereanent, and to enter into submissions, &c.;
and generally all and sundry other things relative to the management
and execution of the said trust, to do, use, and exerce for us, and in our

No. 22. names, which we, as trusteesforesaid, could do ourselves if personally present."

Nov. 22, 1831.
Manners v.
Willison.

Mr Cannan continued to act under these powers until his death in 1825, when the trustees appointed his son, Horatius Cannan, jun., to be factor in his stead; and directed him to prepare a deed of factory in his own favour, in the same terms as that granted to his late father. This deed was never made out, but Cannan entered on the ordinary duties of a factor, and was also assumed as a trustee in place of his father. In the course of the year 1826, the trustees lent £2000 sterling, (being part of the trust funds,) to one Manners, on an heritable bond and disposition over tenements in Edinburgh in the progress of building. This loan was transacted for the trustees by Cannan, upon whose report of the nature of the security offered, and that the houses were to be finished within a specified time, they accepted the security.

Manners did not finish the houses; and having become bankrupt, his estates were sequestrated, and Bridges, W.S., was elected his trustee, and was infest in the bankrupt's heritable property, including that over which the security above mentioned extended. Thereafter Cannan entered into an agreement with Bridges, whereby Bridges, as trustee on Manners's estate, was to expend certain sums in finishing the houses over which the security in question extended, under a condition that the sums so expended were to be preferable to the heritable debt. Under this agreement Bridges expended certain sums on these houses, along with the other heritable property, of all which he held possession, and drew the rents.

After the property had been several times exposed to sale without success, it became evident that it would not yield sufficient to pay the heritable debt, and the trustee and commissioners came to the resolution of abandoning it to Willison's trustees, but under the burden of the sums expended on it, and of certain arrears of feu-duty due to the superior. Willison's trustees having refused to undertake these burdens, Bridges raised an action to have it found that the property was renounced; that Willison's trustees were bound to accept it, and sell it, and to impute the price and rents, primo loco, in extinction of the sums expended, and also to relieve Manners's estate of the arrears of feu-duties; and concluding for immediate payment of a certain sum of outlays on the houses, for which Cannan had granted his bill as part of the agreement above mentioned. Willison's trustees pleaded, that Cannan had no special authority to enter into the transaction, which was beyond his ordinary powers as factor, and of which they were completely ignorant; and as to the arrears of feu-duties, that they fell to be discharged out of rents levied by Bridges, or other personal funds of the estate.

On the other hand, Bridges answered that Willison's trustees had conferred on Cannan powers to enter into the transaction, and that the accounts annually rendered by him to them were sufficient to make them aware of the transaction. The writings produced, however, in no degree

established this averment, and Bridges offered no parole proof, and made No. 22.
no demand for an issue.

The Lord Ordinary assizled the trustees. Bridges thereupon reclaim-
ed, and the Court, on advising his reclaiming note, appointed him to state
in a minute "what further proof he offers and requires in support of his
allegation."

Nov. 22, 1831.
Manners v.
Williamson.
Brown.

Bridges accordingly gave in a minute, in which he founded on the
minutes of the trustees, and other documents, and certain entries in Mr
Cannan's accounts, but no parole proof was offered.

When the case was again put out for advising, the counsel for Bridges
craved to have an issue sent to a jury as to how far the trustees had
authorized Cannan to enter into the transaction in question, or acquiesced
in it.

LORD JUSTICE CLERK.—That it may not be said that we overlooked this offer
of farther proof on the part of the pursuer, I think we are called upon to pronounce
a specific judgment, in the first place, upon that demand. Now I am decidedly of
opinion that this is not a case for a jury. What are the pursuers to prove, or how
would they frame their issue? They loosely aver, in the fifteenth article of their
condescendence, that "the defenders had conferred upon Mr Cannan, as their com-
missioner, &c., ample powers to enter into the foresaid transactions or arrangements
on their behalf. Moreover, they became aware that he, acting for them, &c., had
become a party to these transactions," &c. Then, observe what the condescend-
ence goes on to state as the "particular" proof of the averment, namely, the ac-
counts. The accounts are now canvassed in the minutes before us, and all the
documentary evidence which the pursuer pretends to on this point is produced.
I cannot think this a case for a jury; but we ought to find specifically to that
effect.

LORD MEADOWBANK.—I am of the same opinion. In the article of the conde-
scendence quoted by your Lordship, the pursuer refers to the accounts as the fun-
damental proof of the averment that the trustees were a party to this transaction.
The interlocutor ordering minutes of further proof, is followed by a reference to
these accounts, and the offer of parole proof is carefully avoided. The only alle-
gation upon which the pursuer could claim an issue, is that of which we have the
documentary evidence before us. I think there is no question for a jury.

The other Judges concurred, and the Court agreeing with the Lord Ordinary as
to the import of the evidence in process, refused the reclaiming note.

JAMES BRIDGES, W.S.—ALLAN and BRUCE, W.S.—Agents.

JOHN BROWN, Petitioner.—*Small Keir.*

No. 23.

Agent and Client.—A law-agent is not entitled to the expenses of an application
for decree under the act of sederunt 1806 against his client, who makes no unne-
cessary opposition, except those of extracting the decree.

Brown, law-agent, having been employed to lead an adjudication, Nov. 24, 1831.
afterwards made an application under the act of sederunt 1806, in order. 1st Division.

No. 23. to recover payment of his account from his client. The accounts were remitted to the auditor, who struck off 3s. 4d. from the charge for agency, Nov. 24, 1831. Brown. and taxed off £1, 1s. from a fee to counsel. The balance of the account Allan v. Tait. left was £14, 16s. 9d. No appearance was made for the defendant. When the auditor's report was moved in Court, Brown moved to be allowed the expenses of the application. The Court considered the claim doubtful, and intimated that it was proper to fix an uniform rule upon the subject, and that they would therefore consult with the other judges before deciding on it. This having been done, and the report being again moved,

The LORD PRESIDENT intimated it as the unanimous opinion of the judges, that where no unnecessary opposition was made, the expenses craved should not be allowed.

THE COURT therefore "approved of the report of the auditor upon the foregoing account of expenses; modified the same to the sum of £14, 16s. 9d., for which, and expense of extract, decerned at the instance of the said John Brown, &c. and allowed the same to be extracted as an interim decree accordingly, but found no other expenses due."

JOHN BROWN, S.S.C.—Agent.

No. 24.

— ALLAN.—*Robertson.*

— TAIT.—*Cunninghame.*

Process.—Application for a new trial incompetent, after six days have elapsed from the commencement of the Session ensuing after the trial.

Nov. 24, 1831. By § 35 of the Jury Court act of sederunt, it is provided, that "when Ier DIVISION. a new trial is to be applied for in the Jury Court, &c., in case there shall not be twenty days of the Session then to run (next after the trial has been had), the application for a new trial must be made within six days after the commencement of the next Session."

By 1 William IV. c. 69, § 16, it is enacted, "that all rules and regulations in observance in the Jury Court, at the time of the union of jury trial in civil causes, with the administration of justice in the Court of Session, established and enforced by act of sederunt, shall continue and be observed as rules and regulations applicable to the Court of Session after such union, until the same shall be altered by acts of sederunt."

Robertson having moved for a new trial, in a cause Allan v. Tait, *Cunninghame* objected that the six first days of session had elapsed before it was made.

Robertson answered, that the whole regulations of the old Jury Court did not of necessity affect proceedings in jury causes in the Court of Session.

LORD PRESIDENT.—The late statute expressly provides that the regulations established by act of sederunt, and in observance in the Jury Court at the time when it was merged in the Court of Session, shall remain in force in this Court until altered by acts of sederunt. We cannot entertain this application. No. 24.

Motion dismissed.

Nov. 24, 1824.
Allan v. Tait.

Gordon v.
Trotter.

COLONEL GORDON, Pursuer.—*Keay—Moir.*

No. 25.

THOMAS TROTTER, Defender.—*Sol.-Gen. Cockburn—Cunninghame.*

Process—Expenses—Act of Sederunt, 11th July 1828, § 55.—1. Where a pursuer, after closing the record, recovered from his secretary under a diligence, a writing, not noviter veniens, and the record was opened up “to make such additions thereto as may be necessary by production of the said writing,”—held competent for the defender to lodge amended revised answers, “although changing, to a certain extent, the statement of facts contained in his former answers;” 2. By the Lord Ordinary, that such production, if allowable at all, could only be received after paying the whole previous expenses. 3. Held, that, though from the terms of an interlocutor former revised answers might continue to form a part of the record, yet no statement there would bind the defender, which was inconsistent with that made in amended answers.

In an action by Colonel Gordon to have it declared that a sum of £200, set forth in a disposition as the consideration of conveying a freehold qualification in favour of Mr Trotter, had not been paid, the defence was rested on the discharge in the deed, and an allegation, that although no money had been paid, yet the defender had claims to a larger amount at the time against the pursuer. The record was closed on the 4th March, 1830. Thereafter a diligence was granted to the pursuer, under which he recovered, on 16th February, 1831, from a person who had been his secretary, a document (being a state of the defender's claims), which was produced along with the report of the diligence. The Lord Ordinary, on 3d March, “allowed the production recovered under the diligence to be received, opened up the record to the effect of allowing the defender to make such additions thereto as may be necessary by the production of the said writing, and found the pursuer liable to the defender in previous expenses.” This interlocutor was not reclaimed against, and on June 7, his Lordship decreed for £53, being the whole previous expenses.*

The defender now lodged amended revised answers, in which he not only made certain additions to his former statements, but also several

Nov. 24, 1831.
1st Division.
Lord Newton.
H.

* “**Note.**—On considering the act of sederunt, 11th July 1828, § 55, the Lord Ordinary thinks it questionable, if the production in question, which cannot in the circumstances be held as noviter veniens in notitiam, ought to have been received at all; but having received it on condition of payment of the previous expenses, he is of opinion that the whole must be paid.”

No. 25.

Nov. 24, 1831.
**Gordon v.
Trotter.**

modifications of them. Colonel Gordon objected to such a paper being received, and contended that the defender must leave his previous statements untouched, and only make such additions as became necessary from the production of the document.

The Lord Ordinary, "having considered the record as formerly closed, together with these amended revised answers, found, that under the interlocutor of 3d March last, allowing the defender to make such additions to the record as might be necessary, in consequence of the new production, it is competent to him to lodge this paper, although changing to a certain extent the statement of facts contained in his former answers, in respect no greater alteration is made than, it is to be presumed, would have been done, had the new production been in process, as it ought to have been, before the record was closed: but that, though from the terms of the interlocutor the former revised answers may continue to form a part of the record, no statement there will bind the defender, which is inconsistent with that made in the present amended answers."

Colonel Gordon reclaimed, and craved the Court "to find, that, in the circumstances of the case, the documents referred to in the interlocutor of 3d March last, quoted in the appendix, ought to be received, upon payment of a modified sum of previous expenses, in place of the whole expenses decerned for by the Lord Ordinary; and also, to find that the defender is not entitled to withdraw any of the statements in, or to make any alteration upon his revised answers, in consequence of the production made after the record was closed, but that he is only entitled to make such additions to the record as might be necessary, in consequence of the new productions made by the pursuer, as allowed by the said interlocutor of the Lord Ordinary of 3d March last."

The defender objected that the interlocutor of 3d March had become final, and that it made the payment of previous expenses, or, in other words, the whole previous expenses, a condition on which the last production was to be received; in regard to the alterations on the paper, he repeated the view stated by the Lord Ordinary.

LORD PRESIDENT.—The interlocutor of 3d of March is final. It decerned for previous expenses, without qualification or restriction. That means the whole expenses, and was so meant by the Lord Ordinary.

LORD GILLIES.—A question is raised about what are previous expenses? They are just the previous expenses, and neither more nor less. That is all which the defender asks, and he is entitled to it.

The other Judges having assented,

THE COURT refused the note, with expenses.

C. F. DAVIDSON, W.S.—W. ROBERTSON, W.S.—Agents.

DUKE OF ATHOLL, Raiser.

No. 26.

RODERICK ANDERSON and OTHERS, Claimants.—*D. F. Hope—A. Wood.*Nov. 24, 1831
Anderson, &c.
v. Stewart.JOHN STEWART, (for the Perth Union Bank,) Claimant.—*Shene.*

Diligence Legal—Multiplepoinding—Confirmation—Executor Creditor.—Where a process of multiplepoinding was raised, after the death of the party who was owner of the fund in medio; and a party was called who was designed executor nominate, but who had not taken up the succession; and a final decree of preference was pronounced; and afterwards a party to the decree took out a confirmation as executor creditor of the deceased—Held that the latter diligence attached the estate of the deceased, being still in bonis defuncti, notwithstanding the decree of preference.

RODERICK ANDERSON and others raised action against one Robertson, Nov. 24, 1831, for £263, and recovered decree. They had used arrests in the hands of the Duke of Atholl on the dependence. Robertson died, after which the Duke raised a process of multiplepoinding, to which he called Ann Holdred, designed executrix nominate of Robertson. Anderson and others claimed, in virtue of their decree and arrests; and a claim was also lodged for the Perth Union Bank, amounting to £12,684, due to them, as was alleged, by Robertson, as their agent. On 5th December, 1823, the Lord Ordinary pronounced an interlocutor, fixing the order of preference among the claimants, and decerning accordingly. To this interlocutor, with some modifications, his Lordship adhered on 23d January, 1824. A claim of lien by the Duke of Atholl was sustained in the first place; and the claim of the Bank was postponed to that of Anderson and others. The Bank reclaimed, and craved, that, to the extent of £426, they should be preferred before Anderson and others. The Court “altered, found that the petitioners are entitled to be preferred, secundo loco, immediately after his Grace the Duke of Atholl, and in preference to all the other claimants as prayed for, and remitted to his Lordship to proceed accordingly.”¹ The fund remaining, after satisfying the Duke’s preference, was about £780.

Afterwards Stewart, on the part of the Bank, having made an addition to the original claim, which raised it to £24,328, took out a confirmation as executor creditor, and gave up the Duke’s debt in the inventory. Anderson and others obtained themselves conjoined in the office. Stewart then maintained that the diligence of confirmation, as executor creditor, had attached the whole debt due to Robertson by the Duke, so that it must be distributed, pro rata, among the co-executors, without reference to the decree of preference in the multiplepoinding.

The Lord Ordinary ordered Cases to the Court.*

¹ Dec. 7, 1824, ante III. 372.

* = NOTE.—The Lord Ordinary considers it to have been settled by the cases of Carmichael against Moeman, and Fleming against Wilson, that a confirmation as

No. 26. LORDS CRAIGIE and GILLIES concurred.

Nov. 24, 1831.
Anderson, &c.
v. Stewart.

Livingston v.
Beveridge.

LORD PRESIDENT.—I am of the same opinion too. The objection of litigiosity is specious, but not solid, and every day's experience proves this. Take the case, which is not uncommon, of two creditors competing with each other upon their respective arrestments, and each stating every objection to the diligence of the other. One of them discovers a radical defect, which is common to both; he immediately abandons his own, and uses new and more correct diligence. Could his competitor object that he was barred from this course of procedure by the prior litigiosity? Certainly not. Among competing creditors, each may do the best he can in looking after his own interest. I concur with Lord Balgray, and the rest of your Lordships.

THE COURT accordingly pronounced this interlocutor:—"Find that the balance in medio, after deduction, &c., is divisible among the executors creditors of Roderick Robertson pro rata, according to their several rights and interests; therefore they rank and prefer the said John Stewart for the Perth Union Bank, and the other creditors confirmed along with the bank, pari passu upon the balance of the said fund, and decern, &c.: Find the claimants, Roderick Anderson, &c., liable in the expenses incurred by the bank in preparing their case, and advising the cause this day, &c."

Anderson's Authorities.—Dougal, Nov. 17, 1795 (851.) Haig, May 26, 1812. F. C.

Stewart's Authorities.—2. E. 3. 16.; Mosman, June 22, 1742 (2791) Fleming, June 26, 1823 (ante II. 430); 2. Bell, 297, &c.

J. MACDONELL, W.S.—W. MULBAY, W.S.—Agents.

No. 27.

JOHN LIVINGSTON, Suspender.—Robertson.

**THOMAS BEVERIDGE and Miss E. MACLARTY, Chargers.—D. F. Hope
—Cowan.**

Process Caption—Agent and Client.—Circumstances in which a bill of suspension of a process caption was passed, upon caution being found for all the expense and damage occasioned to the party litigant by the loss of the process.

Nov. 24, 1831. Miss MACLARTY raised an action against Ivor Borland, for payment of a bill of £550, bearing to be granted by John Murray, W.S., on account of Borland. The summons set forth, "that the said Ivor Borland must either have authorized the said John Murray, his brother-in-law, to borrow the sum above-mentioned on his account, and if so, is bound to repay the same; or the said John Murray has been guilty of a gross fraud, punishable by another Court, and which renders it proper, before proceeding in that Court, to ascertain whether the said Ivor Borland is liable or not." Along with the summons the bill was produced, and the whole was borrowed in name of the suspender Livingston, W.S., on a receipt by his clerk. The process not being returned, a process caption was issued in name of Miss MacLarty, and of Mr Beveridge, clerk

2d DIVISION.
Ld. Cringleton.
Bill Chamber.
F.

to the process. Livingston thereupon presented a bill of suspension, No. 27. alleging as follows:—That Murray having become bankrupt, he was appointed agent in his sequestration, and that on the above action being raised, Murray and his wife both applied to him to defend it. That he refused to do so; but that when himself unwell, his clerk was prevailed upon to borrow up the process, and grant a receipt in his name. That, on the first day on which he was able to attend to his business, Mrs Murray called upon him, and requested to see Miss MacLarty's summons, which she feared might contain reflections upon her husband's character; and that she obtained the summons, with the bill and other productions, and carried them away with her.—On this bill being presented, a sist was obtained, and diligence granted to recover the process. Delay was granted from time to time, in consequence of Mrs Murray's state of health, which prevented her examination under the diligence. While this impediment still existed, the Lord Ordinary, on the 12th October, 1830, “in respect, 1mo, That the complainer is primarily responsible for the process in question; 2do, That the caption has been issued according to law and practice; and 3rd, That the complainer has not offered to find caution to the extent of the sums concluded for in the summons at the instance of Miss Eliza MacLarty against Ivor Borland, Esq.; refused the bill, reserving to the complainer to proceed against all whom it may concern, either in a summary mode or by regular process, for his relief or exoneration.” Livingston then offered a second bill, upon the ground that having raised in name of Miss MacLarty a new summons, in terms of that which was lost, he had placed her in precisely the same situation in which she stood before the process disappeared; that she had in point of fact sustained no damage; and he denied that he could be called upon to find caution to the extent of the claims concluded for in the summons. The Lord Ordinary, on the 10th of November, 1830, pronounced this interlocutor:—“Passes this bill, on sufficient caution being found by the complainer, that he will indemnify the nominal charger, Thomas Beveridge, of all consequences arising from the process referred to in the pleadings not having been replaced in his possession; and also, that the complainer will pay to the pursuer of that process (Miss MacLarty) all such damages and expenses as he may be found liable for in any action to be hereafter raised against him by that lady, on account of said process not having been returned to the said Clerk of Court; and allows to the complainer ten days for finding such caution.” Against this interlocutor a reclaiming note was presented by the chargers, the advising of which was superseded several times, for the purpose of enabling Livingston to take steps against Mrs Murray for removing the process. Various proceedings were instituted against her, but she denied all knowledge of it, and nothing was elicited to clear up the matter.¹

Nov. 24, 1831.
Livingston v.
Beveridge.

¹ See Ante, IX. 161, 757, 866.

No. 27. On the case being again advised, the following opinions were delivered :—

Nov. 24, 1831.
Livingston v.
Beveridge.

LORD CRINGLETIE.—I am thoroughly impressed with the necessity of enforcing a party's responsibility to return documents which he has borrowed on his receipt. Hence has arisen the practice of the Court to issue caption against a defaulter, and unless he defend himself upon reasonable grounds, he must go to jail. But are we to carry the rule to the extremity here required? It is said, that Mr Livingston may yet have the process on his table, but what earthly interest has he to retain it?—suppose an agent's house is burnt to the ground, and a process is amissing, quomodo constat, it might be said, that that process did not escape the flames. Would such an argument be listened to? I think it quite sufficient that Mr Livingston should be made to find caution for all the consequences, as he has done all in his power to supply the lost documents.

LORD JUSTICE CLERK.—I agree perfectly that it is an extremely delicate matter to interfere with this species of responsibility, and certainly this case had at first an awkward appearance for Mr Livingston; but we have given ample time to have the matter investigated, and there appears no ground to doubt the good faith of that gentleman. We see what he has done to restore the process, and I think we may consider his case as if he were actually in jail, and this were a suspension and liberation. But I am decidedly of opinion, that, notwithstanding Mr Livingston's explanations, he is bound to find caution to the full extent of all the expense, as well as damage, which Miss MacLarty may incur in consequence of the process being lost. I think the Lord Ordinary's interlocutor not broad enough in this respect, and that we ought to vary it accordingly.

LORD GLENLEE.—Formerly I had some idea, that perhaps the process was not lost—we have no evidence upon the subject one way or another; but I think we must in common sense be satisfied that it is not within Mr Livingston's power, or he would produce it. Now, it would be too much to tell that gentleman, go to jail first, and we will consider if you have it afterwards. That might be a very proper step, if there were grounds of suspicion against Mr Livingston.

LORD MEADOWBANK.—I had the same feeling of delicacy as your Lordships have expressed, as to interfering with this salutary responsibility; but I think that the proposal to enlarge the caution to the fullest extent, really leaves the party without an interest to demand more. All that remains may be considered a question with the Court; for the not restoring a process is of the nature of a contempt—but if Miss MacLarty be fully protected, what interest has the party to urge that Mr Livingston be sent to jail?

THE COURT accordingly adhered to the Lord Ordinary's interlocutor, with a variation to the effect of enlarging the caution to be found by Livingston, which it was directed should be, “to make good to Miss MacLarty all that she can legally claim under her original action, and on account of the loss of the process, together with the expenses she may have fairly incurred thereanent.”

HUNTER, CAMPBELL, and CATHCART, W.S.—HUGH MACQUEEN, W.S.—Agents.

No. 28.

JOHN FISHER and Others, Pursuers.—D. F. Hope—Ivory.
JOHN DIXON and Others, Defenders.—Keay—Marshall.

Nov. 24, 1831.
 Fisher v.
 Dixon.

Fiar and Liferenter—Clause—Testament.—A testator having bequeathed certain provisions to his “daughters in liferent, for their liferent use allenarly, and to their children in fee, adding the condition, and I hereby declare, that the provisions above mentioned shall be in full to each of my daughters, their husbands’ children or assignees, of all that they could ask or claim in and through my decease, legally and conventionally, or any other manner of way”—held that an unconditional fee was thereby constituted in favour of the grandchildren, which was not defeasible by the daughter’s repudiating the provision, and betaking herself to her legitim.

THE late William Dixon executed a deed of settlement dated 11th Nov. 24, 1831. April, 1817, upon the narrative, “that I have already in part provided for my wife by a separate liferent deed, &c., and it is therefore now necessary that I shall provide for my children, which I have resolved to do in manner underwritten.” He then disposed his property of every description in favour of his sons, John and William Dixon, under burden inter alia of the following provisions: “In the second place, under payment to each of my daughters who shall be in life at my death, or the lawful issue of such of them as may predecease me, as coming in right of their mother deceased, of the sum of £2000 sterling, the said provision to bear interest from the first term of Whitsunday or Martinmas after my decease, but the principal sum not to be payable till two years thereafter; declaring, however, that the provision conceived in favour of my daughter Janet, by her contract of marriage, shall be payable in terms thereof; and when the same is paid, it shall be held to be in full of her provision, and of all that she, her husband, or children, can ask or claim by and through my decease: and further declaring, that the provisions to my said other daughters shall not be subject to the jus mariti or right of administration of their husbands, or liable to be attached for their debts or deeds, but shall belong exclusively to my said daughters in liferent, for their liferent use allenarly, and to their children in fee, and shall be so secured at the sight of my said sons, or the survivor of them: and I hereby declare that the provisions above mentioned shall be in full to each of my daughters, their husbands, children, or assignees, of all that they could ask or claim in and through my decease, legally or conventionally, or any other manner of way.”

By a codicil, of date 15th March 1820, he directed “my said sons, or survivors, as my general donees and executors, to content and pay to each of my said daughters in life, and the lawful issue of such of them as have or may predecease, leaving issue, as in right of their parent, the further and additional sum of £2000 sterling, which shall bear interest and be payable in like manner as specified in the foregoing settlement, in regard to the former provisions conceived in their favour; and declaring that the said present, like the former provision, shall not be subject to the jus mariti, debts, deeds, curatory, or administration of any

No. 28. husbands whom my said daughters have, or may marry, but shall, along with the said provisions, be lent out and secured on good security, at the sight, and in the name of my said sons or survivor, along with Mr Nathaniel Stevenson, writer in Glasgow, as trustees, for the use and behoof of my said daughters, in liferent allenarily, and their children in fee, the fee being to be divisible among the children, by any joint deed of the parents, or the survivor; and failing such writing being executed, to be divided among the children, equally and proportionally, share and share alike; declaring that such of my said daughters as shall not be married, or have children, shall, notwithstanding, have right to dispose of by will or settlement, the one half of their total provision; but in failure so to test, the same, along with the other half, shall devolve to their surviving brothers and sisters, including the issue of such of them as have deceased, for their parents' share, equally and proportionally."

On the death of Mr Dixon, Mrs Fisher, one of his daughters, and wife of Mr Daniel Fisher, S.S.C., raised a process of multiplepoinding in name of the defenders, for the purpose of ascertaining whether it was her interest to repudiate the special provision, and take her legitim. On the other hand, her children the pursuers, with their curator ad litem, instituted an action against John and William Dixon, to have it declared that they had a right of fee in the provision of £4000, independent of their mother's repudiation of her liferent right. Upon this question the Lord Ordinary ordered Cases, adding the note subjoined.*

* "NOTE.—The question whether, in the case of a bequest by a father of a certain sum to a child, for his liferent use allenarily, and to the children of that child in fee, the declaration that the bequest shall be in full of all the child's legal claims, imports a condition, on the compliance with which the right of fee, as well as that of the liferent, is dependent,—is one which appears to the Lord Ordinary to be attended with considerable difficulty. The case of Watt v. Ewan, 10th July 1828, founded on by the pursuers, is certainly very nearly in point; and on the strength of that decision, the Lord Ordinary was at first inclined to give judgment in favour of the pursuers;—but in the present case, independently of the expressions in the settlements, marking perhaps more clearly the testator's intention, there is this additional distinction, that the provision is in favour of the testator's daughters in liferent, for their liferent use allenarily, and 'their children in fee'; while in the case of Watt v. Ewan, the provision was, 'in favour of my son John, and his present wife, and longest liver of them, in liferent, for their liferent use, of the interest thereof, and the fee thereof to the children procreated between them, share and share alike;' which expressions might perhaps be held to denote a right in the wife and children of the specified marriage, more absolute and unconnected with the rights of the father, than that created by the general expressions employed in Mr Dixon's settlement. As the point is of some importance, and as the report of the case Ewan v. Watt does not afford the means of ascertaining the precise grounds upon which it was decided, the Lord Ordinary has thought it most advisable to order cases.

"The multiplepoinding and count and reckoning depending between the present defenders and the mother of the pursuers, include the whole funds of the testator; the very sum now pursued for is lent out on security, in virtue of an order made in

Dixons maintained that the terms of the settlement clearly imported the constitution of a fee in favour of the grandchildren, altogether independent of their mother's repudiating, and betaking herself to her legitim ; and that the case was ruled by the decision in the case of Watt v. Ewan (Ante, VI. 1125).

No. 28.
Nov. 24, 1831.
Fisher v.
Dixon.

To this it was answered, that the words of the settlement indicated the testator's intention to create no special or independent right of fee in the grandchildren, but simply to provide for his daughters and their heirs, under a condition of their renouncing their legitim, which equally affected the provision with regard to all interested, and that the case of Ewing was not in point.

The Court, upon advising these cases, directed them to be laid before the other Judges. The following opinions were returned :—

LORDS PRESIDENT, CRAIGIE, BALGRAY, GILLIES, COREHOUSE, and MONCREIFF.—We have carefully considered the disposition and settlement of the deceased Mr William Dixon, dated 11th April, 1817; as also the codicil thereto annexed, dated 15th March, 1820.

By these deeds it is declared, that the provisions to his daughters "shall not be subject to the *ius mariti* or right of administration of their husbands, or liable to be attached for their debts or deeds, but shall belong exclusively to my daughters in liferent, for their liferent use allenarly, and to their children in fee, and shall be so secured at the sight of my said sons, or the survivor of them."

Also, in the codicil conferring an additional provision, it is declared, " That the said present, like the former provision, shall not be subject to the *ius mariti*, debts, deeds, curatory, or administration of any husbands whom my said daughters have or may marry, but shall, along with the said former provision, be lent out and secured on good security, at the sight and in the name of my said sons or survivor, along with Mr Nathaniel Stevenson, writer in Glasgow, as trustees, for the use and behoof of my said daughters, in liferent allenarly, and their children in fee, the fee being to be divisible among the children by any joint deed of the parents or the survivor."

We consider these clauses of great importance, and we think that the grantor, by these deeds, created two separate and distinct estates, the one of liferent and the other of fee, and that these estates were in no ways dependent upon one another. We are the more inclined to be of this opinion, from the circumstance of trustees being appointed to hold the fee separately for behoof of the children, independent of the right of their parents. We therefore cannot see upon what grounds in justice the children can be deprived of the fee by any act or deed of the life-renters, who are entitled to manage their own property as they think fit, without control on the part of their children.

The expressions made use of in Mr Dixon's settlement, and to which the defenders refer, are to be considered with great caution, particularly when direct and

those processes; and the Lord Ordinary understands, that the determination of the pursuers' mother to claim legitim, or to accept the provisions of the settlement, will depend on the result of those processes."

No. 28. positive rights are created. Where the intention of a grantor is clear and explicit, the inductive clause is of little importance in testamentary deeds. Whatever were Mr Dixon's intentions in a certain event, yet, as that certainly has not taken place, without an express declaration it cannot be maintained that the daughters, by claiming any thing due to them, either as a share of the goods in communion at their mother's death, or in the name of legitim at their father's death, could deprive their children of a right of fee, with regard to which their mother had no interest whatever but that of liferent: If Mr Dixon had intended to make the renunciation of those rights a condition of the grant of the fee, he ought to have expressed his intention in a more direct and explicit manner.

Under these circumstances, we conceive it to be improper for a court to extend a condition from presumed intention. In the present case, we think that neither of the parties could make the condition of the other better nor worse.

Upon the whole, we incline to think that the case of Watt v. Ewan, decided 10th July, 1828, is very nearly in point, and ought to be followed as a precedent.

It may be observed, that the plea of hardship which has been stated on the part of the defenders, is not altogether just or correct. The grantor's heirs will enjoy the liferent of the grandchildren's provisions during the life of their mother, and so annually diminish the claim.

LORD FULLERTON.—I concur in the foregoing opinion. If the present could be viewed as a mere question of probability, very plausible reasons might perhaps be given for the supposition that the testator intended to make the right of fee, as well as that of liferent, dependent on the surrender of the legitim by the daughters. But I do not think that the deeds contain words capable of supporting such an intention.

The effect of the deeds clearly is to create two distinct and independent rights—that of liferent in favour of the daughters, and that of fee in favour of the children of those daughters. Then follows the declaration, "that the provisions above mentioned shall be in full to each of my daughters, their husbands, children, or assignees, of all they could ask or claim in and through my decease, legally or conventionally, or any other manner of way." Now I conceive that it would be outstepping the limits of legitimate construction, to connect with the surrender of legitim, not only the provisions of liferent created in favour of the daughters who had a right of legitim, but the provision of fee in favour of the children who had no such right; so as to raise by implication a condition affecting the bequest to the children. The question seems to be substantially the same with that raised and decided in the late case of Ewan v. Watt; and though there may be some slight difference in the expression of these deeds, I do not think that the difference is such as to warrant the application of a different principle to the present case.

LORDS MACKENZIE, MEDWYN, and NEWTON.—I. In this case, the testator declares, that the provisions are granted as "provisions to my daughters, and for the love and favour which I bear to them." The mode adopted of providing the daughters, is, by giving them sums of £4000 each. These sums, to be sure, are directed to be laid out on securities, for them in liferent alienarily, and their children, natis aut nascituris, in fee. But still, the whole grants of these sums were certainly viewed as provisions on the daughters, insomuch that, even in case any daughter predeceased, it is expressly mentioned, that the children of that daughter are to receive it, "as coming in place of their mother," and powers over the fee, at least of one-half, if not of the whole—powers of great importance—are reserved to the daughters,

Nov. 24, 1831.
Fisher v.
Dixon.

or their husbands. The whole of each provision is manifestly viewed as *unum quid*, provided in favour of each daughter. Nor is there any thing absurd, but the contrary, in making provisions for daughters by a destination such as is here done, which reserves the full benefit of it for themselves and their children.

II. The deed then bears, that the provisions above mentioned "shall be in full to each of my said daughters, their husbands, children, or assignees, of all they could ask or claim in and through my decease, legally or conventionally." The "husbands, children, or assignees, are evidently mentioned only as persons to whom the daughters' right might pass. The substance of the clause relates to the daughters; that is, that these provisions were to be in full of their claims, legal and conventional. The idea of *applicando applicandis* is inadmissible. The "husband, children, and assignees," could obviously have no right, legal or conventional, of their own, not derived through the daughter, that was the wife, mother, or cedent. The provision, then, may be read as if the words had been simply, "that these provisions shall be in full to my said daughters, of all they could ask or claim in and through my decease."

III. The daughter Margaret Dixon, Mrs Fisher, refuses to give up, and claims her legitim; and she repudiates the provision,—which she has full power to do. Yet her children claim the fee of the provision, as being settled on them, independently of her, or her deeds. We think the answer to this claim good,—that the manifest intention of the testator was, that the provision, as *unum quid*, should have effect as a provision on his daughter, and as a satisfaction of his daughter's claim, legal or conventional, and not otherwise; and, therefore, if it cannot have this effect, it cannot have effect at all. He never intended it, nor has he expressed it, as a separate independent legacy on his grandchildren.

This construction, we think, is certainly agreeable to the true intention of the testator, and we are not aware of any principle by which that intention can be defeated, and a result produced which the testator never intended. The case of Ewan does not appear to us to be one in which the circumstances were precisely similar to the present. In that case, there does not appear to have been the same grounds for certainty that the provision was viewed as one provision on the child whose legitim was to be discharged; and, on the want of this evidence of intention, we believe the decision of the case must have rested. In this case, we see no room for doubt on that subject.

The case being again put out for advising, their Lordships of the Second Division delivered the following opinions.

LORD JUSTICE-CLERK.—When this case was before us on a former occasion, I took the liberty to suggest, that we should require the opinion of the other Division, by whom the case of Ewan had been decided. We have now the opinions of the consulted Judges before us, seven of whom concur in an opinion, favourable to the claim of the grandchildren, while three adopt an opposite view. With all respect and deference to the majority, and after the fullest consideration, I feel myself bound to agree with the minority of their Lordships. The true question for us to decide is, what is the just and legal construction of Mr Dixon's will. Now this is a rule universally recognised, that if the intention of a testator can be distinctly ascertained from the written terms of his will, we must be guided by that alone. It appears to me to be perfectly clear, that the object which Mr Dixon had pur-

No. 23.

Nov. 24, 1831.
Fisher v.
Dixon.

No. 28.

Nov. 24, 1831.
Fisher v.
Dixon.

ticularly in view, was to provide for his daughters. There is no preamble, and no expression in the deed from beginning to end, indicating the special intention of providing for his grandchildren, the descendants of those daughters. The words throughout are, "to each of my daughters," and the import of these expressions is not in the smallest degree altered by the other arrangements in the deed for the management and security of those provisions. Nay, I find this provision to the daughters following a preamble by which the testator provides for the rest of his immediate family, and he then draws a distinction betwixt the married and the unmarried daughters, with the obvious intention of protecting the provisions of the former from being attached by diligence of their husbands' creditors. If this intention of providing specially for his daughters, is to be gathered from the plain expressions of his will as to the first provision of £2000, I certainly can find nothing in the terms of the codicil, enlarging those provisions by another £2000, which is not *in pari casu*. Then observe this important declaration in the deed, "and I hereby declare, that the provisions above mentioned shall be in full to each of my daughters, their husbands' children or assignees, of all that they could ask or claim in and through my decease, legally or conventionally, or any other manner of way." I take this to be a declaration, that the only possible claim on the part of these daughters, is the provision named as superseding every other. I cannot separate the two sets of provisions, and hold, that the second bestowed a distinct and separate right of fee on the grandchildren. I think they must be held as an *unum quid*, and that taking the whole deed together, there was a provision in full of every other claim for themselves, husbands, children, &c., of £4000 to each of the daughters. With regard to the case of Ewan, which alone remains to be noticed—that by no means appears to me to be identical. In that case, a direct provision of the fee to the wife independent of her husband was executed. The children's right of fee was constituted expressly, and indefeasibly; and I do not think that the question we have now to determine, either did or could arise in the case of Ewan.

LORD GLENLEE.—I can perfectly understand, that if *ex figura verborum* there were a distinct provision of fee to the grandchildren, their claims would be independent of other constructions of the testator's will; but on the other hand, if it be not so, they can have no such indefeasible claim. Now, on looking at the deed, there is *ex figura verborum* a condition or qualification affecting the whole provision to the daughters: it is to be "in full of all they could ask or claim in and through my decease, legally or conventionally, or in any other way;" and it only remains to consider what really was the intention of the testator. Now, I can find no reason whatever for going against the express declaration of his intention in the figure of words used by him. It appears to me that an opposite construction would necessarily lead to anomalous consequences. Supposing Mr Dixon, after having made these provisions, had become impressed with the notion that they were too large; that upon this narrative he had recalled and restricted them simply in regard to his daughters, by some expression of his will not referring to the grandchildren at all; could it be said that the fee to those descendants was a distinct and separate provision, not affected by this special restriction of the daughters' provision? Or suppose that Mrs Fisher, after surviving her father, had died without doing any thing to repudiate her legitim, and that this had descended to her children as their own right of succession; would you have allowed (what is the necessary consequence of viewing this fee as an independent provision) the grandchildren to come forward and claim, first the legitim as their own proper suc-

cession, and then the fee of these provisions, which were meant to supersede her legitim? I am inclined to consider the matter in the view of an offer. Put the case, that Mr Dixon had entered into a communing on the subject, and had written a letter to Mrs Fisher, giving her the option of accepting the provision in terms of the deed in place of legitim, and that Mrs Fisher had refused to repudiate; could it be maintained that the offer held good so far as her children were concerned? I think not—the only condition of the letter had failed; and in like manner, in the case before us, it appears to me that there is no right bestowed upon the grandchildren, which is not measured by the terms of the liferent grant to their mother. Really, as to what is here called a fee in the descendants of the daughters, I think that a very anomalous nomenclature. The proper distinction betwixt *fiar* and *life-renter*, is the complete right of property and power of disposal in the former; but here what is called a fee, is really a right *sui generis*. No proper right of any kind emerges until after the death of Mrs Fisher. It is material to notice the case of Ewan, which is said to be in point, in support of the claim for the grandchildren. Now, in the first place, I do not think, that in a question of this kind, attended with considerable difficulty and nicety, that it is absolutely necessary to follow a single decision of this Court; but then the case of Ewan does not appear to me to involve the present question. What was argued in that case was, that John was sole *fiar*, and might do what he pleased; but the plea was nonsense, for the widow was as much *fiar* as the husband, and the children's right still attached to their mother's.

LORD CRINGLETIE.—I am of the same opinion as your Lordships. Indeed, it humbly appears to me that the majority of the consulted Judges have even mistaken some parts of this case in point of fact. They say, "We are the more inclined to be of this opinion, from the circumstance of trustees being appointed to hold the fee separately for behoof of the children, independent of the right of their parents." Now, I cannot discover that to be the import of the deed. It is most extraordinary to me to be told, that the declaration as to the legitim is to have no effect.

LORD MEADOWBANK.—After considering this case with all the attention in my power, and heard what has fallen from your Lordships, I have come to be of opinion with the majority of the consulted Judges. The question before us entirely depends upon what Mr Dixon has actually said in a legal and formal written instrument, to which we are bound to look as our guide in this matter. All probabilities and conjecture as to what might have been Mr Dixon's intention, I throw aside. I am to look to the words he has in point of fact used, and to satisfy myself if they bear one interpretation or another. If I find that they distinctly and unequivocally bear the construction of two separate provisions; the one a liferent grant with a condition annexed, and the other a right of fee quite unfettered by any condition; I cannot avoid sustaining the claim of the grandchildren. Now, from beginning to end of this deed, I can find no condition which affects this fee to the grandchildren. My brother put the case of a communing, and a letter written by Mr Dixon to Mrs Fisher. I cannot allow that hypothetical case to influence my judgment, because it is not the case before us; and as for those other cases which his Lordship says follow of necessity the view of this deed containing distinct and independent provisions to the daughters and their descendants, I should just be inclined to admit them. I am of opinion that the testator in this case has expressly vested a separate estate in fee of the grandchildren.

No. 28.

Nov. 24, 1831.
Fisher v.
Dixon.

No. 28. The opinions of the whole Court standing eight to six in favour of the claim of the testator's grandchildren, the Court decreed accordingly.

Nov. 25, 1831.

Fisher v.
Dixon.

Campbell v.
Laurie.

ALEX. FORSYTH, W. S.—TOD AND ROMANES, W. S.—Agents.

J. G. CAMPBELL and OTHERS, Suspenders.—Jameson—W. Bell.

No. 29. THOMAS LAURIE and OTHERS, Chargers.—Keay—Monteith.

Bill of Exchange—Statute—Trust.—Where a committee of management, named by commissioners under certain statutes, exceeded their statutory powers, and purchased heritage from parties whom the statute compelled to sell on payment or consignation, but who agreed to take bills; and the committee caused the treasurer to subscribe these bills, which bore, that "the commissioners" promised to pay their contents, and entered upon possession of the heritage; and several members of the committee, with the clerk and treasurer, retired the bills out of their private funds when due, (there being a deficiency of funds belonging to the commissioners)—Held that they were not entitled to have recourse, as bona fide and onerous assignees of these bills, against the payees, whose property had been taken from them.

Nov. 25, 1831. By the statutes 5 Geo. IV. c. 69, and 7 Geo. IV. c. 65, powers were given to certain subscribers to open up a line of new street in Glasgow,

1st DIVISION.
Ld. Corehouse.

called London Street, and to compel the proprietors along the line to cede possession on receiving payment of the value fixed by a jury, or on consignation being made of such value. The statute limited the liability of subscribers to the amount of their subscriptions. The commissioners appointed annually a committee of management. The committee exceeded their statutory powers, both in erecting houses for sale out of the funds of the concern, and also in borrowing money to an amount greatly exceeding that allowed by the statutes. On 19th October, 1826, and after these irregularities had occurred, a meeting of the committee, which consisted of Messrs Laurie, Gilmour, W. L. Ewing, and A. Reid, named a sub-committee, consisting of Messrs Gilmour, Laurie, J. L. Ewing, and J. Reid, "any one of whom, along with either the clerk or treasurer, shall have power to act in buying and selling the property of the concern," &c. Mr A. Reid was treasurer, and Mr Grahame was clerk; these gentlemen were also shareholders in the undertaking. On 28th November following, after some previous treaty, an offer was laid before the committee on the part of Messrs J. G. Campbell and others, to accept of £4000 as the price of certain property which lay along the new street, payable in equal instalments at one, two, and three years from the date at which the verdict of a jury should, of consent, fix the above price. The meeting authorized their clerk, Mr Grahame, to accept the offer. After the verdict was pronounced, a meeting of committee was held on 30th March, 1827, and was attended by Messrs Laurie, J. Reid, and W. L. Ewing. Two other members were also present. The clerk reported that Messrs J. G. Campbell and others were to take payment of the price, in seven promissory-notes, payable at from one to three years date. The

meeting then "authorized the treasurer to subscribe the said promissory-notes, and the same having been produced to the meeting, were subscribed by the treasurer accordingly." The form of the bill was the following:— "Twelve months after date, the Commissioners for forming London Street in Glasgow, promise to pay to Mr J. G. Campbell, or order, the sum of £840, 10s. sterling, value received in heritable property. By order of the committee of management, Andrew Reid, treasurer." Messrs Campbells then executed dispositions in favour of the commissioners, making the price a real burden; and they ceded possession of the subjects, upon which the operations of the purchasers were soon commenced.

No. 29.

Nov. 25, 1831.
Campbell v.
Laurie.

At the date of this transaction the committee consisted, amongst others, of Messrs Laurie, J. Reid, Gilmour, W. L. Ewing, and J. L. Ewing. Some of the bills were discounted at different banks, and two of them, which fell due on 1st February, 1828, were protested for non-payment. In the interim a new election of the committee of management had taken place, and a letter was then addressed, on the part of Messrs J. G. Campbell and others, to Messrs Lawrie, J. Reid, and W. L. Ewing, and the other two members of the committee, who were present when the treasurer was authorized to sign the promissory-notes, intimating that they were held personally liable for the contents of the notes, and concluding, "I have therefore to request that the notes may be immediately paid, otherwise measures of a rather unpleasant nature must be resorted to for the purpose of compelling payment." On 28th March, Messrs Laurie, J. Reid, W. L. Ewing, J. L. Ewing, Gilmour, A. Reid, and Grahame, paid the amount of the notes out of their private funds, (the street concern being said to be insolvent,) and took an assignation to the diligence which had, in the mean time, been raised by the bank against Messrs J. G. Campbell and others. A third bill for £430, 15s. fell due on 1st August, 1828, and was paid by the same parties. After some farther delay, and, as Messrs J. G. Campbell and others alleged, after the sale of considerable property belonging to the street concern, and the application of its proceeds to the liquidation of obligations undertaken by the above-mentioned parties, of a date posterior to the bills in question, Lawrie and others raised summary diligence, as onerous assignees of these notes, against Messrs J. G. Campbell and others, who offered a bill of suspension, which was passed, simpliciter, on January 14, 1830.*

The suspenders maintained, that as they were the payees under the notes, and had granted full value for them under a sale, to which they were compelled by the statutes; and as they had ceded possession of their property, on the faith of the signature of Reid, the treasurer, which was exhibited by the express mandate of the committee of management, the members of that committee were as much liable for the contents of the

No. 29. note, as if they had signed it along with the treasurer. They had accordingly retired the notes when they fell due; and, as they were all cognisant of the circumstances under which the notes had been granted, they did not hold them as onerous and bona fide indorsees, in a question with the suspenders. They could not plead that the statute exempted them from all liability for the debts of the street concern, beyond their several subscriptions, because, at the date of the transaction when the bills were granted, they were acting completely out of the statute, and must be dealt with like any other parties, who, on receiving full value, authorized a mandatory to subscribe notes for payment of the price. Such notes, though eventually taken up by them, or any of them, out of their private funds, could not, in their hands, be made a ground of claim against the suspenders.

Nov. 25, 1831.
Campbell v.
Laurie.

The chargers answered, 1. that by the terms of the notes, the London Street commissioners alone were bound, and these commissioners had alone received the value. The committee of management, who authorized the notes to be granted, merely meant to bind their constituents, and had only done so. When they, as individual members of the committee, subsequently retired these notes out of their private funds, they were onerous indorsees, as much as any other third parties could be, and were therefore entitled to recourse against the suspenders, who had still a lien for the price reserved in their disposition of the property. 2. That the statutes exempted all subscribers to the street from being liable for the obligations of the concern beyond the value of their subscriptions; and 3d, that Messrs Grahame and A. Reid, who merely acted in the official capacity of clerk and treasurer of the committee, were liable to no personal exception.

The Lord Ordinary found "that the bills charged on were granted by the authority of the committee of management of the London Street Commissioners, as the price of certain subjects purchased from the suspenders, by virtue of a compulsory sale, under the statutes mentioned in the pleadings, of which subjects the committee were allowed to take possession on the faith of the bills so granted: that the chargers in retiring the said bills, being themselves either members of the committee of management, or cognisant of all its proceedings, are not to be considered as bona fide and onerous holders, to the effect of enforcing repetition for their own behoof as individuals: that the chargers are not entitled to avail themselves of the provision in the statutes, limiting the responsibility of subscribers to the amount of their subscription, in respect the committee of management greatly exceeded the powers conferred upon them, by erecting houses for sale out of the funds of the concern, by contracting debts beyond the amount authorized by the statutes, and otherwise, and, therefore, suspended the letters simpliciter, and decerned: found the chargers liable in expenses," &c.

The chargers reclaimed, but the Court unanimously adhered.

LORD BALGRAY.—I consider that this question arises out of a contract which was entered into between the suspenders and the chargers, at a time when the chargers' proceedings were carried beyond the statute, and were not within its protection. As soon as the verdict of the jury was pronounced, the commissioners Laurie were bound to pay the price so fixed, or at least before taking possession of the subjects. But instead of this, a treaty is entered into, and the suspenders, who could be compelled to sell their property, agree to take bills instead of actual payment in cash. This was done solely as an accommodation to the purchasers, who were confessedly in some pecuniary difficulties. But as the suspenders don't receive cash, they stipulate for negotiable documents. The committee accordingly give Reid a mandate to sign the bills, and he does so in virtue of their mandate, which produces the same result substantially as if all their names had been exhibited directly. Then the heritable property is taken possession of under the directions of the committee; the purchasers are infest, and subject this property to their operations. A new election of a committee of management occurs, who adopt the sales and the proceedings of their predecessors. When the bills fall due, those who take them up are parties who were members of the committee when Reid, the treasurer, signed them, or they are the clerk and treasurer of the committee, all perfectly cognisant of the circumstances in which the bills were granted. They say they took up the bills out of their private funds, and in the expectation that there would be proceeds from the street concern sufficient to relieve them, and that in this expectation they are disappointed. Be it so; that will not entitle them to turn round on the parties to whom they had themselves granted these bills for value, and pretend that they can have recourse as onerous indorsees. In these circumstances, I cannot hesitate to adhere to the interlocutor under review. For the whole case truly comes to this short point. Laying aside the act, from which the chargers had deviated, what was the true import of the contract of parties when the chargers directed Reid to sign the bills, and give them to the suspenders? The chargers clearly came under an obligation to the suspenders that these bills should be retired when the bills fell due. They did retire them; and, having done so, they cannot now retrace their steps.

The other Judges concurred.

CAMPBELL and M'DOWALL, W.S.—GRAHAME and RICHARDSON, W.S.—Agents.

ROBERT GRAHAM and Others, Pursuers.—*More—J. Hope.*

No. 30.

JOHN AITKEN and Others, Defenders.—*Skene—M'Neill.*

SPECIAL question as to how far the Lord Ordinary had rightly refused Nov. 25, 1831. to enforce a certification against the defenders, for not furnishing a title in the action mentioned Ante V. 340, and VIII. 84, the object of which was to have a sale annulled in respect of the mora on their part, to give a title to the purchasers. The Court, of consent, remitted to the Lord Ordinary a reclaiming note by the pursuers, against his Lordship's interlocutor.

2D DIVISION.
Ld. Mackenzie.
K.

W. A. G. and R. ELLIS, W.S.—J. M'LAWREN—Agents.

No. 31.

GEORGE SIMSON and Others, Pursuers.—*Shene.*Simson, &c. v.
Graham.W. A. GRAHAM, Compearer.—*Bell.*

Wilson v. Webster, &c. *Right in Security—Ranking and Sale.*—The institution of a ranking and sale does not operate as an interruption to a sale by an heritable creditor, under powers in his bond.

Nov. 25, 1831. GRAHAM, an heritable creditor of the late Alexander Smith of Land, having taken steps towards selling the property over which his security extended, in virtue of powers therein contained, Simson and others instituted a process of ranking and sale against the heir, in which the usual interlocutor was pronounced on the 8th July. In consequence of this,

2d DIVISION.
Ld. Mackenzie. GRAHAM suspended proceedings, but presented a reclaiming note, with a view to have a judgment by the Court, on the question whether the action of ranking was a bar to his exercising his powers of sale; and he pleaded, that agreeably to the decision in the analogous case of a sequestration, (*Beveridge v. Wilson*,¹) it could not be considered as interfering with his rights. The Court being satisfied that the dependence of a ranking and sale did not of itself operate as a bar to the exercise of powers of sale contained in an heritable security, found that Graham was entitled to proceed with his sale, reserving to Simson, &c., to make any application competent thereanent, and to Graham his defences.

T.

JOHN YUILLE, W.S.—J. THORBURN, W.S.—Agents.

No. 32.

ANDREW WILSON, Pursuer.—*Cuninghame.*JAMES WEBSTER and Others, Defenders.—*Boswell.*

Title to pursue.—A party, designing himself “the eldest son and heir” of a marriage, and libelling on a disposition to children in fee, found entitled to pursue a reduction of a disposition to his prejudice, although objected that he had an elder brother and a sister, who had an interest, and they were not pursuers—reserving the effect of the clause on the conclusions of the action.

Nov. 26, 1831. ANDREW WILSON, designing himself “the eldest son and heir pro-

1st Division. create of the marriage between Mrs Jean Tod, and Andrew Wilson, Ld. Moncreiff. senior,” and founding his title on a disposition executed by his maternal

S.

grandfather, conveying to his mother and father in liferent, and their children in fee, a certain property, said to have been adjudged by one Goodsir, pursued reduction of a disposition by Goodsir to Andrew Wilson, senior, and another by him to Webster, of the property. The defenders objected to the title to pursue, that there had been two sons and a daughter; that the pursuer was born the youngest son, and had not

proved his elder brother to be dead, and was therefore not entitled to libel No. 92. himself as the eldest son and heir ; and that, as the destination of the fee was in favour of all the children equally, he was not entitled to pursue Nov. 26, 1831. Wilson v. Webster, &c. alone. Wilson answered, that, even if this were admitted, he still had a right of fee in one-third of the property, and to that extent was entitled Scott v. King, to reduce an illegal conveyance of it. If others had an interest along with &c. him, he had no means of compelling them to concur in this action, but he was not, on that account, debarred from protecting his own right. He averred, also, that he was in fact the eldest son and heir.

The Lord Ordinary “repelled the preliminary defences, reserving all questions as to the effect of the clause in the deed libelled on.”

The defenders reclaimed, but the Court adhered.

LORD CRAIGIE.—I do not approve of the interlocutor as it stands. I think, before going farther, the other heirs ought to be called. Besides, can an apparent heir pursue a reduction like this ?

LORD GILLIES.—It is not as apparent heir that he pursues, but as a donee under the grandfather's conveyance. He has no means of compelling any other party to concur with him in this action ; but he cannot, on that account, be prevented from protecting his own interest.

LORD PRESIDENT.—Certainly not. His right to a third of the subjects, under the destination, is admitted by the defender. He may, at all events, prosecute for his own third, even if he be left to prosecute alone.

LORD BALGRAY concurred with the majority.

J. JOLLY, S. S. C.—G. HEGGIE, W. S.—Agents.

JOHN SCOTT, Suspender.—Jameson.

No. 33.

MRS KING or BAILLIE and Others, Chargers.—D. F. Hope.

Process—Expenses.—Where defenders in a Sheriff Court were assailed with expenses, and gave a charge of horning on the decree, and a bill of suspension was offered, and an action of reduction raised by the pursuers—the Court, in the circumstances, refused the bill.

THE Sheriff of Lanarkshire having dismissed an action, at Scott's instance, with expenses, the defenders, Mrs Baillie and others, extracted the decree, and gave a charge for these expenses. Scott offered a bill of suspension, on caution, to which it was objected, that as no advocation had been brought, and it was necessary, in order to determine the propriety of the award for expenses, to form a judgment on the merits of the action, the bill should be refused as incompetent. The Lord Ordinary (Corehouse), on 7th October, 1831, “refused the bill, and found the suspender liable in expenses.”*

Nov. 26, 1831.

1st DIVISION.
Bill-Chamber.
Lord Craige
and Corehouse.

H.

* “**NOTE.**—A suspension of a decree of an inferior Judge for expenses of process is not necessarily incompetent, although the decree is not brought under review on the

No. 38. Scott then presented a second bill, and raised a summons of reduction.
 Nov. 26, 1831. Answers were ordered, and, on Nov. 11th, the Lord Ordinary (Craigie),
 Scott v. King, "upon the grounds stated by the Lord Ordinary on advising the first bill,
 &c. refused the bill, found expenses due," &c.

Scott reclaimed, but the Court adhered.

LORD GILLIES, (who was for altering,) was understood to be influenced by the consideration, that unless the bill were passed, the suspender would be compelled to pay expenses, which the issue of his action of reduction might prove not to have been justly decreed for. On the other hand, by passing the bill, the chargers, if justly entitled to their expenses, could only be delayed from recovering them for a time, and they were secured by caution against ultimate loss. They were thus exposed, undoubtedly, to the evil of a certain delay; but the hardship on the other party was greater if compelled to pay in the meantime, because he might be wholly unable to recover these expenses again, though he should succeed in his action of reduction.

LORD PRESIDENT.—I cannot allow myself to be influenced by the mere circumstance that a summons of reduction has been raised. The suspender, if he wished to avoid being exposed to the present demand, should have brought an advocacy of the Sheriff's judgment. Having neglected to do this, I think his situation is analogous to that of a party who has allowed a judgment to go against him by default, and who is not to be reponed without an immediate payment of certain expenses. The judgment for expenses must therefore be enforced in the meantime, and if he succeeds in his reduction, it will cut down the award of expenses, and any disadvantage under which he labours in the meantime, is the result of his own neglect.

LORDS CRAIGIE and BALGRAY were also for adhering; and farther intimated, that they considered it to be a question not of competency, but of discretion, on the part of the Court, to entertain a suspension of a charge which was given for expenses only; though in general it was proper to follow the rule laid down in the note of the Lord Ordinary.

Charger's Authority.—Shiells, July 2d, 1825. *Ante, IV. 134.*

WOTHERSPOON and MACK, W.S.—F. HAMILTON, W.S.—Agents.

merits; for cases can easily be supposed where the question of expenses is independent of the merits. But where, as in this case, it is impossible to judge whether expenses have or have not been improperly awarded without forming an opinion upon the merits, and the merits are not and cannot be brought under review in the suspension, it does not appear that the diligence ought to be staid upon the ground that the suspender states that he is in cursu of bringing an action of reduction."

JOHN M'GILL, Pursuer.—*J. Anderson.*
JAMES MELVIN, Defender.—*Marshall.*

No. 34.

Nov. 26, 1831.
M'Gill v. Mel-

Process—Act of Sederunt 11th July, 1828, § 57—Reponing.—1. Circumstances in which the Court reponed a party against a second judgment by default. 2. Question raised whether the Court have a discretionary power, in ordinary actions, in so reponing.

M'GILL, S.S.C., raised an action against Melvin for payment of his account. No defences were lodged, and decree in absence was pronounced. Melvin was reponed against this by presenting a reclaiming note. In the meantime, a vacation had passed. An order was pronounced for condescendence and answers. Melvin failed to lodge his answers, and the Lord Ordinary, “in respect the defender has failed to lodge answers to this condescendence within the time limited, remitted the business account libelled on to the auditor to tax and report, preparatory to pronouncing decree.”

1st DIVISION.
Lord Newton.
H

Melvin reclaimed, produced his answers, and craved to be reponed. M'Gill objected to this as an abuse of the forms of process, and as contrary to the spirit of the provisions for reponing a party. Their object was to give a remedy against casual or occasional oversight, not against wilful contempt of the orders of the Court. He founded on the case of Gordon.¹ Melvin answered, that as he had produced the paper, for default of which alone the interlocutor under review was or could have been pronounced, he was entitled, by § 57 of the act of sederunt 11th July, 1828, to be reponed, on paying such expenses as the Lord Ordinary might award. He farther added, that it was through mere inadvertence, and not design, that the default had occurred. The case of Gordon was not in point. It belonged to the class of extraordinary actions; the delay which had there occurred was of a very different character from that in this case, and the interlocutor of the Lord Ordinary there was merely a necessary step of preparation towards a judgment, without implying a decerniture in favour of either party.

LORD PRESIDENT.—I think the judgment in the case of Gordon was well founded in the circumstances of that case. But I conceive, that in the present one we should repon and remit to the Lord Ordinary, as usual.

LORD BALGRAY was understood to say that he considered the Court to possess no discretion upon the subject, but to be bound to grant what was craved by Melvin on producing his paper with the reclaiming note, because it was expressly so provided in the act of sederunt.

LORDS CRAIGIE and GILLIES were also for granting the prayer of the note, Defender reponed accordingly.

J. M'GILL, S.S.C.—A. HILL, W.S.—Agents.

¹ June 7, 1831; ante, IX. 690.

No. 35.

Nov. 29, 1831.
Miller v. Fisher.

ROBERT MILLAR, jun. Suspender.—*Wilson.*
PETER FISHER, Charger.—*Monteith.*

1st DIVISION.
Bill-Chamber.
Lord Craigie.
D.
Johnson v.
Johnston.

Process.—This was a bill of suspension by Millar, a writer in Glasgow, of a charge on a bill of exchange, chiefly on the ground that certain claims, acquired by him from one Twaddell against the charger, made him creditor, and not debtor, to the charger. An account, to which affidavit had been made by Twaddell, was produced in support of the suspension. The charger not only disproved these claims, but placed the account and affidavit by Twaddell in circumstances of such suspicion, that the Lord Ordinary, on refusing the bill of suspension with expenses, “directed the clerks of the bills not to give up the documents produced by the suspender, and particularly the account and affidavit of James Twaddell, unless in virtue of authority from the Court or Lord Ordinary on the Bills.”

Millar reclaimed, but the Court adhered.

J. PATTISON, jun. W.S.—A. HAMILTON, W.S.—Agents.

No. 36.

JOHN JOHNSON, Pursuer.—*Jameson—W. Bell.*
WILLIAM JOHNSTON and Others, Defendants.—*Walker—Houston.*

Commony—Decree Arbitral—Statute 1695, c. 38.—Where a process of division of commony under the statute 1695, c. 38, was brought in 1767, and submitted to arbiters, who divided it, except a part of a moss which they decerned to remain common, a second process of division of that part dismissed as incompetent, in respect of the decree arbitral.

Nov. 29, 1831.

1st DIVISION
Ld. Corehouse.

H.

THE Red Moss of Balerno, prior to 1767, formed part of the commony of Balerno and Harlaw. A process of division of commony was then raised, which was eventually submitted to arbitration. The arbiters were specially empowered “to determine whether the mosses within the said commony shall be divided, or shall remain undivided, for the common and joint use and behoof of the said parties, and to fix and ascertain the extent and boundaries of the said mosses if left undivided.” The arbiters divided the rest of the common, but they decerned and ordained the Red Moss of Balerno, amounting to 45 acres, to “remain common, for the use and benefit of the forenamed several parties concerned, as formerly, but decerned them not to break in or encroach on each other’s haggs.”

One of the parties to this process and arbitration was the proprietor of the estate of Revelrig, and Mr Johnson having in 1826 acquired the property of Muirbank from the then proprietor of Revelrig, raised a process of division under the act 1695, c. 38. He alleged that villages had been erected on the estates of some proprietors adjacent to the moss; that

their inhabitants dug peats in any part of the moss promiscuously, without regard to the hags originally marked off for each heritor under the decree arbitral; and that a change had occurred in the condition of the Red Moss, which had become fit for pasturing cattle since the date of that decree.

No. 36.
Nov. 29, 1831.
Johnson v. Johnston.

Johnston and others, defenders, denied these allegations, but objected to the competency of the action, in respect that the decree arbitral had expressly decerned the moss "to remain in common."

The Lord Ordinary "sustained the fourth preliminary defence; and, in respect of the decree arbitral, found the action incompetent," and dismissed it with expenses.*

Johnston reclaimed, but the Court adhered.

LORD BALGRAY.—I conceive that the decree arbitral, being regularly pronounced under a submission of the process of division of the commony, must have the same force as if that process had been followed forth to decree in this Court. I, therefore, adhere to the Lord Ordinary's interlocutor. But I do not altogether assent to his Lordship's note. There is excellent pasture for sheep during a considerable part of the year upon every moss. But I apprehend, that so long as any of this moss remains, the cottars of any of the dominant tènements have an interest to oppose a process of division of it. If a declarator were brought, setting forth that such a change had taken place in the condition of what was a moss, when the decree arbitral was pronounced, that it would clearly have been divided had it been in its present state at the date of that decree, this might make way for a division of it now. But the holder or occupier of any dominant tenement might appear, and shew it was still a moss, and oppose the division.

His Lordship was understood to observe, that the Judge Ordinary had power to regulate the possession of the moss, so as to prevent one party from injuring his neighbour.

LORD PRESIDENT.—I am also for adhering; and I would observe that the allegation strongly made by the pursuer of a great change having taken place in the condition of the subject since the date of the decree arbitral, is at variance with the terms of his own libel. He there complains of the promiscuous use of all parts of the Red Moss, as a peat-moss, "every one digging, or pitting for peats, or other purposes, on any part of the said Red Moss, which he thinks proper to appro-

* "NOTE.—The power of dividing commons is given by the statute 1695, c. 38, and cannot be extended beyond the limits of the statute, either by this Court, or by arbiters acting under a judicial reference of a process of division. The statute expressly enacts, that in case it be instructed that mosses cannot be conveniently divided, they 'shall remain common, with free iish and entry thereto.' A process for dividing the commons of Balerno and Harlaw having been judicially submitted, the arbiters, after dividing the subject, with the exception of the Red Moss, declared that that moss should remain common in future. The power conferred by the statute being thus exhausted, it is not competent to proceed to a second division under it. But if, as the pursuer alleges, the Red Moss has become fit for pasture of cattle since the date of the decree arbitral, and is applied to that purpose, an action of souming and rouming will lie at common law."

No. 36. priate to himself," &c. This sufficiently shows the subject to remain still in the condition of a moss, and precisely as it stood when the arbiters saw fit to decern it to remain in common.

Nov. 29, 1831.
Johnson v.
Johnston.

Curtis v. Sandison.

LORD CRAIGIE was understood to say he was satisfied from the libel, that the subject remained still a moss, and that the action had been prematurely brought; but that, although it might have been proper in 1767 to ordain the Red Moss to remain common, a change of circumstances might justify the division of it afterwards.

LORD GILLIES concurred completely with the Lord Ordinary. Even were the moss exhausted, his Lordship would not consider it divisible, after the arbiters, who did not act ultra vires of the submission, had decerned that it should remain in common.

J. JOHNSON.—WALKER, RICHARDSON, & MELVILLE, W.S.—W. FORBES, S.S.C.—Agents.

No. 37. EDWARD CURTIS and Mandatory, Suspenders.—G. Napier.
WILLIAM SANDISON, Charger.—Jameson—Dick.

Contract—Penalty—Interdict.—Where it was stipulated in a contract between a London tailor and his Edinburgh agent, that the latter should not exercise the trade of a tailor in Edinburgh for a period of twelve months after the agency should cease, "and for the punctual performance of all the articles, &c., on his part to be performed," and the agent bound himself in the sum of £200, "to be taken and considered as liquidated damages, and not as in terrorem, or by way of penalty;" and the agent openly exercised the trade within the twelvemonth—Bill of suspension passed, and interdict granted on caution, though the agent insisted that nothing but damages could be claimed.

Nov. 29, 1831. CURTIS, tailor in London, entered into an agreement there with Sandison, who came to Edinburgh to act as his agent. The agreement, after prescribing the nature of Sandison's duties, and fixing his salary, commission, &c., provided that Sandison "shall not, nor will, in case he the said William Sandison shall cease or discontinue, or shall be discharged from acting as such agent as aforesaid, at any time or times within twelve months after the determination of the said agency, either directly or indirectly, by himself, or with any other person or persons, or in his own name, or in the name or names of any other person or persons whomsoever, commence, or carry on, or cause to be commenced or carried on, the said trade or business of a tailor or clothier, within fifty miles of the city of Edinburgh aforesaid, without the license and consent of the said Edward Curtis, in writing, for that purpose, first had and obtained."

1st DIVISION.
Bill-Chamber.
Lds. Corehouse
and Moncreiff

It was farther provided, that if Sandison "shall be desirous to dissolve this contract, and of such his desire shall give unto the said Edward Curtis three calendar months' notice in writing; or in case the said Edward Curtis shall at any time hereafter be so desirous, and of such his desire shall give unto the said William Sandison one calendar month's notice in writing, that then the said parties do hereby covenant and agree, that

from and after the expiration of the said three calendar months, or one calendar month, as the case may happen, this present contract and these presents shall cease, determine, and become absolutely void, any thing Nov. 29, 1831. Curtis v. Sandison.
herein contained to the contrary thereof in any wise notwithstanding; and then also the said accounts shall be settled and adjusted by and between the said parties to the day on which such notice shall expire."

It was then stipulated as follows: "For the due and punctual performance of all and singular the articles, clauses, matters, and things herein-before mentioned on his part to be performed, he the said William Sandison doth bind himself, his heirs, executors, and administrators, unto the said Edward Curtis, his executors, administrators, and assigns, in the sum of £200, to be taken and considered as liquidated damages, and not as in *terrorem*, or by way of penalty."

After acting as agent for about a twelvemonth, Sandison's agency ceased in March, 1831, he having received the month's notice stipulated in the contract. Having begun the trade of a tailor in Edinburgh, Curtis, in September, presented a bill of suspension and interdict, to have him prohibited from carrying on business within fifty miles of Edinburgh; and he alleged that, as he lived in London, he had not been aware, till recently, of Sandison's violation of the contract. Interim interdict was granted, and answers were ordered, on advising which, the Lord Ordinary (Corehouse) passed the bill, "but, *in hoc statu*, recalled the interdict."*

Curtis presented a second bill, contending, that unless immediate interdict were granted, the whole object of the application would be defeated; and that the stipulation regarding damages did not weaken the obligation on Sandison to give specific implement, in terms of the contract, so far as this could still be enforced. He offered caution for any damage which might be occasioned to Sandison by the interdict. The Lord Ordinary (Moncreiff) ordered answers, and issued the subjoined note.†

* * Note.—It is provided by a clause in the contract, that the respondent shall be bound in the sum of £200 for the punctual performance of the agreement; and it is expressly declared that this sum should be held as liquidated damages, and not as a penalty. Taking this clause into view, and also the fact that the contravention has already taken place, the respondent having established himself in business in Edinburgh for several months without challenge, there is room for holding that the suspender is not entitled to an interdict, but only to the damages, as liquidated."

† "Note.—The Lord Ordinary thinks that the point of law argued by the complainant in this bill is deserving of serious attention, and that the state of the case, as represented towards the conclusion of the bill, renders it very necessary that the point should be well considered before the bill is passed. But, after the interdict had been recalled by Lord Corehouse, the present Lord Ordinary, whatever his impressions may be, does not think that he could or new grant an interdict, until the respondent has an opportunity of meeting the complainant's argument. He recommends to the respondent to confine himself to the proper merits of the case."

No. 37. Sandison answered, 1. that it was only in the event of the abrupt cessation of his agency, without any notice on either side, that the stipulation against Nov. 29, 1831. Curtis v. Sandison. his acting as a tailor came into operation; and that, when the agency ceased in consequence of intimation, it had been explicitly stipulated that the whole contract between the parties "became absolutely void," except to the single effect of an accounting being rendered by him, as was specially provided for. But, 2. that where a sum was stipulated in name of liquidated damages, no course was left to Curtis but to sue for these damages, leaving Sandison to state his defences in that action. He also averred, that Curtis had not duly fulfilled his part of the contract towards him; Curtis denied this averment.

The Lord Ordinary (Moncreiff) reported the case.*

LORD BALGRAY.—I am for granting the interdict. Suppose that it had been applied for by Curtis, immediately on the termination of the agency of Sandison, and before the contract was actually violated by him, and that he admitted his intention to infringe it, could we then have refused an interdict? I apprehend it would have been impossible; and it would be a very odd result, if, because Sandison has already violated the stipulation openly and avowedly, our power to interdict him, as to the future, should be done away. The obligation undertaken was of a precise nature, and perfectly lawful; and so long as Sandison can give specific compliance with it, he is bound to do so. Had the whole period of twelve months expired, specific implement would have been impossible, and nothing but a claim of damages could have remained; but it is otherwise during the currency of the twelve months; we can interdict as to what remains of these, and I think Curtis entitled to such interdict.

LORD PRESIDENT.—I am of the same opinion.

LORD GILLIES.—I concur. It is quite fallacious to maintain, that, because the contract of agency is at an end, after due notice, the stipulation founded on by

* "NOTE.—The Lord Ordinary takes this course, because it is plainly the shortest for ending the question of interdict. He must confess that he is not able to refuse the interdict. There is a plain avowal of a direct and flagrant violation of one of the most important stipulations of the contract. He thinks the argument, founded on the other clause as to the contract becoming inoperative, in the will of either party on certain conditions, very groundless; because the previous clause regulating the case of the respondent 'ceasing, discontinuing, or being discharged from acting as such agent,' did clearly, in his opinion, refer pointedly to that case of a ceasing, discontinuance, or discharge under the latter clause. The respondent's allegations of other breaches of contract are plainly not relevant in the question of interdict, being denied; and though it is clear enough that he might suffer by the interdict, it is surely very clear that the complainer's whole interest under the bill will be defeated, if he does not obtain the interdict. The case, therefore, resolves into the question of law, whether the clause as to the £200, as liquidate damages for any breach of the contract, supersedes the claim for specific observance of the stipulations. The case has been brought before the present Lord Ordinary on full argument, which it was not before Lord Corehouse; and all he thinks it necessary to say is, that he is not at present able to think, that, in this case, the complainer was precluded from enforcing specifically any of the precise stipulations of the contract."

Carta must also be at an end, having been part of the contract. The stipulation No. 87. was intended to come into operation after the contract of agency was at an end, and the precise case has arisen for which the provision was made. As to the other Nov. 29, 1831. Curtis v. San-argument, that nothing but damages can be claimed, I conceive it to be equally dison. unfounded. Whatever is stipulated in name of damage, is always "by and attour Cook, &c. v. performance," whether these express words be used or not. Wherever specific Jeffrey. performance, therefore, can be had, under a lawful contract it may be enforced.

LORD CRAIGIE was understood to concur.

THE COURT accordingly passed the bill, and granted interim interdict as craved.

Suspender's Authorities.—Davis, Jan. 25, 1793 (5. Durnford and East, T. R. 118); Homer, Nov. 26, 1825 (3. Bingham, 322); M. T. 1803 (7. Peterdorff, 127); Walker, Jan. 15, 1735 (9455); 3. Erak. 3, 86; 1. Bell, 655; Muir, June 18, 1811 (F. C.); Fraser, Feb. 25, 1813, (F. C.)

Charger's Authorities.—1. Bell, 655; Cochran, Jan. 9, 1702 (10,041); Bairdner, July 27, 1706 (10,043); Johnstone's Trustees, Jan. 19, 1819, (F. C.)

GORDON and SKELTON, W.S.—A. Scott, W.S.—Agents.

J. COOK and H. PAUL, Pursuers.—Jameson—Neaves.
JEFFREY (CUTHILL'S TRUSTEE), Defender.—D. F. HOPE—Greenshields.

No. 88.

Bankrupt—Relief—Trust—Process.—1. Where co-trustees separately, and in different proportions, advanced money to further the affairs of a trust; sold part of the trust property; and took heritable bonds, privatis nominibus, from the purchasers, on which infestment followed; and the estate of one of the trustees was sequestered, an action by the solvent trustees against the trustee under the sequestration, to have it found that the bonds belonged to the trustees, and that they were entitled to be vested in them for the purpose of clearing off the outstanding obligations of the trust, and equalizing the advances of the trustees, sustained. 2. An objection, that the summons did not libel upon a trust-deed, repelled, in respect there was no preliminary objection taken debito tempore, and that the summons founded on the existence of a trust which was more particularly condescended on thereafter.

WILLIAM HARLEY, merchant in Glasgow, became insolvent in the year 1816, and executed trust dispositions and conveyances of all his estate, (which consisted in great part of houses, and ground for building speculations,) with full powers to manage, sell, and borrow money, in favour of Thomas Grahame and others, (a committee of his creditors,) for the purpose of paying, by instalments, a composition agreed to be accepted by the creditors, and reconveying to him the surplus, if any, after satisfying the advances by the trustees, and expenses of the trust. Under these conveyances the trustees were infest, and entered into the management. Before the year 1819 they had paid the composition to the creditors, but had involved themselves in very complicated obligations. In that year, all the trustees, with the exception of Graham, withdrew from

Nov. 29, 1831.
2d Division.
Ld. Mackenzie.
R.

No 38. the trust ; and the pursuer, Cook, along with Cuthill, a writer in Glasgow, M'Gavin, a professional accountant, and one Moffat, came in their place.

Nov. 29, 1831.
Cook, &c. v.

This was effected by a disposition, of date 20th Dec. 1819, by Harley and his trustees, which proceeded on the narrative of the previous conveyances, and that "now seeing that the purposes of the trust created by the foresaid deeds before narrated, have been in part fulfilled, that the said trustees have sold various parts of the said subjects, and applied the proceeds thereof towards payment of the foresaid first, second, and third instalments of the said composition, towards payment also of the sums due to the tradesmen employed under the trust to finish, for sale, the houses on the said lands, and towards the feus due to Blythswood, and paid off the heritable debt due to Miss Fogo's trustees, and that the said Richard Alexander Oswald, John Smith, William Penney, Hugh Gilchrist, and Alexander Broom, being desirous of retiring from the foresaid trust, and of divesting themselves of the various subjects vested in them by the foresaid deeds, in so far as not already done by separate conveyances in favour of purchasers, divested themselves in favour of the disponees after named, for the purposes of winding up the said trust progressively, by making such sales of the said subjects as the same can be accomplished, by borrowing money on the said lands, or otherways, as they shall consider most proper, and that the subjects hereinafter disposed should be vested for the foresaid purposes in the said disponees." They therefore conveyed all the property to the new trustees, "declaring that these presents are granted, and the said subjects disposed, in trust, for the purpose of our said disponees, or their foresaids, selling, feuing, or otherways disposing of the whole of the said property, or such parts thereof as they may think proper, absolutely and irredeemably, either by public roup or private bargain, for such prices as they may think proper to accept of, and that with or without the consent or concurrence of the said William Harley, and for the purpose of borrowing such sums of money as can be obtained on the security of the said lands, and granting heritable bonds and dispositions in security for repayment of the same, and applying the proceeds in payment of the expense and charges incurred, or to be incurred by them in the premises, in payment of all advancees and obligations already come under, or to be come under by them, or any or either of them, in relation to the said properties, or to the affairs of the said William Harley, and to pay over the balance to the said William Harley, or his heirs or disponees." M'Gavin also afterwards withdrew from the trust, and Paul, another accountant, succeeded him in his professional capacity, obtaining a guarantee from the trustees to be relieved from the losses and engagements of the trust. In 1822, Harley's estates were sequestered, and all the trustees had also become bankrupt, (except Cook, Cuthill, and Paul,) and their estates were sequestered. Among other transactions, Cook and Cuthill, with the professional assistance of Paul, sold certain portions of the trust property, taking from the purchasers heritable bonds, two of

which were ex facie in favour of the parties privatis nominibus, and on No. 38.
which they were infest.

Nov. 29, 1831.
Cook, &c. v.
Jeffrey.

During the progress of the trust, advances of money had been made to a great amount both by Cook and Cuthill ; and in January 1830, the proportion of these advances stood thus : Cook had advanced nearly £18,000, and Cuthill upwards of £6826, so that there appeared an excess of advances by Cook, of upwards of £11,000. Paul, who was guaranteed by the trustees, had also, it was alleged, advanced nearly £3000. It was admitted that, under the circumstances, there was no chance of a reversion to Harley ; and it now only remained to extricate the trustees, as far as possible, from their outstanding obligations and advances of money. In February 1826, Cuthill had also become bankrupt, and left Scotland ; and after considerable opposition, Cook obtained a sequestration of his estates, on which the defender Jeffrey was appointed trustee. Cook and Paul (who were now the only solvent trustees) proceeded to take steps to wind up the trust. For this purpose, they raised a summons of adjudication and declarator against Jeffrey, as Cuthill's trustee, subsuming that Cuthill was bound to relieve Cook of one half of the difference between their respective advances, and that both were bound to relieve Paul, and concluding to have it found and declared that the pursuers have the only good and undoubted right to the heritable bonds ; to have Cuthill divested of any title standing in his person with regard to them ; and with a conclusion for adjudication of the subjects. Jeffrey in defence pleaded—

1. That as the securities were granted to the parties therein mentioned privatis nominibus, and not as Harley's trustees, he was entitled to them so far as Cuthill was interested, and could not be affected by the trust ; and 2. That at all events, as Cuthill had made large advances, he was entitled to hold the bonds in relief thereof ; and that accordingly Cook, in the proceedings relative to the sequestration of Cuthill's estate, admitted that the claims which the trustees had against Harley's estate were as individuals, and not as joint trustees.

The Lord Ordinary pronounced this interlocutor : “ Finds no grounds stated on which the pursuers can be found entitled to more than a rateable share in the funds libelled, in proportion to the amount of the money advanced, or debt undertaken by the pursuer, James Cook, on account of the trust-estate libelled, as compared to the money advanced, or debt undertaken for the said estate, by Archibald Cuthill,—and therefore finds, that effect cannot be given to the conclusions of the present action, and dismisses the same, and decerns ; finds no expenses due to either party.”

Cook and Paul reclaimed. The Court ordered cases, in which, besides the above pleas, Jeffrey maintained that the deed 1819, which was alleged to constitute the trust, could not be founded upon, as it was not relevantly set forth in the summons. As to this last matter, Cook and Paul contended that the summons sufficiently averred the trust, the details of which

No. 38. were given in the condescendence, and that no preliminary objection having been taken to the summons, this plea was now incompetent.

Nov. 29, 1831.
Cook, &c. v.
Jeffrey.

LORD JUSTICE CLERK.—I must say I never had a more difficult case to deal with in respect of complex procedure; but having gone through these voluminous pleadings, I have formed an opinion, in which I do not at present at least coincide with the Lord Ordinary. There has been an objection started to the summons, which is said to be defective, in respect that it does not set forth the deed of 1819, which is certainly the connecting link betwixt Cook and Cuthill, and the other trustees of Harley. It appears to me that there is nothing in the objection; for not only is the existence of the trust set forth in the summons, but Cook and Cuthill are expressly stated to have been trustees, and as such “infest in the lands and others thereby disposed in security,” &c.; and the summons goes on to say, “the said Archibald Cuthill is also bound, jointly and severally with the said pursuer, to relieve the other pursuer Henry Paul of the whole amount of the sums still due to the creditors of the trust,” &c. Then, when the summons is brought into Court, there is no preliminary objection taken, but, on the contrary, a condescendence lodged, in which the whole progress of these complicated transactions is fully narrated, and, among other deeds, that of 1819 is specially founded on; and an answer is given in by the other party, at once closing with the pursuers, by referring to this very deed. The objection, therefore, in the first place, comes too late; and, secondly, the summons is completely explained by the condescendence, upon which issue was joined by the defender. Then, upon the merits of the case, after the fullest consideration of all the documents, I can discover no grounds upon which Mr Jeffrey can maintain that Cook and Cuthill were not connected as co-trustees. It is as clear as possible from the terms of the deed of 1819, that they were joined in that capacity. It is of no consequence whatever that certain original objects of that trust had been previously accomplished, or that Harley’s affairs were desperate. The deed distinctly proves, that Cook and Cuthill were linked to the previous trust as co-trustees, joined with Graham, and thereafter Mr Paul lends his professional assistance. It has been said, that the parties came to have transactions individually, and not as co-trustees; and certain averments to that effect, in the process of sequestration, have been alluded to; but these averments were met with unequivocal denials, and I cannot find that Mr Cook is foreclosed by any thing in these pleadings. With the evidence of the documents themselves before us, we are not to be guided by a reference to such averments in a condescendence. It is made out to my satisfaction that, on the one hand, the outstanding engagements, and on the other, the advances made, must all be referred to this joint trusteeship; it is impossible to refuse the claim of relief from these outstanding engagements, and I cannot look upon the documents founded on, as any thing else than documents of debt, to which both parties have equal right. They are co-trustees, and as such, are bound by the common rules of trusts, and if one party have advanced more than another, this must be equalized; the present is a claim of relief, and, independent of their capacity of co-trustees, I think the parties were bound by their mutual agreement so to discharge the obligations.

LORD GLENLEE.—Certainly, some doubts as to the accuracy of this summons suggested themselves to me. It calls itself a summons of declarator and adjudication, and, to be sure, the subsumptions are all well enough; but then we are called upon to find in a way that I had some doubts if we could grant, as the conclusion

seems to be, for complete investiture in these bonds. But there is no objection stated to the summons, and really the question of importance is, as to the respective rights of the parties in these trust-bonds. Cuthill's trustee wants to make out a right to carry off one half of these bonds, and he relies upon their terms, which, ex facie, lend some countenance to his plea. It is plain, however, on considering the whole documents, that his demand is unjust. Cook and Cuthill were so joined, v. Amos, that these advances were in consequence of a commune negotium. The subject must be free first, and then a division equalizing the advances.

LORD CRINGLETIE.—I entirely agree. The Lord Ordinary's interlocutor is just a negation of a commune negotium. The question before us is, whether there was a trust, and such commune negotium in respect to these advances, and I am satisfied that there was. But the case must go back, in order to ascertain how the parties stand upon an accounting.

LORD MEADOWBANK.—I had also some doubts as to the accuracy of this summons, in one of the most complicated cases on the procedure I ever read; but no objection was taken to the summons, and I must say, that my only other difficulties have been removed, and I agree with your Lordships.

THE COURT accordingly pronounced this interlocutor:—“Recall the interlocutor complained of, sustain the present action, and remit to the Lord Ordinary to bear parties as to the amount of the pursuers' advances in regard to the affairs of William Harley, referred to in the summons and pleadings, and to proceed farther thereanent as to his Lordship shall seem just, reserving to both parties all claims for expenses.”

CAMPBELL and MACDOWAL, S. S. C.—J. MOWBRAY and A. HOWDEN, W.S.—Agents.

ALEX. MARJORIBANKS, Suspender.—**D. F. Hope—Miller.**
HELEN AMOS, Charger.—**Skene.**

No. 39.

Bankrupt—Parent and Child—Bastard—Aliment.—1. The aliment of an illegitimate child, born before sequestration of the father's estate, is not affected by the statutory discharge, so far as arising after the date of sequestration. 2. Circumstances in which an aliment of £20 was awarded on account of a child blind and dumb.

THE suspender was the father of an illegitimate child, of which Helen Amos was delivered in January 1826. The child was dumb and blind; and in January 1828, Marjoribanks granted the following obligation to Amos:—“I hereby agree to pay you, for behoof of your son, Thomas Banks, during his life, or so long as he continues deprived of sight, the sum of £20, to be paid on the 27th January of each year,” &c. At that date £40 were stated as due for two years' maintenance of the child. The estates of Marjoribanks were sequestered in March 1828; Amos ranked for the £40 of arrears; and in Nov. 1830, he obtained a discharge under the Bankrupt statute.

In Jan. 1831, Amos raised an action before the Sheriff against him, concluding for payment at the rate of £20 per annum of aliment to the

Nov. 29, 1831.
Cook, &c. v.
Jeffrey.

Marjoribanks
Amos.

1st Division.
Bill-Chamber.
Lords Craigie
and Fullerton.
R.

No. 39. child, from the date of the sequestration. The Sheriff found, "that in the circumstances of the case, the sum of £20 per annum is not excessive Marjoribanks as an alimentary provision for the child in question, particularly as the v. Amos. child is both blind and dumb, and therefore is altogether helpless, and requires a very unusual degree of attendance, and as the aliment does not (as in the ordinary case) cease with childhood, but must continue during youth and manhood, if the child shall survive; and therefore decerned against the defender in terms of the libel: found him liable in expenses," &c.

Amos having extracted the decree, and given a charge, Marjoribanks presented a bill of suspension, pleading, 1. That the claim of an illegitimate child against the father was a debt commencing with the child's birth, and therefore prior in its origin to his sequestration; that debts, though future and contingent, might be ranked under a sequestration; and thus, the whole debt arising from this source might have been ranked for, and if so, it fell within the statutory discharge. 2. That the amount of aliment allowed was excessive.

Amos answered,—1. That the aliment arising posterior to the sequestration was a new debt; it arose *ex jure naturæ*, and could not be extinguished by the statutory discharge. 2. That the amount allowed was not excessive, for the reasons stated in the Sheriff's interlocutor. She farther alleged, that the suspender had recently, by the death of his father, succeeded to a landed estate; but while the fact was admitted, it was stated that the property was fully burdened.

The Lord Ordinary (Fullerton) refused the bill, with expenses. A second bill was offered, which the Lord Ordinary (Craigie) also refused.*

The suspender reclaimed, but the Court unanimously adhered.

LORD BALGRAY.—A claim which arises like this, *ex debito naturali*, and applies only to what accrues after sequestration, cannot be affected by the statutory discharge. And though the obligation was reduced to writing, that does not alter its nature; the primary obligation is left untouched by the sequestration, to the extent I have now mentioned. I think the Sheriff's interlocutor well founded in all its parts.

The other Judges concurred.

Suspender's Authorities.—1. Bell, 643; Ballantyne, Feb. 17, 1814 (F. C.) 54 Geo. III. c. 137. § 61.

Charger's Authority.—1. Erik. 6. 56.

A. CLASON, W. S.—SCOTT AND RYMER, W. S. Agents.

"**NOTE.**—The Sheriff has most properly found, that the aliment claimed by the charger, and vouched by the complainant or suspender's obligation, was not more than was truly due antecedently, *ex jure naturæ*; and to such obligations the bankrupt statutes, which relate to ordinary contracts, cannot be applied."

JOSEPH BECK, Advocate.—D. F. Hope—Gillies.

No. 40.

W. LEARMONT and Co., Respondents.—Shene—Lumsden.

Nov. 30, 1831.
Beck v. Learmonth.

Prescription Triennial.—Where a party had received furnishings in 1823, and again in 1825; and these last were proved to have been paid in 1826; and action was raised against him, in 1828, for the balance of the account-current, Held—That the furnishings in 1825, having been paid, could not form an item in the account between the parties; and, therefore, that the furnishings in 1823 were prescribed.

W. LEARMONT and Co. of London, were in the habit of dealing Nov. 30, 1831.
with Beck, in Dumfries, on whom their traveller called for orders. In 1823, Johnson, then their traveller, got orders in April and August, for goods amounting to £25, 5s. 6d., and in March 1825, Appelbie (who was now the traveller of the house) obtained orders, all of which were executed, amounting to £19, 6s. 6d. The latter sum having been repeatedly demanded from Beck, was paid by him in 1826 to one Fraser, on the part of Learmonth and Co. That Company afterwards, in May 1827, wrote to Beck as follows:—“Sir, as you seem determined not to understand the state of the account sent you, being for goods sent you by orders through Mr J. H. Johnson, as under, and for which we have never received payment. You paid Mr Fraser for goods furnished you by orders through our traveller, Mr Appelbie, £19, 6s. 6d., which is at your credit. We will wait until course of post, giving our attorney, Mr John Wight, final orders to proceed. We are,” &c.

1st Division.
Ld. Corehouse.
D.

In March 1828, when three years had nearly expired from the date of the last article of Appelbie's furnishing, Learmonth and Co. raised an action against Beck, before the Sheriff of Dumfries-shire, for £25, 5s. 6d., as the balance of their account-current. Beck pleaded that this sum applied to specific articles in the account, being the orders given to Johnson in April and August 1823; that these were the last articles in the account, because the later orders to Appelbie had been specially paid and extinguished in 1826, and the account was therefore prescribed; and he farther contended, that the fact of the payment in 1826, went to strengthen the plea of prescription, or presumed payment, as to the previous items.

Learmonth and Co. unsuccessfully attempted to show that the sum of £19, 6s. 6d. was not specially applicable to the furnishings by Appelbie; but they separately pleaded, that, even if these were held to be paid, still as they had at one time formed the concluding items of a general account-current, and as prescription ran from the date of the last item, it was impossible for a debtor, by merely making payment of the last item of an account, which was the only one within the years of prescription, to detach it thereby from the preceding items, and so remove back the terminus a quo, to the next earlier item in that account, and thereby subject the whole of it to the triennial prescription.

No. 40. The Sheriff-substitute "sustained the plea of prescription." On appeal, the Sheriff-depute recalled that interlocutor, and decerned in terms of the libel. Beck brought an advocation, in which the Lord Ordinary, "In respect it is proved, under the hands of the respondents, that the articles furnished by them on the order to Appelbie, in March 1825, were paid by the advocator, recalled the interlocutor of the 16th March, 1830, remitted, with instructions, to the Sheriff-depute to return to the interlocutor of the Sheriff-substitute of the 10th November, 1829, and decerned; found the respondents liable in expenses," &c.

Nov. 30, 1831.
Beck v. Learmonth.

Learmonth and Co. reclaimed, but the Court unanimously adhered.

LORD BALGRAY.—As the last articles were specially paid and satisfied, they must be struck out of the account. The last item in the account, therefore, is the one immediately preceding those which had been specially paid. As more than three years from that date had expired prior to the execution of the summons, in March 1828, the plea of prescription applies.

LORD CRAIGIE.—I think that, from the state of the account, the plea of prescription applies to it, and therefore, though my private impression may be different, I must give effect to the legal presumption of payment which thence arises.

LORD GILLIES.—The question seems to me to be a very short one. The account is one that suffers the triennial prescription. This prescription runs from the date of the last item in the account. What is the last item here? That in 1825 is proved to have been specially paid, and it no longer remains in the account. It is a mere fallacy to maintain, that though paid and extinguished, it is still the last article of any account. Laying it aside, therefore, the last item is in 1823, and the triennial prescription has run. Indeed, it would be highly dangerous to admit the doctrine contended for by Learmonth and Co. Suppose that a customer, after dealing for some time on credit, changes to dealings in ready money with the same merchant. He must take care of his situation, for though he goes on with ready-money payments for ten years together, every new transaction of this sort, if not three years distant from the previous one, would then keep open the old account which arose while he had dealt on credit, and he might suddenly be called on for payment of it, as unprescribed, after he had lost his vouchers, in the confidence that it was unnecessary to preserve them. I am clearly of opinion that the interlocutor of the Lord Ordinary is well founded.

LORD PRESIDENT.—I concur.

Respondents' Authority.—3 Erak. 7, 17.

R. WELSH, S.S.C.—J. WIGHT, W.S.—Agents.

JAMES MUIR, Advocate.—*More—Monteith.*
JOHN and THOMAS BRAIDWOOD, Respondents.—*Jameson—A. Wood.*

No. 41.

Nov. 30, 1831.
Muir v. Braid-

Process—Bill of Exchange.—A pursuer having libelled on a bill as “drawn by him,” but admitted on the record that the drawer’s name was not written by him, and stated, that “it was filled up by the writer of the bill at the same time with writing it, and was so filled up when delivered to the pursuer by the acceptor”—action dismissed, reserving to bring an action on the bill in a competent shape.

MUIR raised action before the Sheriff of Lanarkshire, for £200, as contained in a bill which he libelled to have been “drawn by him upon, and accepted by John Braidwood.” The defenders (the representatives of Lord Newton. D. Braidwood,) pleaded, *inter alia*, that the bill was forged. In making up a record, Muir stated “that the drawer’s name is not written by himself. It was filled up by the writer of the bill at the same time with writing it, and was so filled up when delivered to the pursuer by the acceptor.” The Sheriff, on the authority of the case of Jackson,¹ “dismissed the action, and assailed the defenders with expenses.” Afterwards, on considering a reclaiming petition, he found “that it is set forth in the libel, that the bill sued on was drawn by the pursuer; that, in the answers to the defender’s condescendence, it is said, ‘The pursuer admits that the drawer’s name is not written by himself, and was filled up by the writer of the bill; that it is not averred that the signature of the pursuer was exhibited per his procuration, or even that he saw or authorized the exhibiting of his signature by a person whom he does not even name; that, on the contrary, the libel sets forth that the bill was drawn by the pursuer himself; therefore found, that action cannot be sustained on a bill so signed and so libelled, and adhered,’ &c.

Muir brought an advocation, in which he did not object to the record of facts as made up in the Inferior Court.

The Lord Ordinary “having seen the summons in the case of Jackson, referred to by the Sheriff—repelled the reasons of advocation, remitted simpliciter, &c., found the advocate liable in expenses,”* &c.

Muir reclaimed.

LORD BALGRAY.—There is nothing before us but a bill drawn by a James Muir on a John Braidwood. The pursuer admits that he did not, himself, draw the bill. How does it appear that there may not have been some other James Muir, who drew it? The advocate libels that he drew the bill, and in the record he admits

¹ Dec. 9, 1825, ante IV. 214.

* “Note.—The Lord Ordinary has decided the case on the authority of the decision of the Court in that of Jackson. It does not appear to him that there is any such difference in the circumstances of the two, as to justify a different judgment, and that the Sheriff was warranted in dismissing the action.”

No. 41. that he did not draw it. The Lord Ordinary and the Sheriff have disposed of this case rightly, by dismissing the action.

Nov. 30, 1831.

Muir v. Braide-wood. *More, for Advocate.*—The Sheriff not only dismissed, but assailed; he should only have dismissed the action, reserving our right to pursue in a more competent form.

Laird v. Mid-leton.

LORD PRESIDENT.—The interlocutor of the Sheriff is right, so far as it dismisses the action, but it may be proper to insert the reservation now craved. It is impossible to support this libel as it is drawn, by pleading that the bill was signed by procuration, in virtue of Muir having adopted the signature. For, in a proper signature by procuration, the procurator signs his own name, and not that of his principal; adding, at the same time, the notice that he acts per procuration. Nothing of that kind occurs here.

LORDS CRAIGIE and **GILLIES** approved of the judgment under review, to the effect of its dismissing the present action.

THE COURT then “adhered, &c. reserving to the pursuer to bring his action on the bill in a competent shape, and to the defenders all objections thereto, as accords; of new, found expenses due,” &c.

W. A. G. and R. ELLIS, W.S.—A. FLEMING, W.S.—Agents.

No. 42.

ALEXANDER LAIRD, Suspender.—Russell.
WILLIAM MIDDLETON, Charger.—Cunningham.

Process—Suspension—A. S. 11th July, 1828, § 7.—The Lord Ordinary on the Bills, in refusing a bill of suspension of a charge on a decree by an inferior judge proceeding on a proof, ought to specify in his interlocutor the facts material to the case, which he found to be established by the proof, and otherwise observe the A. S. 11th July, 1828, § 7.

Dec. 2, 1831.

1st DIVISION.
Bill-Chamber.
Lord Craigie.
D.

LAIRD offered a bill of suspension of a charge on a decree by the Water Bailie of Glasgow, which proceeded on a proof. The Lord Ordinary “refused the bill, found expenses due, &c.,” and explained his views of the case in a note. Laird reclaimed, and pleaded that by A. S., 11th July, 1828, § 7, it was imperative on the Lord Ordinary, on refusing the bill, “to specify distinctly in his interlocutor the several facts material to the case, which he found to be established by the proof;” and otherwise to comply with the provisions of that section.

To this it was answered, that the Lord Ordinary’s note explained on what grounds his judgment was rested. Besides, as the Lord Ordinary had simply refused the bill, this was in effect an adoption of the interlocutor of the inferior judge, in which there was a sufficient specification of the facts found proved.

LORD PRESIDENT.—What is stated by the Lord Ordinary in his note, forms no part of his interlocutor. But the act of sederunt is quite express, and we cannot, therefore, look to the note to supply what is wanting in the interlocutor. With regard to the other argument, that the refusal of this bill of suspension is an unqua-

lified adoption of any interlocutor by the Sheriff, I would observe that the refusal merely shows the Lord Ordinary to be of opinion that the decree of the inferior judge was well founded. It may be, that the Lord Ordinary arrives at the same conclusion with the inferior judge, but on different premises; he may conceive that certain part of the facts found proved by the inferior judge, are immaterial to the case, and may still refuse a bill of suspension, because other facts appear to him to be sufficient of themselves to support the judgment. Unless, therefore, the Lord Ordinary, in his own interlocutor, had explicitly adopted a special interlocutor of the inferior judge, which was framed, in compliance with the requisites of the Act of Sederunt, we could not listen to this argument. This is not done, and we must recall the interlocutor, and remit to the Lord Ordinary on the bills, to dispose of the cause in terms of the Act of Sederunt.

The other Judges assented.

THE COURT accordingly pronounced this interlocutor:—"Recall the interlocutor reclaimed against, in hoc statu, and remit to the Lord Ordinary on the Bills, to advise the bill, answers, and proceedings, taking into his consideration the provisions contained in the 7th section of A. S., July 11, 1828."

J. NAIRN S. S.C.—W. WADDELL, W.S.—Agents.

JAMES SIM, Pursuer.—D. F. Hope—Sandford.
CHARLES CLARK, Defender.—Keay—A. Murray.

No. 42.

Dec. 2, 1831.
Laird v. Mid-

Sim v. Clark.

Reparation—Agent and Client—Notary.—1. Circumstances in which the Court found an agent liable for the amount of a sum lent, in consequence of the unusual and defective form of a security. 2. Question, whether a law-agent, who, as seller, disposed land, and was employed by the donees to act as notary to the instrument, was qualified to do so.

SIM raised an action against Kidd and five others, as a committee of management of the Associate Burgher Congregation in Cupar-Angus, and also against Clark, a writer there. He libelled, that, in 1811, the committee "entered into a minute of sale with Charles Clark of Prince-lands, writer in Cupar-Angus, by which they feued from him a small piece of ground in that village, for the purpose of erecting a chapel or meeting-house on it: that during the year 1815, and before the chapel or meeting-house was finished, but after the work was considerably advanced, the pursuer was applied to by the said committee of management to advance a sum of money to them in loan, to enable them to complete the said chapel or meeting-house: that the pursuer having agreed to lend them the sum of £200 for this purpose, the parties waited on the said Charles Clark, and requested him, in his character of agent, to get the necessary deeds completed: that at this time, the said Charles Clark had not granted to the said society or committee of management any feudal title to the said piece of ground,—they having hitherto possessed it only in virtue of the said minute of sale: that the said Charles Clark,

No. 43.

Dec. 2, 1831.
1st Division.
Lord Newton.
D.

No. 43. having accepted the said employment, was bound to have prepared regular deeds in favour of the said committee, for the purpose of feudally vesting in them, for their own behoof, and that of the congregation at large, the said subjects ; and should thereafter have caused them to execute a regular bond, with all the necessary clauses in favour of the pursuer, in order that he might have had not only the personal security of the committee of management and congregation at large, but also the ground and the meeting-house or chapel erected thereon, in real security to him for the money which he advanced : that in place of doing so, however, the said Charles Clark executed a deed, purporting to be a feu-disposition by him in favour of the said Thomas Kidd, James Morris, John Reid, James M'Leod, Henry Simpson, and James Kidd, ‘as a committee of management elected by the Associate Burgher congregation of Cupar-Angus, and to any succeeding committee of management to be elected by said congregation,’ whereby he conveyed to them the said piece of ground : that this feu-disposition is subscribed by the said Charles Clark alone, while it contains the following clause :—‘and as we have been accommodated by James Sim, farmer at Whiteley, with the sum of two hundred pounds sterling, to enable us to build the said church, it is hereby declared, that after the feu-duty payable for said ground, which is declared a prior and preferable burden, the said sum, and the legal interest from the date hereof, and which shall be payable to the said James Sim, his heirs and assignees, (but the principal sum of which cannot be demanded till two years from this date,) shall also remain a real burden affecting the said subjects, and as such is appointed to be engrossed in the infestment to follow hereupon :’ that this deed contains no personal obligation on any one for the repayment of the £200, and annual-rents ; whereas, to secure the pursuer against loss or damage, a regular bond ought to have been granted by the committee of management, binding themselves, not only personally, but as authorized by the congregation, binding the whole members ;”—“that the said Charles Clark did farther infest the said committee, and officiated himself as notary, although he was the grantor of the deed ;”—that the whole congregation had deserted the church ; that the principal sum and considerable arrears of interest were now due ; that the pursuer had vainly required payment of his loan from the committee, or the members of the congregation ;—“that it has been thus through the culpable negligence or ignorance of the said Charles Clark in not preparing proper deeds, containing personal obligations on the committee of management, and as the representatives of the congregation at large, binding the whole members thereof for the payment of said loan and interest, and conveying to the pursuer, by a valid deed or deeds containing all the usual and necessary clauses, the piece of ground and chapel or meeting-house themselves in security, that the loss and damage to the pursuer has arisen, and the said Charles Clark is thereby, in the event of the pursuer not making good his claim from the said committee of management, in

Dec. 2, 1831.
Sim v. Clark.

regard of their non-liability or inability, liable and bound to indemnify No. 43.
the pursuer for such loss and damage."

He therefore concluded against the committee for repayment of his loan, with interest, since 1820; and, in case of failure to recover from them, then against Clark, both for these sums, and such expenses as he had or should incur in endeavouring to make his claim effectual against the committee.

Dec. 2, 1831.
Sim v. Clark.

Clark denied that he had acted as agent for Sim, and alleged that he was employed by the committee alone; that they had arranged with Sim for the loan of £200, and informed the defender that if he made such loan a real burden on the disposition granted in their favour, Sim would be satisfied therewith, and this arrangement would save expense to the committee; that he had made the loan a burden on the disposition; that after the disposition had been delivered to the committee, they employed him to act as notary; and that he accordingly took infestment in favour of the committee. He therefore pleaded, 1. that, under these circumstances, he was not liable for the sums libelled; and, 2. that there was no objection to his acting as notary in giving infestment.

A proof was allowed, Sim having undertaken to prove that Clark was fully instructed to procure deeds securing the personal responsibility of the congregation, as well as the real burden. Two witnesses, who were members of the committee, deponed severally that Sim, "in lending the money, insisted upon a bond over the property in addition to the personal responsibility of the members, and this was agreed to be given to him;" "that the deponent was present in the house of David Ritchie, vintner in Cupar-Angus, when Sim paid down the money, and the papers were laid down by Clark; that he does not recollect the exact words used by Sim at the time, but they were to this import,—that he hoped Clark would, or rather had, taken care that all the papers were right, as he had no other agent in the business; that there was no other agent present at the time, and the deponent is not aware of any other agent having been consulted."

The Lord Ordinary "sustained the defences, and assailed the defendant, Charles Clark," with expenses.

Sim reclaimed.

LORD BALGRAY.—This agent should have put Sim in possession of an heritable security, executed according to the ordinary course of practice, and conferring on the lender of the money the usual facilities for its recovery. He has not done this, but, on the contrary, has produced a very odd species of deed. It purports to be a feu-disposition, executed and signed by himself alone. He advances no money; it is another person, Sim, who does so; and he introduces a statement as if on the part of the donees, beginning, "as we have been accommodated by James Sim with the sum of two hundred pounds sterling." The same clause then proceeds to say, "which sum shall be payable to James Sim, his heirs," &c. I should like to ask, payable by whom? There is nothing but the church bound to pay it by the

No. 43.

Dec. 2, 1831.
Sim v. Clark.

deed. The agent should have explained to the parties, that, however much they wished to save expense in framing deeds, it was essential for the facility and security of a lender to have a personal obligation, as well as heritable security; and without explicit instructions, he should not have deviated so far from the course of practice as to leave the lender destitute of any personal obligants. I see no evidence that Sim was to be satisfied with a security so defective as this, which leaves him, if he has any individual personally bound to him, to seek them out, and prove the obligation by a proof led aliunde of the deed. It is quite possible that the motive of all parties might have been economy, and that this was the cause why such a deed was executed. But although this is a favourable circumstance for the agent, he has executed a deed which is professionally so much blundered, that he has incurred personal responsibility to Sim. I am therefore for altering the interlocutor.

LORD CRAIGIE.—I concur. A professional man who is instructed, by a lender of money, to execute the necessary deeds for his interest, is not to be deterred by the expense from framing the requisite deeds, and giving an effective security. Even if the lender and the borrowers expressed an earnest desire that as much economy as possible should be observed in framing the security, it was the duty of the agent to explain, especially to Sim, a rustic, what deeds were necessary in order to confer upon him the usual facility and security possessed by a lender of money under an heritable bond. When I look to the whole proceedings in this case, I see so much looseness and blundering on the part of the agent, resulting in the injury of Sim, that I would alter the interlocutor, and subject Clark as personally responsible.

LORD GILLIES.—I take a very different view from either of the Judges who have spoken. The question arises in a penal action against this agent Clark; and it is, whether such prejudice has arisen to Sim, from Clark's negligence of duty or ignorance of business, as will justify us in subjecting Clark in damages. This is a question which we cannot decide against him upon vague or general views; there must be clear and explicit grounds to rest upon. Now, what are the grounds in this case? Sim agreed with the committee to lend them £200; this was a transaction between themselves, to which Clark was no party. He appears to me to have been merely told that such a loan having been agreed on, the lender desired that it might be made a real burden upon the committee's infestment in the disposition which Clark was about to grant in their favour. Clark accordingly did grant an heritable right to the committee, burdened with a sum of £200, and they were infest under such burden. The sasine is perfectly valid; so far, then, Clark did what he was employed to do, and I think he was not employed to do more. The personal obligation of the committee could be so easily obtained by their granting a bill, or bond, or letter to Sim, that he might very well do what he appears to have done, by concurring in an economical arrangement, profitable solely to the committee, and applying to Clark to lay a real burden on the infestment in their favour, while he dispensed with the preparation of any formal personal bond. The preparation of such a deed would have been a source of professional emolument to Clark, to which he could have had no objections, if his instructions warranted its execution. But it is said he was bound to have suggested to Sim the expediency of such a bond, and that he is personally liable for not having prepared it. Under the circumstances, I do not think so; but even if it were so, what is the injury to Sim from the want of it? Are not the committee personally liable to Sim for this loan, as much as if they had granted a bond? They, as disponees, accept a dispo-

sition and infestation, which narrates the loan to them, and declares it a real burden on the property disposed; they enter into possession of the church which was built with the loan; they occupy it for fourteen years; and they don't dispute the advance of the money. It cannot, therefore, be doubted that they are personally liable to repay Sim; and if they could have paid him under a charge of horning on a registered bond, they will equally do so under the decree recovered by Sim in this action. Thus Sim has his real security, and he has the personal security of those parties, who are as much bound as if they had granted a bond. I therefore conceive that this agent, who appears to have done his duty faithfully and honestly, and to have been laudably desirous to waive his own personal profit, is not liable in damages to Sim. The utmost which could have been required of him, was to make a real security, and to have taken the bond or obligatory letter of the committee besides. The real security exists, and Sim has all these parties personally liable to him also. I therefore concur in the interlocutor of the Lord Ordinary.

LORD PRESIDENT.—At first my opinion was the same with that expressed by Lord Gillies, but, on looking at the evidence of Simpeon and Kidd, my views were changed. They severally depone, that when Sim advanced the money, he said to Clark, “that he hoped Clark would, or rather had taken care that all the papers were right, as he had no other agent in the business.” From that instant, Clark was the agent of Sim the lender, and incurred the responsibility of acting in that character. Had he meant to repudiate this, he should have immediately informed Sim that he could not act as his agent, and then Sim could have obtained another. But Clark did nothing of this kind, and being liable to Sim as his employer, I think there was so great a deviation from the course of practice, and so gross a blunder committed to the prejudice of Sim, that Clark is personally responsible. It is true, that the mere obligatory letter of this committee might not have been better for Sim than what he has at present; but a registrable bond, or a bill, would have given him access to summary diligence, which could have been enforced as soon as there was an appearance of the breaking up of the congregation, and at a time when the committee could have more easily made good their relief against the congregation. I concur, therefore, with the majority of the Court, and would alter the interlocutor of the Lord Ordinary.

THE COURT then “altered, &c., repelled the defences for Charles Clark, and decerned against him conform to the conclusions of the summons, but found that he is entitled, on payment to the pursuer, to an assignation of the debt, so that he may operate his relief as accords; found the defender liable in expenses,” &c.

A. SHEPHERD, W.S.—J. FERGUSON, W.S.—Agents.

KENNETH M'KENZIE, Pursuer.—Keay—Maitland.
JAMES REID and RODERICK NICOLSON, Defenders.—Sol.-Gen. Cockburn
 —Cuninghame.

No. 44.

Process—Reparation.—1. Where a pursuer libelled that two defenders had conceived groundless malice against him, and taken every opportunity of defaming him; and (after stating certain procedure by both defenders jointly) subsumed that they, or either of them, had been in the constant practice of defaming him to ruin him,

No. 43.
 Dec. 2, 1831.
 Sim v. Clark.
 M'Kenzie v.
 Reid, &c.

No. 44. and, in particular, that each of them had done several separate acts specially libelled, in furtherance of their design; and concluded for a sum of damages against each of them severally, or against both, conjunctly and severally—Held a competent form of libel. 2. Case where falsehood, malice, and injury being averred—Held not necessary to libel the want of probable cause.

Dec. 2, 1831. M'KENZIE, Comptroller of the Customs at Stornoway, raised a summons of damages against Reid and Nicolson, shipowners there. He submitted that they “having conceived a most groundless malice, hatred,

D.

and ill-will against the pursuer, have taken every opportunity of defaming, vilifying, and traducing his character, both as a private individual, and in his official capacity; and have attempted to ruin him in the eyes of his friends, the public, and the Honourable Commissioners of our Customs; and to blast his credit and future prospects in life; and, in particular, the defenders, on the 24th day of September last, or some other time during that month, or of the month of August preceding, or of October following, prepared, or caused to be prepared, copied over, or caused to be copied over, and exhibited to a number of individuals, at different times and places, and transmitted to and laid before, or caused to be transmitted to and laid before, the said Commissioners of our Customs, in whom the power of appointing persons to hold offices or situations connected with the customs, and of promoting or removing them therefrom, is vested, a petition, memorial, or other paper, purporting to be in their names, and which is signed by both, or one or other of them, and pretending to enumerate various causes of complaint against the pursuer and others, containing a variety of mistakements, insinuations, and misrepresentations of the pursuer's official conduct, calculated and intended to prejudice the Honourable Commissioners, and all others to whose knowledge it came, against the pursuer.”

He then set forth that the allegations in the petition (which chiefly related to the seizure of a fishing smack belonging to Reid and Nicolson, and the maltreatment of her crew) were false, malicious, and injurious; “that the defenders not only forwarded the said petition to the said Honourable Board, but they both, and each or either of them, in furtherance of their design to ruin the pursuer, and get him dismissed from our service, gave publicity thereto, and to the different statements therein at different times and places, all with the foresaid malignant intention. In particular, the defenders, or either of them, gave a perusal of the said petition, or of a copy thereof, to Mr John M'Donald,” &c.; farther, “that the said James Reid, and Roderick Nicolson, or either of them, have also been in the constant practice, and have taken every opportunity, both public and private, of vilifying and traducing the pursuer's character, to different persons, at sundry times and places, with the malignant intention of ruining him in their estimation, and of destroying his reputation and credit. In particular, at a party in the house of the said Roderick Nicolson,” &c.

The pursuer then stated several occasions on which Reid had spoken of

him falsely and calumniously, and specified several instances in which Ni- No. 44.
 colson had also done so:—After which he proceeded, “that the said James Dec. 2, 1831.
 Reid and Roderick Nicolson have also, at sundry other times and places, and M’Kenzie v.
 before a great variety of individuals, defamed, vilified, traduced, and in- Reid, &c.
 jured the pursuer in his character and reputation, all as will be more parti-
 cularly condescended upon in the course of the process to follow hereon.
 By all which conduct and proceedings, and false and malicious statements,
 the pursuer has suffered great loss, injury, and damage, and his feelings
 and peace of mind have been injured, a stigma has been cast on his char-
 acter and name, and an attempt has been made to deprive him of his
 means of living, by false accusations against him, to the Honourable Board
 of Customs, with the view of inducing that Honourable Body to dismiss
 him from our service, and stopping his promotion therein; for all which,
 and the consequences thereof, the said James Reid and Roderick Nicol-
 son are liable to the pursuer in reparation and damages, in manner after
 mentioned.” He then concluded: “Therefore, the said James Reid and
 Roderick Nicolson, defenders, ought and should be decerned and ordain-
 ed, by decree of the Lords of our Council and Session, either severally
 to make payment to the pursuer of the sum of £2000 sterling each, or
 conjunctly and severally, of the sum of £4000 sterling, or such other sum,
 more or less, severally, or conjunctly and severally, as our said Lords
 shall find due to the pursuer, as a solatium, and in name of damages,
 for the injuries before detailed.”

Reid and Nicolson pleaded, 1. that, as the libel began with a complaint against them jointly, and proceeded afterwards to set forth certain grounds of complaint against each of them separately, it was incompetent; that, in so far as the claim of reparation was rested on allegations relating to Reid alone, no liability could attach to Nicolson, and, consequently, it was incompetent to include him under the same summons; and vice versa.

2. That as the petition libelled on complained of injurious official treatment received from the pursuer in the ordinary course of their business, and as this complaint was addressed to the pursuer’s superiors in office, it was necessary to libel not only falsehood and malice, but also the want of probable cause. This latter averment having been omitted, the summons was irrelevant. In support of this plea, they particularly founded on the case of Leven,¹ as decided in the House of Lords.

M’Kenzie answered—

1. That though the libel did not, in words, charge a conspiracy, yet it set forth a series of joint proceedings by the defenders, with a common purpose to injure the pursuer; and after narrating these, it proceeded to libel separate acts done by each of them, in furtherance of the same design. This was competent in support of the prior part of the libel. But even if this were held to make a separate civil claim of reparation against each, it was competent to include more debtors than one under the same

No. 44. summons. The conclusion was for a sum of damages against both conjunctly, or against each of them severally, and this was in perfect conformity with the subsumption in the libel. There were numerous cases where similar libels had been sustained.

Dec. 2, 1831.
M'Kenzie v.
Reid, &c.

2. That as falsehood, malice, and injury were libelled, there was no necessity, by the law of Scotland, to libel the want of probable cause, even were this a case of privilege, which it was not.

The Lord Ordinary ordered cases, on considering which, he repelled the defences to the form and relevancy of the action.*

The defenders reclaimed.

LORD PRESIDENT.—I think there was no occasion to libel the want of probable cause in order to make this libel relevant. Let the defenders prove probable cause if they can, but how could the pursuer prove the want of it? How is a negative to be proved? The defenders are bound to prove the affirmative if they can. I concur with the Lord Ordinary.

LORD GILLIES.—I think the libel relevantly laid. In regard to the opinion of Lord Eldon referred to, even if I were satisfied that his Lordship had meant to state, in another case similar to this, that the want of probable cause must be libelled, I should hesitate to adopt implicitly such a view. I do not conceive that the dictum of a single judge, however eminent, can be allowed to have the effect of changing the established law of this kingdom.

LORDS CRAIGIE and BALGRAY concurred.

THE COURT accordingly adhered.

Pursuer's Authorities.—(1.) Hamilton, Aug. 10, 1771; Leven, July 8, 1822; 1 Shaw, App. Ca. 179; Gilfillan v. Ure (not rep.); Robertson, 4 Murray, 509. 516. 523. 536; Armstrong,

* “**Note.**—The Lord Ordinary is disposed to repel both the defences to which the Cases relate, being satisfied, on considering the cases and authorities referred to by the pursuer, that, where a summons charges two or more defenders jointly with having conceived malice against, and a design to injure the pursuer by defaming his character, and states certain joint acts as done with this view, it is not incompetent, by the law and practice of Scotland, to charge further acts of defamation, though done separately, more especially where the summons concludes alternatively for a joint or for a several liability.

“ He sees also no sufficient reason to think it essential to libel want of probable cause, even in actions for injury done in the course of judicial proceedings; for whatever may be the law of England in such matters, it has not been the practice in this country; and various actions of this nature, where the libel contained no such allegation, have been allowed to proceed without objections on this ground, though otherwise most keenly litigated, and where the defence was conducted by counsel of the first ability.

“ But he has ordered the cause to the roll, that the defenders may say, before an interlocutor is pronounced, whether they are to acquiesce or not. He would not have considered it sufficient to obviate the first peremptory defence, that the pursuer charges not only the sending the memorial to the Commissioners of the Customs, but the communicating it to other persons, at Stornoway; for he understood the defence to apply merely to the first, and as intended to preclude it alone as relevant ground of damage.”

3 Murray, 315.; 4 Erak. I. 65.; Act of Sederunt, Nov. 2, 1695. (2.) Swinton, 2 Sh. App. No. 44.
 Ca. 245; Keddie, 3 Murray, 38; Aitken, 3 Murray, 227; Gilchrist, 3 Murray, 363; War-
 rand, Nov. 19, 1771 (Hailes Rep. 446); Hamilton, 4 Murray, 222 and 571; Watt, 4 Mur-
 ray, 416; Hosie, Jan. 11, 1828, 4 Murray, 416.

Defenders' Authorities.—(1.) 4 Erak. I. 65.; Gray, 1741 (11986.) (2.) 2 Selwyn, 938;
 Gibson, 3 Murray, 258.

Dec. 2, 1831.
 M'Kensie v.
 Reid, &c.

Orr, &c. v.
 Vallance, &c.

R. M'KENSIE, W.S.—J. ADAM, W.S.—Agents.

WILLIAM ORR and Others, Complainers.—*Murray—Ivory.*
 ARCHIBALD VALLANCE, and Others, Respondents.—*D. F. Hope—*
Anderson.

No. 45.

Process—Burgh Royal—One of the bailies of a royal burgh, elected at the Michaelmas annual election, having a few months thereafter left the burgh, and (as was alleged) gone abroad; and the Town-council assuming the office to have thereby become vacant, having gone through the form of electing another in his place—Held, that a bill of suspension and interdict, presented by a minority of the council, against such party's acting as bailie, was incompetent; and that the proceeding could only be by them challenged in the form of petition and complaint, or reduction; but observed that such bill would have been competent, if presented by the original bailie himself.

AT the election of magistrates for the burgh of Lauder, at Michaelmas Dec. 2, 1831.
 1830, a person named Dods was chosen first bailie. Some months there-
 after Dods left Lauder, and, as was alleged, went to America, with the intention of settling there, but there was no direct evidence as to this, nor had he tendered any resignation of his office. The Council of Lauder, (which, in the absence of the first bailie, consisted of sixteen members,) was equally divided on politics, but the casting-vote of the remaining bailie gave the preponderance to the party to which he had attached himself. The opposite party, consisting of the complainers, Orr, &c., at a time when they supposed one of their opponents to be absent from Scotland, so as to leave them the majority, resolved to have the place of first bailie filled up by one of their friends, and for that purpose had a meeting of council called in June last. The meeting was held accordingly, but on observing the counsellor, on whose absence they had calculated, appearing in his place, Orr, &c., protested against any election being made, on the ground, *inter alia*, that there was no vacancy. The other party, however, taking advantage of these proceedings on the part of their opponents, in order to establish more firmly their own majority, insisted on carrying through the election, chose Vallance, who was in the same interest with them, and recorded their proceedings regularly in the minutes of council. On this Orr and the rest of his party, with exception of one counsellor, presented a bill of suspension and interdict against Vallance, and the several members of council who had voted for him, to have him prohibited from exercising any of the duties of bailie, or member of the council.

2d DIVISION.
 Bill-Chamber.
 Ld. Fullerton.

No. 45. Lord Moncreiff granted interim interdict, while he ordered the bill to be answered; but Lord Fullerton, on advising the answers, recalled the interdict, and reported the bill and answers to the Court.

Dec. 2, 1831.
Orr, &c. v.
Vallance, &c.

Besides various pleas, which it is unnecessary to notice, an objection was taken by Vallance, &c., to the competency of the bill, that no election of magistrates of a burgh can be challenged, otherwise than by a petition and complaint under the statute, or a regular action of reduction; and that although the present bill was in point of form for prohibiting Vallance from exercising the duties of bailie, it in reality raised the question of the validity of his election, and so was an evasion of the rule of law regarding the mode of challenging all elections, whether at Michaelmas, or intermediate periods.

To this it was answered—

Where an election is competent to be made, its validity, no doubt, can only be challenged by petition and complaint under the statute, or by reduction; but where the question is, whether there was any competency in having an election at all, the rule does not apply. Here there was no vacancy to fill up, and no office to which to elect. The proceedings of the Town Council cannot be considered as an election within the meaning of the rule. It was merely an illegal and unauthorized intrusion of an individual into an office not vacant, and it is as competent to apply for an interdict against his acting, as if he had intruded himself violently, or been placed in the office by the council, without the formality of entering their proceedings in their minutes, which step cannot convert an illegal intrusion of a party to an office not vacant, into an election within the meaning of the rule. To succeed in interdicting Vallance, it is not necessary to reduce or set aside in any way the proceedings of the council, which can confer no right, seeing there was no office into which they could elect him, and a complaint or a reduction can only be required when the proceedings must be set aside in order to succeed. If Dods had himself presented this bill for interdicting Vallance from intruding into his office, it is not disputed, on the other side, that such an application would have been competent; but although the difference of parties may give rise to a question of title, it can never affect the question as to the form by which it is competent to make this challenge; for the superior interest or title of Dods could not authorize him to proceed by a mode, if in itself illegal and incompetent.

LORD JUSTICE CLERK.—I have a very clear opinion that this application is incompetent. I apprehend that there is no point more thoroughly fixed, than that there is no process for reviewing proceedings of town councils filling up vacancies real or supposed, other than petition and complaint, or reduction. Then what is the nature of this? It is in form, no doubt, a complaint against the actions of this person Vallance as chief magistrate; but what is put in issue is the merits of the election by the town council, and we have the regular minutes of election as an appendix to the bill. If we could sustain such applications under the miserably

cover that they are only against the actings of the man, there would be no case in which the same sort of argument might not be used to sanction a bill of this kind instead of a complaint or reduction, in which it is a fundamental principle that the council one and all must be called. I can listen to no such flimsy pretext; and it is not necessary to enter into the question whether all the parties are called, for on the incompetency alone I think the bill must be refused.

Dec. 2, 1831.
Orr, &c. v.

Hume, &c.
Valance, &c.

Hume v. Stewart.

LORD GLENLEE—I am of the same opinion. If Dods had applied, it would have been a different case; but the complainers have no title in them, and we must first of all enter into consideration of the merits of the election, which is incompetent in the present shape.

Ross v. Millar,
&c.

LORD CRINGLETIE.—I entertain the same idea. A bill of suspension would do against a party having no title or election at all; but here there is a formal election, which must be complained of by complaint or reduction.

LORD MEADOWBANK.—I agree. In the case of Dods applying, there would be no need to enquire into the merits of the election, and so a bill by him would have been competent.

THE COURT accordingly refused the bill as incompetent, with expenses.

J. KENNEDY, W.S.—GIBSON-CRAIGS, WARDLAW, AND DALMIEL, W.S.—Agents.

JAMES HUME, Suspender.—*Milne.*
JAMES STEWART, Charger.—*Monteith.*

No. 46.

BILL of suspension by Hume, an apprentice, of a charge by Stewart, Dec. 2, 1831. his master, for alleged breach of indenture. The Lord Ordinary passed the bill, but on caution only. Hume reclaimed; but the Court refusing to pass without caution, he offered juratory caution, on which the bill was passed accordingly.

2d Division.
Bill-Chamber.
Lord Glenlee
F.

GREG and MORROW, W.S.—J. HENDERSON, S.S.C.—Agents.

— Ross, Suspender.—*Robertson—M'Neill.*
MILLAR and BAIRD, Chargers.—*Neaves.*

No. 47.

Bill of Exchange—Forgery—Process.—1. Bill of suspension of a charge on a bill of exchange alleged to be forged, passed without caution on an inspection by the Court of the bill charged on, along with documents not denied to be genuine. 2. A reclaiming note against an interlocutor refusing a bill of suspension allowed to be received, though the diligence had been previously executed, in respect of an arrangement by the parties.

Ross having been charged by Millar and Baird on a bill of exchange Dec. 2, 1831. purporting to be accepted by him, presented, during vacation, a bill of suspension without caution, alleging the signature of his name to be a forgery. Not having produced genuine signatures to be therewith compared, his bill of suspension was refused. He was thereafter incarcerated under the

2d Division.
Bill-Chamber.
Lord Cringletie.

No. 47. diligence, before the arrival of the box-day enabled him to present a reclaiming note against the interlocutor refusing the bill. He then, besides Dec. 2, 1831.
Ross v. Millar, &c. the reclaiming note, presented a bill of suspension and liberation, under which he was liberated, on an arrangement that the merits should be discussed under the reclaiming note. On the note being put out for advising, it was objected to as incompetent, in respect the diligence had been carried into execution before it was presented; but this objection the Court repelled, in respect of the arrangement above mentioned, and Ross, having now produced a variety of documents signed by him, and which were not alleged by the chargers not to be genuine, and the Court, on an inspection of these, and comparison of them with the bill charged on, being satisfied that the latter was a forgery, passed the bill without caution or consignation, the suspenders not insisting to answer after the opinions given by the Court.

LORD CRINGLETIE thought that the inference which could be drawn from an inspection of documents alone, could not be sufficiently strong to warrant passing a bill without caution.

—Agents.

No. 48. EDWARD BELLIS, and JOHN THUNDERCLIFFE, Petitioners.—*D. F. Hope*
A. M'Neill.
 JOSEPH M'GREGOR, Respondent.—*Skene—Brown.*

Bankrupt—Sequestration—Process—Partnership.—1. Circumstances in which the Court refused to recall a sequestration; 2. Where the Lord Ordinary on the Bills, in vacation, awarded sequestration, and, within the reclaiming days, a “reclaiming note, or petition,” was presented, craving to have the judgment reviewed, or to have answers ordered, and a recall of sequestration granted—Held, that it could only be entertained as a petition for recall; 3. The sequestering creditor having made affidavit of a debt as against E. B. and company, the Lord Ordinary refused to award sequestration, except against E. B. and Co. as a company.

Dec. 3, 1831.
 1st DIVISION.
 H. EDWARD BELLIS, John Thundercliffe, and John Burt, carried on business under the firm of Edward Bellis and Co. Spalding was the onerous indorsee of a bill granted by the company for £445 to Duncan, W.S., agent of the Equitable Loan Company. In October 1831, he gave a charge on the bill. A suspension was presented, setting forth that the Equitable Loan Company, who were accused of much oppressive procedure, could not have charged on the bill had it remained in their hands, and that Spalding was not an onerous and bona fide indorsee. This was referred to Spalding's oath; the oath was negative, and the bill of suspension was refused. Spalding then sent a messenger with a caption, to search for Bellis and Thundercliffe. Burt was said to reside in England. The messenger returned an execution that they had absconded.

Spalding made an affidavit to the debt as due to him by Bellis and Company, and applied for sequestration, both against the company, and the partners as such, and as individuals. Bellis and Thundercliffe objected, 1. ^{Dec. 3, 1831.} Bellis, &c. v. That as the affidavit only stated the debt against the company, the sequestration could only be awarded against the estate of the company. 2. That the Equitable Loan Company could not have applied for sequestration had they continued the holders of the bill, and Spalding was colluding with, and acting for them. 3. That that company and Spalding were the only creditors, and a sequestration was therefore inexpedient and unnecessary, especially as Bellis and Thundercliffe had claims of damages against the Loan Company, which might be quashed by that company's preponderating influence in the sequestration.

Spalding answered, 1. That an affidavit of a debt, as against a company, is sufficient to support a petition for sequestration against the individual partners, as they were liable for the company debts. 2. That he was an onerous bona fide indorsee, as had been instructed, in the suspension, on reference to his oath. 3. That the creditors were not of so limited a number as was alleged, an assertion which any debtor might make in bar of sequestration; and as to the actions of damages, they might be pursued by the bankrupts, if not duly prosecuted by the trustee.

The Lord Ordinary, on 11th November, sequestered the estates of Edward Bellis and Company, as a company, in terms of the statute. Bellis and Thundercliffe then boxed a copy of the petition and answers, prefixed by a paper entitled, "Reclaiming Note, or Petition." It contained an alternative prayer, to review and alter the Lord Ordinary's judgment, or otherwise to appoint the application to be served on Spalding, and answered by him as a petition for recall of sequestration. The Court entertained the latter prayer, intimating that the application could not be considered as a reclaiming note, but as a petition, and ordered answers, which were lodged by Joseph M'Gregor, the interim factor on the estate. On considering these, their Lordships refused to recall the sequestration, but, in the circumstances, found no expenses due.

LORD PRESIDENT.—Spalding, on an oath of reference, has deponed that he was an onerous indorsee. As such, he is entitled to do all diligence for recovering payment of his debt. The debtors here are in the circumstances in which the statute provides to a creditor the remedy of sequestration, and I see no ground sufficient to justify the Court in restraining him in the use of that remedy.

LORD GILLIES.—There must be tangible and legitimate ground for us to rest upon, before we can recall a sequestration. Suspicion of abuse of the diligence is not enough, and there is nothing more than suspicion in this case.

Petitioners' Authority.—Cormack, Dec. 20, 1828; ante, VII. 221.

J. TURNER, W.S.—A. CASSELS, W.S.—Agents.

No. 49.

Dec. 3, 1831.
Lowrey v.
Donald, &c.

MRS JANE LOWREY or MAXWELL, Pursuer.—*Shene—J. Paterson.*
COLIN DUNLOP DONALD and DR KING, Defenders.—*D. F. Hope—*
Sol.-Gen. Cockburn—Murray—R. Bell.

Drysdale v.
Drysdale, &c.

Process—Record—Preliminary Defence.—Circumstances in which a Lord Ordinary having pronounced decree absolvitor, which, *ex facie*, appeared to dispose of the cause on the merits, and no record having been made up—the Court recalled the interlocutor, and remitted to the Lord Ordinary to hear parties on a special defence.

Dec. 3, 1831. MRS JANE LOWREY or Maxwell raised a declarator of marriage, and
1st DIVISION. concluded for a count and reckoning against the trustees of the late Mr
Lord Newton. Maxwell, and against his brother.

D.

Two of the trustees (Mr Donald and Dr King) pleaded that they had previously resigned the trust, and, “as they do not hold the character under which they have been cited, they ought to be assoilzied.” The Lord Ordinary “assoilzied the defenders, Colin Dunlop Donald, and Dr Benjamin Watts King, from the conclusions of the present action, and decerned; reserving to the pursuer her right to insist against the defenders personally, if, on succeeding in the action, it turns out that the trust-funds in the hands of the remaining trustees are insufficient for her satisfaction, and she is prepared to show that the defenders, before their resignation, had intromitted with, or mismanaged the trust-funds.”

The pursuer reclaimed, and objected that if the decree of absolvitor was meant to sustain a defence on the merits, a record should have been made up; and if it was meant to sustain a preliminary defence, it should have expressly set this forth.

LORD PRESIDENT.—If this defence were dealt with as preliminary, the interlocutor should have qualified it as such. If not preliminary, there should have been a record before decree absolvitor was pronounced.

LORD GILLIES.—The interlocutor, *ex facie*, disposes of the cause as on the merits, and there is no record.

The other Judges assented.

THE COURT therefore, “in respect the Lord Ordinary has pronounced decree absolvitor, recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to hear parties on the special defence for Colin Dunlop Donald, and Dr Benjamin Watts King, and do therein as shall be just—all claims for expenses, hinc inde, being reserved.”

J. HANNAY, W.S.—W. BELL, W.S.—Agents.

No. 50. ALEXANDER and ADOLPHUS DRYSDALES, Pursuers.—*More—Maitland.*
MRS DRYSDALE, or GORDON, and HUSBAND, Defenders.—*Robertson.*

Aliment—Cognition and Sale.—Circumstances in which the Court dismissed an action of aliment by two children against their mother; and granted warrant to sell the estate of the deceased father.

THE late Mr Drysdale of Viewfield, by an antenuptial contract, provided a free annuity of £300 a-year to his widow. On his death, in 1817, his estate was not equal to pay this, and the interest of his debts, and to aliment two sons left by him in pupilarity. The tutors of the pupils were advised by counsel, in 1818, that it was necessary to bring a cognition and sale of the lands, in order to prevent any accumulation of arrears of the widow's annuity, as the sale would probably realize such a sum as might procure her an annuity of £300, and leave a surplus for the children. The widow thereon addressed a letter to the tutors, consenting to give up one-half of her annuity, during her pleasure, so as to prevent, if possible, the sale of the estate. For nine years she drew the restricted annuity, but, after that period, (in consequence, as she said, of her father's death, which deprived her of further pecuniary assistance from him,) she was obliged to intimate to the curators of her children, that she would again draw her full annuity of £300 per annum. A few years afterwards she married again, and a process of cognition and sale of Viewfield was brought by her son Alexander Drysdale, the heir-apparent, along with his curators. On June 10, 1831, the Court "sisted this process of cognition and sale, until a process of aliment is brought at the instance of the children of the deceased John Drysdale, against their mother."

Alexander Drysdale, and his younger brother John, then raised a process of aliment, (which was an amicable suit,) and in which the circumstances above mentioned were explained to the Court. It was also stated that the sale would not only provide the stipulated annuity, but leave a considerable reversion to the children.

The Court unanimously dismissed the action of aliment, and granted warrant to sell the estate.

LORD PRESIDENT.—Now that the circumstances are fully before the Court, there is no room for hesitation. The case of Maidment¹ was a great deal stronger than this, yet the claim of aliment was not sustained.

The other Judges assented.

CAMPBELL and MACK, W.S.—M. and J. LOTHIAN, S.S.C.—Agents.

GEORGE BRODIE, Petitioner.—Sandford.
WILLIAM SINCLAIR, Respondent.—G. Napier.

No. 50.

Dec. 3, 1831.
1st Division.
Ld. Moncreiff.
D.

Drysdale v.
Drydale.

Brodie v. Sin-
clair.

Appeal—Expenses.—Under a petition for applying a judgment of the House of Lords in part reversing that of this Court, the Court, while they refused a motion for expenses prior to appeal, and subjected the petitioner in the expenses of discussing the motion, found him entitled to the expense of having the judgment applied.

No. 51.

¹ 6. Dow, 257.

No. 51. BRODIE having appealed against the judgments in the case mentioned Dec. 3, 1831. ante IX. 36, (whereby he was only found entitled to recover from Sinclair 2d DIVISION. two admitted items of £11 and £10, out of an account of £219, and was subjected in expenses of process, against which the two sums above mentioned were allowed to be set off,) Sinclair allowed the case to be heard Brodie v. Sinclair. in the House of Lords, ex parte. The judgment of the Court on the merits Bell v. Cadell. was affirmed, but that finding expenses due was reversed, and the cause was remitted to this Court, "to do therein as shall be consistent with this judgment." (IX. Ap. p. 18.) Brodie now presented a petition to have this judgment applied, and besides craving a decerniture for the two sums of £11 and £10, which was not objected to, he claimed the expenses of process prior to appeal. This the Court refused, and subjected him in the expenses occasioned to Sinclair in opposing the demand, while, on the other hand, they found him entitled to the proper expense of having the judgment applied.

D. CLYNE, S. S. C.—G. and W. NAPIER, W. S.—Agents.



No. 52. BINNING BELL (SMITH'S TRUSTEE), Suspender.—D. F. HOPE—Whigham. WILLIAM CADELL (for Bank of Scotland), Charger.—Shene—Walker.

Right in Security—Poinding of the Ground—Bankrupt—Sequestration.—1. An heritable creditor, who has obtained decree of poinding of the ground prior to sequestration, is entitled to proceed with the same, to the exclusion of the trustee on the sequestered estate. 2. Poindings of the ground are not included under the bankrupt act, or other enactments regulating poindings.

Dec. 3, 1831. THE Bank of Scotland was infest in two heritable bonds and dispositions in security, granted by James Smith of Jerburgh over certain lands 2d DIVISION. belonging to him, in respect of a cash credit obtained by him with the Ld. Mackenzie. bank, and for a loan of money made to him along with his brothers John F. and Alexander, with whom he carried on in partnership an extensive business in cattle-dealing. In June 1829, the charger, Cadell, treasurer of the bank, raised separate summonses of poinding of the ground, for the principal and interest of the two bonds. Under the first of these summonses he obtained decree on the 12th June; and having extracted the same, he (June 22) expedite letters of poinding the ground, which were executed on the 25th, when cattle and other movables on the lands, belonging to James and John Smith, (Alexander being now dead,) to the value of £831, were poinded. The execution was reported to the Sheriff on the 6th July, and warrant of sale obtained on the 10th. On the second summons, decree was obtained on the 24th June; letters were expedite on the 8d July, and executed on the 6th, when articles to the extent of £697 were attached; the execution was reported on the 11th, and warrant of sale granted on the 15th.

In the meantime, on the 3d July, the estates of James and John Smith No. 52.
 were sequestrated, and the suspender, Bell, having been appointed trustee,
 presented a bill of suspension and interdict, maintaining that the whole movable property of the bankrupt was carried by the sequestration,
 so as to preclude any preference by poindings of the ground not previously completed by sale, and report thereof. An arrangement having been made with the charger, under which the property poinded was sold, and the price consigned to await the judgment of the Court, the Lord Ordinary (Moncreiff) passed the bill on caution, adding the subjoined note.*

Dec. 3, 1831.
Bell v. Cadell.

On the part of the trustee it was pleaded—

The effect of the sequestration is completely to pass to the trustee all movable property of the bankrupt, as at the date of the first deliverance.¹ After that, no creditor can acquire a preference when such has not been previously completed. Infestment on an heritable bond, however, does not constitute a completed lien over the movables on the lands over which it extends, as was found in the case *Hay v. Marshall*.² If so, then it was absolutely necessary, in order to create a preference, that the poindings of the ground should have been fully completed prior to the sequestration, and these cannot be held to have been completed in the present case, seeing the bankrupt act, and other enactments regulating poindings, apply generally to all poindings, not excepting poindings of the ground, and require to complete the diligence that the sale be accomplished and reported.³ At all events, the second poinding cannot be effectual to constitute a preference, as it was not even executed till after the sequestration, and a mere decree of poinding the ground is not of itself sufficient to attach the movables on the lands.

To this it was answered—

The diligence of poinding the ground is totally distinct from personal poinding, and the bankrupt statutes have no reference whatever to the former, but relate exclusively to the latter. The question therefore falls to

* "If the Lord Ordinary were to act simply on the inclination of his own opinion, he would refuse the bill, because he is strongly inclined to think that the clause of the act of Parliament referred to has no relation to poindings of the ground by heritable creditors, and that, in general, such creditors are entitled to do what they can within the sixty days, or even after the sequestration, to establish their preference. But the case deserves discussion; and, therefore, the Lord Ordinary passes the bill. He cannot, however, pass it without caution, chiefly because the precedent would be bad; and, in the present case, there can be no hardship, as the trustee has sold the goods and received the price."

¹ 54 Geo. III. c. 54, § 30. 40; 2 Bell, 327.

² 7 July, 1824, (*ante* III. 223); and in House of Lords, March 22, 1826, (2 W. and S. 71.)

³ A. S. Dec. 14, 1805; *White v. Tullis*, June 18, 1817, (F. C.); *Samson v. M'Cubbin*, May 15, 1822, (*Ante*, I. 470.)

No. 52. be determined, without respect to the special provisions in these acts. Infestment by an heritable creditor gives a real right over the movables on Dec. 3, 1831. Bell v. Cadell. the land, to the effect of entitling him to prevent their removal, and appropriate them in satisfaction of his debitum fundi, at any time before they are effectually attached by another.¹ That his preference does not depend on the mere execution of the poinding, appears from this, that in a competition among heritable creditors, the rule of preference is the priority of the sasine, not of the execution of the poinding.² It is no doubt true, that if he unduly lie by till a personal creditor have completed his diligence, he will be excluded, and nothing more than this was decided in the case of Hay, where the heritable creditor had taken no steps whatever. But, in the present case, the Bank had commenced to put their right in execution, and left no room for the operation of the principle of Hay's case, and the bankrupt act does not prevent the completion of rights previously subsisting, which require not the act of the bankrupt, and are not the subject of special regulation in the statute.³ Consequently, there is no ground for depriving the heritable creditor of the rights acknowledged by all the authorities, to be constituted by his infestment over the movables, on the lands in which he stands infest.

The Lord Ordinary repelled the reasons of suspension, and found the letters orderly proceeded, adding the subjoined note.*

¹ Ersk. 2. 8. 32. and 4. 1. 11; Webster, July 13, 1780 (2902); Parker, Feb. 5, 1783 (2868); White v. Tullis, June 18, 1817 (F. C.)

* Stair, 2. 5. 12.

* 2. Bell, 329; Buchan, May 24, 1797 (2905); Cormack, July 8, 1829 (Ante VII. 868.)

* "A poinding of the ground on a debitum fundi, whatever may have been its origin, seems to the Lord Ordinary to have become, in our law, different in kind from an ordinary poinding of the movables of a debtor. The latter proceeds on a mere personal debt, the former on an infestment only. The latter affects all movables, but the former is confined to the movables on the fundus, in which the poinder is infest. The latter requires a decree against the person who is debtor, and a charge on the decree, and is limited to his property. The former proceeds on a decree against the land (though the existing party in right of it is called in the action)—needs no charge, and will operate directly against the movables of whoever becomes possessor of the land. It may be, that the party interested in the fundus, is not at all bound personally for the debt, but may be free by giving up the fundus. He may be a tenant liable for his own rent, but not liable, personally, for the debitum fundi, or a singular successor, or heir apparent not entering, or even charged to enter. Ordinary poindings are all equal inter se, or preferable by priority of time of execution only. If they coincide in time, one creditor may ask to be conjoined in the poinding with the other. Poindings of the ground, inter se, it seems perfectly certain, are not equal, nor depend on priority of time of execution: That proceeding on the first infestment is preferable, though there appears to be a remedy where the preferable creditor unduly lies by.—Vide Stair, B. 2, tit. 5, sect. 12, confirmed by all our writers. It seems not possible to account for these peculiar qualities of

The trustee having reclaimed, the Court ordered cases, on advising which they unanimously adhered, on the grounds stated in the note of the Lord Ordinary. No. 52.

Dec. 3, 1831.
Bell v. Cadell.

BROWNS and KENNEDY, W.S.—HARRY DAVIDSON, W.S.—Agents.

poindings of the ground in any other way than by admitting that they are founded on a real right, which not only affects the fundus, but the movables thereon, as accessories thereof. It is true that this real right, in so far as it affects the movables, is of rather an anomalous kind, and weaker than the right to the land itself. For it is liable to be excluded by all completed alienations of the movables, either voluntary or judicial, to persons who have no connexion with the land, as well as by the rights of tenants, excepting to the amount of the rent due by them. The latter restriction did not exist originally, but exists now, by virtue of an express statute, extended by later practice; and even yet, to a certain extent, the goods of the tenant are poindable for a debitum fundi, though not for any personal debt of the landlord. The former restriction in favour of completed alienation, is absolutely necessary to my management whatever of the fundus, as well as to the safety of the public, and has been introduced by customary law. But still, though this right be subject to great but necessary limitation, it seems to be a real right sui generis, founded on the sasine in the land, and creating, where it is not legally defeated, a preference according to the priority of the sasine. If it be such at all, however, it seems impossible to carry the exception so far as to admit ordinary poindings into equal competition with it, when these are not completed before the process for actual exercise of the real right is commenced. That would, in truth, be doing away all notion of a real right whatever. And it would seem strange to hold, that while a poinding of the ground, or a debitum fundi, with a prior infestation, was preferable to a poinding of the ground on a posterior infestation, yet a poinding on an ordinary personal debt, without infestation at all, was on a full level with the poinding of the ground on the first infestation, their preference depending merely on priority in time. The Lord Ordinary, therefore, does not think that there is any full similarity or equal competition between poindings of the ground and ordinary poindings; and this opinion is confirmed by all that is to be found in our writers, in reference to actual practice; and particularly in Mr Ross, though he does not approve of the practice. It is confirmed, lastly, by the case of Tullis; and the case of Hay is not contrary to this view, merely showing one of the exceptions or limitations on the real right of debitum fundi, as affecting movables, above stated. This being the case, the Lord Ordinary does not think that an ordinary poinder can be entitled to be conjoined with a poinder of the ground, or that he can have the benefit of any of the provisions for dividing the product of poindings among creditors. The Lord Ordinary is satisfied, that in all these provisions, ordinary poindings of movables of persons—for the debts of persons—were in view, not poindings of the ground for debita fundi. There is nothing in any of the Acts of Sederunt or Statutes, to show that any such change in our law was ever contemplated. Nor does there seem any impossibility in giving a construction to these provisions excluding poindings of the ground. It is only necessary to believe, that the term poindings, or poindings for debt, was used in the sense of ordinary poindings, poinding of the ground being viewed as a complex name for a peculiar process sui generis, and so not included under the other terms, and then there remains no difficulty in the construction. In the Act of Sederunt, 10th August, 1754, it seems manifest that ordinary poindings only were in view; for the act, in its preamble, mentions 'the great injustice done to the cre-

No. 53.

ALEXANDER FRASER and Others, Pursuers.—*M'Neill.*
 SIR FREDERICK GEORGE JOHNSTONE, Bart., &c. Defenders.—*Clephane.*

Dec. 3, 1831. SPECIAL case of accounting, in which the Court adhered to a judgment
 2d DIVISION. of the Lord Ordinary, repelling two pleas of the defenders.

Ld. Mackenzie.

T.

Fraser, &c. v.
Johnstone, &c.

WALTER DICKSON, W.S.—J. J. FRASER, W.S.—Agents.

No. 54.

HUGH BOGLE and Others, Pursuers and Claimants.—*Wood.*
 JOHN HENDERSON and Others, Defenders and Claimants.—*Monro.*

Principal and Agent—Executor—Foreign.—Executors, merchants in London, appointed by a merchant there, allowed, in accordance with the admitted usage in England, commission at the rate of one half per cent on payments made by them, by consignation, in a process of multiplepoinding, (of which they were raisers,) or otherwise.

Dec. 6, 1831. HUGH BOGLE and others, merchants in London, executors appointed
 2d DIVISION. by the late George Bogle, merchant there, raised a process of multiple-

T.

Ld. Mackenzie. poinding against John Henderson and others, children of the late David
 Bogle, &c. v. Henderson, &c. Henderson of Jamaica, in consequence of arrests used by these
 parties of certain sums of money, being part of George Bogle's estate, in their hands. In this process, Bogle, &c., put in various claims for commission upon payments made by them, and inter alia, they claimed "a commission, at such rate as may appear reasonable, on the payments made by consignation or otherwise, since this process was raised." The Lord Ordinary, in conformity with an opinion of English counsel, which bore

ditors of notour bankrupts, by the preference given to arrestments and poindings according to their dates,' which was not the case in relation to poindings of the ground. In the particular clause of the last Bankrupt Act which is libelled, the words ' poinding of a debtor's effects,' may easily be held not to include poindings of the ground, which are rather viewed in law as poindings of the farm movables on the debitum fundi, than as poindings of a debtor's effects. Nor would it be easy to find in the act provisions suited to the case of poindings of the ground, such as may easily occur,—ex gr. in case of a tenant poinded to a small extent for a large debitum fundi, of a singular successor in the fundus, or an apparent heir not personally liable for the debitum fundi. The provision of sect. 4th is said to be, in practice, applied to poindings of the ground. If it be so, this cannot be otherwise than by an equitable extension of this clause, which is useful and convenient in all cases to all concerned, imposing no loss on any body; and it is not possible to apply it strictly to all poindings of the ground. It would not follow, however, that other clauses were to have a similar extension, to the effect of taking away existing preferences, nowhere mentioned in the act as fit to be abrogated, and still less taken away expressly."

that this was the usual mode of remuneration in England in such cases, No. 54.
found them entitled to the commission claimed.

The Court adhered.

Dec. 6, 1831.
Begle, &c. v.
Henderson, &c.

Ridgway, &c.
v. Brock.

GEORGE DUNLUP, W.S.—CHARLES BAXTER and ALLAN M'DOUGALL, W.S.—Agents.

THOMAS RIDGWAY, NEPHEW, Petitioners.—D. F. Hope—A. Wood. No. 55.
HENRY BROCK, Respondent.—Robison.

Partnership—Bankrupt.—Circumstances in which a creditor of a company was found entitled to rank for his debt upon the bankrupt estate of that company, trading under a new denomination, and with an additional partner.

THOMAS RIDGWAY and nephew, bleachers in Lancashire, were creditors of Archibald Duncan and Company, manufacturers in Glasgow, (the partners of which were Archibald and James Duncan,) for the balance of an account. Towards the close of the currency of this account, a third person, named Lancaster, was taken into partnership by Duncan and Company under a new contract, which bore, inter alia, the following clauses: “First, the said copartnership shall be carried on under the name and firm of Lancaster, Duncan, and Company, for the dyeing and printing business, and of Archibald Duncan and Company, for the weaving business, and shall subsist and endure for the space of five years from and after the 1st day of August last, 1826 years, which is hereby declared to have been the commencement thereof, notwithstanding the date of these presents, &c. Second, each of the said partners shall have power to subscribe the company’s firms, but only in regard to the business of the companies, and in no other whatsoever, excepting in so far as the firm of Archibald Duncan and Company is required for the winding up of the late business of the said Archibald and James Duncan, or as either of the firms may be granted to the said Thomas Lancaster for the winding up of his late business, &c. Third, the capital stock of the said company shall consist of and be advanced in manner following, viz.; the said Thomas Lancaster shall advance the whole capital at present belonging to him, as the amount thereof shall be ascertained in a final winding up and balancing of the books of the concern lately carried on by him, made up to the 1st day of August last, at which date the said late concern is hereby declared to have ceased and determined. And the said Archibald Duncan and James Duncan shall severally advance the amount of capital at present belonging to them, both as copartners and as individuals, as the same shall be ascertained in a final winding up of the businesses lately carried on by them in like manner to the 1st day of August last, when their business is also declared to have ceased,” &c.

Dec. 6, 1831.
2d Division.
Ltd. Cringleton.
F.

No. 55. There was no public notification of this new copartnery, nor any call upon the debtors and creditors of the original firm to settle claims, and wind up accounts. Messrs Ridgway, not being able to obtain payment of the balance of their account, raised an action before the Sheriff of Lanarkshire against Duncan and Co., but subsequent to the junction with Lancaster. Defences were given in for Duncan and Co.; and pending this process, the company became bankrupt, and of date, 23d Feb. 1830, the estates of the company were sequestrated, under both firms, together with the estates of the individual partners. The process before the Sheriff having been sisted until the appointment of a trustee, and Brock, the respondent, thereafter chosen, he was cited as a party to the action. It was no longer defended, and Messrs Ridgway obtained decree against the firm of Archibald Duncan and Co., and Brock as trustee. Thereafter Messrs Ridgway gave in their claim to be ranked on the whole bankrupt estates of the double firm; upon which claim Brock pronounced as follows:—"The trustee rejects the claim as a ranking upon the estate of Archibald Duncan and Company under sequestration, in respect that the debt claimed was contracted prior to the formation of the present company of Lancaster, Duncan, and Company, and Archibald Duncan and Company, of which the said Thomas Lancaster, Archibald Duncan, and James Duncan, were the partners, and was contracted while the only partners were the said Archibald Duncan and James Duncan. The trustee, for these reasons, refuses to rank said claim upon the present company-funds of Archibald Duncan and Company, and Lancaster, Duncan, and Company, which is one and the same company, but sustains the same as a claim upon the funds of Archibald Duncan and James Duncan, as individuals."

Against this deliverance Messrs Ridgway presented a petition to the Court of Session; and maintained, that the obligations of the firm of Duncan and Co. fell upon the double firm, both in consequence of the latent nature of the alleged dissolution of the original firm, and by the express terms of the contract of the new copartnery. The trustee defended his rejection of the claim, upon the ground that the obligation contained in the decree against Duncan and Co., could not rank as a proper debt against the double firm, which was a new and separate copartnery. The Lord Ordinary issued the subjoined note,* and pronounced this interlocutor:

* "It is admitted that the debt claimed on by the petitioners is a just and true debt against Archibald and James Duncan; and it is farther admitted, that it was contracted by Archibald and James Duncan and Company. In this situation the Lord Ordinary cannot admit that partners of a company having contracted a debt, can withdraw their funds from payment of that debt by the mere act of entering into a new copartnery with a third person, and that too without notifying to the public their intended measure, and calling on all their creditors to demand payment of their debts, and the debtors of the company to pay what they are owing. Any person entering into such copartnery without such previous measures, appears to

—“Recalls the interlocutor or deliverance of the trustee on the sequestered estate of Lancaster, Duncan, and Company, and Archibald Duncan and Company, and the individual partners thereof, and remits to said trustee to rank the debt due to the petitioners on the sequestrated estates of said companies, and the individual estates of Archibald and James Duncan, but not on the private or individual estate of said Thomas Lancaster, and decerns.” No. 55.

Dec. 6, 1831.
Ridgway, &c.
v. Brock.

The trustee reclaimed, but the Court, on the grounds set forth by the Lord Ordinary, refused his reclaiming note.

R. WELSH, S. S. C.—D. CAMPBELL, W. S.—Agents.

THOMAS SCOTT and JOHN LIVINGSTON, Pursuers.—*Shene*—J. Anderson. No. 56.
ALEXANDER DONALDSON, Defender.—*Rutherford*—Lothian.

Triennial Prescription—Agent and Client.—Circumstances in which a party was held not to be the employer of law-agents in a process which was conducted, with his sanction, in his name, and towards which he contributed information at different times, and entitled to plead the triennial prescription.

the Lord Ordinary (to use the gentlest language) to consent that the funds of the new company must remain liable for payment of the debts of the company with whom he has associated himself. But in this case there is no need for presumed consent. By the contract of copartnery the consent is express. The stock to be contributed by Archibald Duncan and Company, is their free fund after payment of their debts existing at the date of the contract. There is an express stipulation that they may use the firm of the company to grant bills and other documents as renewals of such debts, or evidences thereof; that accordingly such documents have been granted, and the trustee admits that where such have been granted, he has ranked them on the estates under his management. But the Lord Ordinary considers that the express stipulations in the contract of copartnery have the same effect as if a bill had been granted to the petitioners, except that these stipulations could not have warranted diligence as a bill or bond would have done, or a demand against Lancaster as an individual. The right to sign the company firm to a document renewing or acknowledging a debt of Archibald Duncan and Company, is contained in the contract; it is equivalent to a declaration that the stock of the new company was liable for such debt; it is in perfect conformity to the clause stipulating that the stock to be contributed by Archibald Duncan and Company was to be their funds remaining free after payment of their debts; and, as a consequence of this, the stock of the new company remained subject to such claims; nor can the Lord Ordinary assent to the plea of the trustee, that by the act of injustice by Archibald Duncan and Company in resisting payment of the debt due to the petitioners, instead of giving a bill for it, as they were bound to do, since the debt is admitted to be just, the funds of the new company are not to be liable. For all these reasons, the Lord Ordinary has dissented from the opinion of the trustee. As no such bill, however, was granted, the Lord Ordinary does not think that Thomas Lancaster's private estate is liable.”

No. 56. DONALDSON bought a tenement, consisting of two stories, "with the pertinents," from Little, and entered into possession. An action was

Dec. 8, 1831.

1st Division.

Lord Newton.

D.

afterwards raised against Donaldson, by M'Glashan and others, his neighbours, for alleged encroachments on their property, and a defence was maintained in Donaldson's name against the action. The agents employed for the defence were Murray and Inglis, W.S. Donaldson made repeated visits to them in the course of the action, relative to it; he also precognosced witnesses, and occasionally revised the pleadings. Little had died before the action was raised, and Murray was one of his trustees. In 1829, Scott and Livingston, as assignees of Murray and Inglis, pursued Donaldson for the amount of their business-account, which ended in 1825.

In defence, Donaldson denied that he had employed Murray and Inglis; pleaded the triennial prescription; and stated, that as soon as the action was raised against him, he intimated it to Murray, as one of Little's trustees, informing him that he would not defend, and calling on Little's trustees to defend, as Little was the party truly interested, being liable to him in warrandice; and that the assistance he had rendered to Murray in the course of the action, was merely in aid of the trustees, and in consequence of his local knowledge regarding the encroachments.

The pursuers answered, 1. That as the plea of the triennial prescription was a plea of presumed payment, it was incompetent to a party who denied having ever been liable; that Donaldson's connexion with the action, which was carried on in his name, with his sanction, sufficiently proved the employment; and as his denial of liability was also a denial of ever having paid, they were entitled to decree. 2. That the allegation that the action was carried on truly for behoof of Little's trustees, and not on Donaldson's employment, was extrinsic, and required some other proof than his allegation, or qualified admission.

The Lord Ordinary "sustained the defence founded on the triennial prescription, and assailed the defender,"* with expenses.

Scott and Livingston reclaimed.

LORD GILLIES.—This case raises some questions of great importance. It relates to the triennial prescription—a branch of our law involving points of great

* "NOTE.—The defender has made no admission of having employed Mr Murray, or Messrs Inglis and Murray, to do the business for which payment is claimed; on the contrary, this is expressly denied. Neither is the constitution of the debt proved scripto of the defender, and the claim is liable to the triennial prescription. The Lord Ordinary at first entertained some doubts whether the admission by the defender, that the process was carried on in his name, did not so far prove employment as to throw on him the burden of proving that the expense was agreed to be borne by Little's trustees; but he sees from the case of Campbell against Stein, 23d November, 1813, that this circumstance was not held sufficient to prove employment, and that the triennial prescription was there sustained.

difficulty, and embarrassed by some decisions which can scarcely be reconciled with each other. But, besides this, there is a question of evidence, whether Donaldson ever employed Murray and Inglis. There is nothing before us to satisfy us that the result of the action against Donaldson would truly have inferred warrandice against Little's trustees. It does not appear whether the alleged encroachments of Donaldson were made by his taking possession of new subjects, or only of such as Ewing v. fell within Little's conveyance to him. In these circumstances, the point arises whether Donaldson, in whose name the defence was conducted, and who had so much connexion with the process, was the employer of Murray and Inglis, or was not. I confess the case appears to me to involve various points of much delicacy, which I am not disposed to decide at present; at least I cannot feel myself warranted in concurring with the Lord Ordinary.

LORD BALGRAY.—I am for adhering. Murray was not only one of Little's trustees, but he was also their law-agent. The statement or admission of Donaldson is, that, when the action was raised against him, he went directly and turned over the defence upon the trustees of his author, Little. This was just doing what he had a right to do, if they were liable in warrandice. As for the use of Donaldson's name, and the assistance he gave in precognoscing witnesses or revising papers, it was natural for a person in his situation to give all the information and assistance in his power to the trustees; but it would be hard to subject him as employer on that account, without some other evidence of the fact that he was the employer.

LORD PRESIDENT.—I take the same view; though I do not approve of the sort of defence which has been maintained by Donaldson. He should either have stood by the plea of prescription, or by that of non-employment. In regard to the aid he gave in the conduct of the process, it was only what any donee was bound to do, towards a donee who was in the hazard of incurring warrandice.

LORD GILLIES.—I cannot refrain from noticing, that I think there is no evidence before us to entitle us to hold that Little's trustees would have incurred warrandice, though decree were recovered in the action against Donaldson.

LORD CRAIGIE concurred with Lords President and Balgray.

THE COURT therefore adhered.

Pursuer's Authorities.—Clyne, July 2, 1830; (*ante*, VIII. 1004.) Halliday, Dec. 13, 1816. (*Ante*, V. 116.)

J. LIVINGSTON, W.S.—D. CAMPBELL, W.S.—Agents.

WILLIAM EWING, Pursuer.—*Rutherford—H. J. Robertson.*

No. 57.

ARCHIBALD WIGHT, Defender.—*Wilson.*

Process—Multiplepoinding.—The raiser of a multiplepoinding as to a sum due by him under a decree, is bound to consign the full amount without deduction of illiquid claims on his own part.

EWING raised a process of multiplepoinding as to a sum due by him, Dec. 8, 1831. under decree of this Court, but in his condescendence he deducted the amount of certain illiquid claims on his own part. The Lord Ordinary ^{2d Division.} _{T.} Lord Medwyn.

No. 57.

Dec. 8, 1831.
Ewing v.
Wight.Wilson v.
Beveridge.

ordained him to consign the fund in medio as libelled, without deduction. Ewing reclaimed, upon the plea that he was not bound to consign a greater sum than he admitted in his condescendence to be due.

LORD GLENLEE.—To support such a plea, the claim must be perfectly liquid. The other judges concurring,
THE COURT adhered.

ADAM and BROWN, W.S.—JAMES BURNES, S.S.C.—Agents.

No. 58.

LAURENCE WILSON, Pursuer.—*Shene—Cuninghame.*
WILLIAM BEVERIDGE, Defender.—*Sol.-Gen. Cockburn—Christison.*

Et è contra.

Process—Proof—Judicial Examination—Partnership.—1. An issue allowed on a general averment of partnership, without any specification on the record of the facts from which partnership was to be inferred; 2. Circumstances admitted in a judicial declaration emitted “before answer,” held not sufficient to exclude a proof.

Dec. 9, 1831.

2d DIVISION.
Lord Medwyn.

T.

In 1815, the pursuer Wilson, the defender Beveridge, and one Kirk, entered into a copartnership for the purpose of spinning yarns, of which Wilson was the managing partner. In 1821, Kirk died, and, after some years, counter actions were instituted by Wilson and Beveridge; that on the part of Wilson to have it found that Beveridge ceased to be a partner in December 1820, prior to Kirk’s death; and that on the part of Beveridge, to have it found that he still continued a partner. In the record made up in these processes, which were conjoined, Beveridge averred in general terms that he was a partner after December 1820, and after Kirk’s death, but without entering into any specification of the particular facts from which this was to be inferred.

On advising the cause, the Lord Ordinary being of opinion that the judicial examination of the defender was likely, “with the facts which appear already sufficiently established, to decide the cause without further proof,” appointed such examination “before answer.” Against his Lordship’s interlocutor Beveridge reclaimed, but the Court (February 19) adhered, (Ante IX. 485.) Thereafter the judicial examination took place, and Beveridge emitted a declaration, of which the material parts are subjoined.*

* “Interrogated, whether there was any understanding between the declarant and his copartners, as to the manner in which funds were to be provided for by them, for carrying on the business of the company? Declares and answers, that he has no recollection of any such understanding, but that he certainly provided funds for the business himself. Interrogated, if he provided the whole funds for carrying on the said business himself at the commencement? Declares and answers, that he thinks he did so, both at the commencement, and for several years afterwards.” “Inter-

On advising this with a declaration of Wilson, the Lord Ordinary pronounced this interlocutor :—“ Finds that the spinning and thread manu-

No. 58.

Dec. 9, 1831.
Wilson v.
Beveridge.

rogated, declares, that during the continuance of the said copartnery, between the years 1815 and 1820, it was the practice to send parcels of linen yarns occasionally to Dunfermline, to be sold or dispatched from thence. Interrogated, declares, that he does not recollect particularly whether he received the proceeds of the said sales, but he believes that he may have received the proceeds of some of them.” “ Interrogated, if the declarant ever sold at Dunfermline, or dispatched from thence, any of the goods of the company for sale after 1820? Declares and answers, that he does not recollect. Interrogated, if he ever sold or dispatched for sale any of the goods of the company, or stated as the property of the company, after 1821, 1822, 1823, 1824, or 1825? Declares and answers, that he does not recollect. Interrogated and desired to state the period, or to mention any time within two years thereof, that he effected the last sale on account of the company. Declares and answers, that he cannot do so. Interrogated, whether he ever settled any account relative to the copartnery stock or profits with his deceased partner, Charles Kirk, or his representatives? Declares and answers, that he never did; but that he recollects that Mr Wilson called upon the declarant some time after Charles Kirk’s death, and mentioned to him that he had settled with Mr Kirk’s widow his accounts with the concern. Interrogated, if the declarant had ever any conversation with Mr Wilson after Mr Kirk’s death, relative to the disposal of his share? Declares and answers, that he does not recollect that he ever had any particular conversation with him about it; but that he understood that Mr Kirk’s share would fall equally between Mr Wilson and the declarant. Interrogated, if the declarant ever gave any money to Mr Wilson, to enable him to settle with Mr Kirk’s representatives? Declares and answers, that he does not recollect whether he did or not. Interrogated, if, prior to 1820, the declarant was a party to any bills granted or discounted for the use of the company? Declares and answers, that he does not recollect whether he was or not. Interrogated, if, prior to 1820, the firm of Laurence Wilson and Company was generally used in bills, invoices, or accounts made out in relation to the business of the company? Declares and answers, that the firm of Laurence Wilson was that generally used by the company, and that of Laurence Wilson and Company occasionally, but, as the declarant thinks, very seldom; and in confirmation thereof, he now produces fifty-five bills and promissory notes, as per inventory, which are marked by the declarant and commissioner as relative hereto, which are all signed by the pursuer, Laurence Wilson, and only one of them signed by the firm signature, Laurence Wilson and Co.: that the declarant has also a number of accounts paid by him for the company, and made out in the name of Laurence Wilson alone; but the said accounts not being at present in Edinburgh, and the pursuer requiring him to produce the same, he will search for, and transmit them to the commissioner immediately on his return home. Interrogated, if all the said bills now produced, and the accounts referred to, relate to business of the copartnery, and if he entered the same at the time in any books against the copartnery? Declares and answers, that the said bills and accounts related wholly to the business of the copartnery, and that the same were all entered at the time in a small book which the declarant kept for the express purpose. Interrogated and required to produce the said book? Declares and answers that he has it not in Edinburgh, but that he will transmit it along with the accounts. Interrogated, and the declarant’s attention being called to the fact, that the last of the series of bills now produced, bears date 24th September 1819, he is requested to state if he is possessed of any bills of a later date, paid on account of the company, and if so, to produce them? Declares and answers that he

No. 58. factory business carried on at Midmiln, under the firm of Lawrence Wilson, or Lawrence Wilson and Company, terminated upon the death

Dec. 9, 1831.
Wilson v.
Beveridge.

cannot say, but that he does not think he has any such, but that he will make a search, and if he can find any, will transmit them to the commissioner. Interrogated, if the declarant knew of a single instance of the firm of Laurence Wilson and Co. having been used either by himself or by Mr Wilson subsequent to 1820? declares and produces an account, Messrs Laurence Wilson and Company to John Bonar, commencing 26th August 1815, and ending 8th December 1821, which is marked by the declarant and commissioner as relative hereto; and that he does not recollect at present any other instance of that firm having been used since that date. Interrogated, if the books were ever brought to a balance subsequent to the written minute of copartnery before referred to, dated 26th December 1818? declares and answers, not that the declarant knows of. Interrogated if he knows any reason why the books were not so balanced? declares and answers, that he does not. Interrogated, if he ever requested Mr Wilson to bring the books to a balance subsequent to the said minute? declares and answers that he has certainly requested him to do so, but that he cannot condescend upon the times. Interrogated, declares, that he thinks he has done so more than once, for he was as anxious to get the affairs wound up as Mr Wilson could be. Interrogated if, either before or after 1820, the declarant furnished to Mr Wilson all the materials, accounts, or vouchers in his possession, which might be necessary to balance the books accurately? declares and answers, that he gave Mr Wilson a statement of his accounts in the year 1829; and further declares, in explanation, that the declarant moved from the house which he then occupied in Guildhall Street, Dunfermline, to that which he now inhabits, at or about the end of the year 1821, and that in the course of his fitting, all the documents and vouchers of the Midmiln concern in his custody were mislaid and amissing, and that he did not recover them till the year 1829, which was the reason that his account, as aforesaid, was not furnished till then. Interrogated, if he ever mentioned that excuse to Mr Wilson till the present time? Declares and answers, that he does not recollect having done so. Interrogated, if he ever made any advance to Mr Wilson, for behoof of the Company, subsequent to 1820? Declares and answers, that he does not recollect whether he did or not. Interrogated, if his books will contain any evidence of such advance, if made—and he is requested to transmit a copy of the entries therein to the commissioner? Declares and answers, that the books will shew whether he did so or not, and that he will transmit a copy of the entries therein to the commissioner, if he finds any, as required. Interrogated, if the declarant ever asked Mr Wilson to exhibit to him the books relative to the mill business subsequent to 1820? Declares and answers, that he asked him for them in 1829, particularly to enable the declarant to make up that statement which he furnished to Mr Wilson, in 1829, above referred to. Interrogated, if Mr Wilson ever consulted the declarant, subsequent to 1820, relative to the copartnery affairs? Declares and answers, that he certainly has; and, in particular, that he consulted him relative to a contract with Rutherford, Findlayson, and Company. And farther, that he recollects Mr Wilson consulting with the declarant, relative to a claim which the Midmiln Company had against Mr George Spence, which was either submitted, or intended to be submitted, to Mr Struthers of Brucefield, and that he likewise recollects of Mr Struthers talking to him about the matter, as if the declarant had been concerned in it. Interrogated, declares, that he does not recollect, particularly, having been consulted by Mr Wilson after 1820, in any other affairs of the Midmiln Company, except those above referred to, but that he was in constant communication with Mr Wilson, and in the habit of frequently seeing him, and enquiring how matters were

of Charles Kirk, in 1821, and that there is no evidence to establish, No. 58.
 rebus ipsi et factis, that the defender, Beveridge, continued a partner in the concern, but, on the contrary, much to show that he was not; and, therefore, finds that the accounting between the parties must take place, on the principle that the defender was not a partner in the concern subsequent to the death of Kirk."*

Dec. 9, 1831.
 Wilson v.
 Beveridge.

going on, as he had done all along. Interrogated specially, if the declarant's consent was ever asked, as a copartner, to a single transaction relative to the Midmiln business subsequent to 1820? Declares, that it has; and particularly, in the two instances above alluded to. Interrogated, declares, that he does not recollect particularly whether his consent was ever asked to any other affairs after the above-mentioned period, but that he thinks very likely it was. Interrogated, if any changes in the business of the mill, or of the machinery, were ever communicated to the declarant subsequent to 1820? Declares and answers, that the declarant was quite in the knowledge of the changes having taken place in the nature of the manufacture at the mill. Interrogated, if these communications were made to him by Mr Wilson, or by whom? Declares and answers, that he thinks they must have been made by Mr Wilson. Interrogated specially, if his consent to these changes was asked as a copartner? Declares, that he does not recollect particularly whether his consent was asked or not; but if the changes were communicated by Mr Wilson, he, the declarant, must have consented to them. Interrogated, if the declarant ever inspected the machinery at Midmiln, or sent any men of skill to examine the same on his behalf, between 1820 and 1829? Declares and answers, that he thinks he must have seen the machinery at Midmiln, but that he never sent any person of skill to examine it; and in explanation says, that he certainly has seen the machinery since 1820. Interrogated, declares, that the declarant is no judge of the value of machinery.

* His Lordship added this Note.—“ The grounds of this interlocutor are, 1. That while, previous to 1820, the firm of Lawrence Wilson, or Lawrence Wilson and Company, was used indiscriminately, there is no instance of the social firm having been used subsequently, and this must have been known to the defender, as almost all of the bills passed through his hands as bank agent: 2. That, when the accounts were furnished to the defender previously to instituting this process, though some objections were made, he did not object that the accounts were not brought farther down than 1820, and the accounts produced by himself in this process (No. 10.) stop in 1820; and, in his declaration, he says, ‘he can assign no reason for this,’ which seems to imply that he does not choose to assign the only reason, that he, at that period, ceased to be a partner, and that he had not then adopted his present plea: 3. That, prior to 1820, he made all the cash advances; and he admits that, subsequently, he never made any: 4. That he ceased to interfere in the management of the business, and never sought, so far as he alleges, to be consulted therein, although considerable changes took place in the nature of the business, and the only instances of his being consulted subsequently are two relative to old claims of the company: 5. The whole declaration shows his ignorance or want of recollection about many things totally inconsistent with his having a concern in the mill, even although he was not to take the same active management and superintendence of it as at first.

“ It is true, the pursuer has not established his averment that the defender voluntarily gave up his concern in the Company in 1820, nor offered any proof thereof, and therefore the dissolution has been fixed at the death of Kirk, which, according to the defender, took place on 29th September 1821.”

No. 58.

Dec. 9, 1831.
Wilson v.
Beveridge.

Beveridge again reclaimed, and contended that the Lord Ordinary ought not to have decided on an assumption of facts opposed to his averment of partnership subsequent to Kirk's death, without allowing him a proof of that averment, and he craved an issue on that point. To this demand it was objected,

1. That he had not on the record given such a specification of facts inferring a partnership as to warrant a proof; and,
2. That the statements and admissions in his judicial declaration, were exclusive of his allegation of partnership.

LORD JUSTICE CLERK.—There has been no finding that the case is to be decided on the judicial examination. The order for examination is "before answer," and, after it was taken, there was nothing done by the Lord Ordinary to foreclose further investigation, and the books of the Company are not even brought into the process. If precluded from other evidence, I am satisfied on the whole, without agreeing to all the special opinions of the Lord Ordinary, that there is no proof of the continuance of the partnership after the death of Kirk, by which it was terminated. I do feel a difficulty, however, in assuming that the cause is to be decided on the declarations alone, excluding the offer of proof.

LORD GLENLEE.—The death of Kirk dissolved the partnership, and how can we allow a proof, unless there were averments of special facts to the effect that the new concern was carried on by Beveridge? The onus lies on him, but I would not allow a proof without specification of facts inferring partnership. Why should I not treat the declaration as I would a condescendence, and is there any thing in it to lead any one even to suspect his general averment to be true? And therefore I would not allow further proof.

LORD CRINGLETIE.—The Company was certainly dissolved by the death of Kirk, and I don't see any specific averment by Beveridge, as to its being continued afterwards. The question is, however, if we are to allow him a proof under his general allegation, without a specification. The use of condescendence and answers is to prevent surprise; and the averment is broad and precise, though he does not say how he is to prove it. I therefore think we should allow an issue, Beveridge being pursuer.

THE COURT accordingly allowed an issue, in which Beveridge was to stand pursuer, as to whether he was a partner with Wilson after Kirk's death.

W. H. SANDS, W.S.—W. BINNY, W.S.—Agents.

WILLIAM FORTUNE, Advocate.—*Sol. Gen. Cockburn—Alison.*
JAMES LUKE, Respondent.—*Shene—Handyside.*

No. 59.

Dec. 9, 1831.
Fortune v.

Bill of Exchange—Oath on Reference—Relief.—A party having assigned his share in a Banking Company, by a deed obliging himself to relieve the assignee of losses and calls prior to a certain date, accompanied with a letter of guarantee to the same effect; and the Company having thereafter renewed their contract, and ultimately stopped payment; and the assignee having obtained from the cedent a promissory-note to the amount of a call upon him as a partner under the new contract, and bearing to be for value; but having admitted, on a reference to oath, that it was given solely in relation to the obligation of relief;—held entitled to recover under the bill to the extent only to which he could instruct losses covered by that obligation.

By assignation dated 3d July, 1822, the advocate, Fortune, made over to the respondent, Luke, his share of the Fife Banking Company, and inter alia obliged himself, his heirs, and successors, “to free and relieve the said James Luke and his foresaids, of all calls made upon the said share, or losses incurred by the said Company effeiring thereto, previous to the said second day of August last; as also of all debts, deeds, and transactions of the Company previous to that date, the said James Luke being, by his acceptance hereof, bound and obliged, not only to free and relieve me of all calls, deeds, and debts of the said Banking Company effeiring to the said share posterior to the said second day of August last, and in all time coming, to relieve the said Banking Company, not only of all debts, deeds, and transactions of the said Company prior to that date, but also of all such debts, deeds, and transactions posterior thereto, effeiring to said share.” He also granted a letter of guarantee, prior in date to the deed of assignation, in the following terms:—“I acknowledge to have received from you the sum of two hundred and fifty pounds sterling, as payment of my share of the Fife Bank stock, and I hereby become bound to make good to you any loss you may sustain by said purchase at the end of the present contract.” Luke, by a regular deed of acceptance, obliged himself and successors to fulfil the terms of the assignation, and all the obligations incumbent on him as the holder of a share in the Company. The original contract of this Company expired in 1823, and a new one was entered into by several of the partners of the last, including the respondent. In December 1825, the Bank stopped payment; and having executed a trust-deed, various calls were made upon the partners effeiring to their respective shares, the first of which was paid in January 1826. In April thereafter, Luke represented to Fortune that he had raised all the funds in his power to meet these calls, which, as he alleged, were owing to losses and engagements falling on the Bank under the original contract, and of a date comprehended within the period during which Fortune was bound to relieve him. In consequence of this representation, but without receiving present value, Fortune gave Luke his promissory-note, bearing to be for value, and payable one day after date, for £500 sterling,

Dec. 9, 1831.

2d Division.
Ld. Fullerton.
T.

No. 59. being the amount of the call upon the partners. Payment having been refused, Luke raised an action upon this note, before the Sheriff of Fife-shire, which Fortune defended, chiefly upon the grounds,

Dec. 9, 1831.
Fortune v.
Luke.

1. That it had been granted without value;

2. That he had been induced to sign it in consequence of having been led to believe that his obligation of relief to the pursuer under the original contract of the Company had come into operation; and that it was understood to be held as a security only, until it was ascertained how far he was liable to relieve the pursuer from these calls.

After some preliminary procedure, the Sheriff, "in respect that the circumstances stated, refer only to a plea of no value, and in respect that there is no offer to prove this defence either by the writ or oath of the pursuer, the creditor in the bill, &c., decreed in terms of the libel." Luke having brought an advocation, in which he referred "the whole cause to the respondent's oath, the latter deponed as follows:—'That he got said bill from Mr Fortune the advocator; that at the time when he got this bill from Mr Fortune, he had had no money transactions with him, except as to the share of the Fife Bank already deponed to; and at the time when he got said bill, he did not pay over to Mr Fortune any money; that previous to this, and he thinks about the same time, he had been called upon to pay a first instalment or call to the Fife Bank, and the sum was £500; that he does not think that the call specified whether it was a payment for loss under the old contract or under the new, but it was just a call for £500 generally, as a loss sustained by the Bank, for which a call was made upon the proprietors of stock; that he told Mr Fortune that he was informed by the gentlemen who had the management of the affairs of the Bank, that his, the deponent's, share of the loss was very trifling, but that his, Mr Fortune's, share was very great; and the deponent adds, that this seemed to be Mr Fortune's understanding as well as his: that Mr Fortune had no share in the Bank at this time, and he believes that the share which he sold to the deponent, was the only one he had: that he does not recollect of having seen any state of the Bank's affairs at this time, showing the loss under the new contract, and that under the old, and all he knew about it at this time was from what the gentlemen having the management of the Bank affairs, Messrs Cheyne and Mackersie, told him, as above deponed to: that he does not think that he ever mentioned to Mr Fortune that he had drawn dividends regularly on the share which he had purchased from him, and there was no occasion for him to do so, as Mr Fortune knew that as well as he did. Being interrogated, and desired to state the history of the bill sued on, and the value and purpose for which it was granted, depones, that when he received the letter intimating a call for the £500, he went over to Mr Fortune, and told him that there was a call for the above sum, and that he must find money to answer the call: that Mr Fortune said that he had no money, but that he had plenty of property, and that if he, the depo-

uent, would pay the money, that he should be repaid every farthing of loss under the old contract: that the deponent said that it was not very convenient for him to pay that money, but that he would stretch a point to oblige him: that accordingly the deponent did raise the money, and he received from Mr Fortune the bill in question as a voucher for the money he had paid, and which he considered he had paid for Mr Fortune: that he did not borrow said money, but he paid it from funds of his own: that he had no other ground for holding that he had paid this money for Mr Fortune, than the statement he had from Messrs Cheyne and Mac-
Dec. 9, 1831.
Fortune v.
Luke.
 kersie, that the great loss was upon the transactions under the old contract, as already stated: that Mr Fortune always acknowledged his liability to pay the loss under the old contract: that the deponent never understood that said bill was meant for circulation, because it was drawn at one day after date, and it was so drawn out purposely that it might bear interest from its date: that it was never mentioned when it was that the deponent was to ask payment of the bill. Interrogated, whether it was understood between him and Mr Fortune that said bill was to remain in his possession unnegotiated till it was ascertained, by the settlement of the Bank affairs, what proportion of the loss of the Bank fell upon the old contract, and what on the new? Depones, that it was not so understood by him; but that he understood that he could raise money on that bill whenever he pleased, either by discounting it, or by forcing Mr Fortune to pay it. Interrogated, how he reconciles what he has now stated with what he said before, that said bill was not meant for circulation, as it was drawn at one day's date? Depones, that when he received said bill, he certainly did not mean to put it into circulation; but he as certainly did not understand that he was not entitled to do so if he thought proper. Depones, that before he raised action on the said bill, he had not in his possession any state showing what proportion of the loss fell upon the old contract, and what proportion on the new, nor had he ever, even down to this day, any such state; but before he raised the action, he saw the Bank books, and these books showed the loss upon the old contract, and also the loss upon the new, but he did not know what part of the loss arose on the old contract prior to the 2d of August, 1821, and what was subsequent to that date; and that he merely looked at the sum total, and he thinks that there was £84,000 odds on the old, and £14,000 odds on the new; and he never looked for, nor can he say what part of that £84,000 arose prior to the 2d of August, 1821, and what subsequent to that date, nor can he tell if any part of that sum of loss arose prior to the said date or not. Depones, that he thinks there have been four calls, three of £500, and one of £1000: that he never attempted to raise money upon the bill in question, till he raised the present action against Mr Fortune.'"

Upon this, the Lord Ordinary pronounced the following interlocutor:—
 "Finds that in the year 1822, the respondent purchased from the advocate a share in the Fife Banking Company, then carrying on business under

No. 59.
Dec. 9, 1831.
Fortune v.
Lüke.

a contract which was to expire in August, 1823: That by the terms of the assignation, dated on the 3d day of July, 1822, the advicator obliged himself to free and relieve the respondent 'of all calls made upon the said share, or losses incurred by the said Company effeiring thereto,' previous to the 2d day of August, 1821, the respondent being bound and obliged by his acceptance of the assignation to free and relieve the advicator 'of all calls, deeds, and debts of the said Banking Company effeiring to the said share, posterior to the said 2d day of August, 1821:' Finds that upon the expiry of the foresaid contract, the respondent became a partner of the new contract then entered into for carrying on the Fife Banking Company: Finds that on the 26th of January, 1826, the advicator granted the promissory-note libelled to the respondent for the sum of £500, payable one day after date, and bearing to be for value: Finds it established by the deposition, that at the time of granting the said promissory-note no money was actually paid by the respondent to the advicator: Finds it also established by the deposition, that the said promissory-note was granted on occasion of a call made by the Fife Banking Company on the respondent, which call was communicated by the respondent to the advicator: Finds it also established by the deposition, that the call so communicated to the respondent did not bear to be a call for losses incurred under the old contract prior to August 1821, or under the old contract at all, but that it was general, and that the respondent possessed at the time no information authorizing him to state what part of the loss to which the said call was applicable, arose under the old contract or the new: Finds it established by the said deposition, that upon the respondent intimating to the advicator that there was a call for the above sum of £500, and that the advicator must find money to answer that call, the advicator said 'that he had no money, but that he had plenty of property, and that if he, the deponent, would pay the money, that he should be repaid every farthing of loss under the old contract: That the deponent said that it was not very convenient for him to pay that money, but that he would stretch a point to oblige him. That accordingly the deponent did raise the money, and he received from Mr Fortune the bill in question, as a voucher for the money he had paid, and which he considered he had paid for Mr Fortune:' Finds that, according to the legitimate construction of this passage, and of the general tenor of said deposition, the obligation of relief held by the respondent against the advicator, formed the only valuable consideration for the said bill, and that consequently the said deposition proves the onerosity of the bill only in so far as the call was truly comprehended under said obligation of relief; and therefore, in respect that it is not established, either by the deposition, or by any other evidence, that the foresaid call, on occasion of which the bill was granted, arose from losses covered by the advicator's obligation of relief: Advocates the cause, recalls the interlocutor complained of, and decerns, and appoints the case to be enrolled, in order that the pursuer may state the manner

in which he proposes to establish that the condition on which the one-
osity of the bill depends has taken effect." No. 59.

Luke reclaimed, but, without calling for a reply, the Court adhered. Dec. 9, 1831.
Fortune v.
Luke.

LORD JUSTICE-CLERK.—After the utmost attention to the terms of this deposition, which contains the whole case, I cannot entertain a doubt. The Lord Ordinary's interlocutor is the most articulate and well reasoned possible. Darling v.
Adamson, &c.

The other Judges concurred.

M'Iver v.
Stewart.

PATRICK TERNHANE, W.S.—J. ANSTRUTHER, W.S.—Agents.

Mrs M. S. DARLING and Others, Pursuers.—*Skene—G. G. Bell.* No. 60.
J. ADAMSON and T. WATSON, Defenders.—*Forsyth—Neaves.*

SPECIAL case. The Lord Ordinary had approved of the drafts of certain deeds for carrying a trust into execution, prepared under remit from the Court, who now adhered to his Lordship's interlocutor. Dec. 9, 1831.
2d DIVISION.
Ld. Fullerton.
R.

J. S. DARLING, W.S.—D. TURNBULL, W.S.—Agents.

DONALD M'IVER, Advocate.—*Keay—Maitland.* No. 61.
ALEXANDER STEWART, Respondent.—*Wood—Anderson.*

Process.—Circumstances in which a Sheriff's judgment was reversed, and the case remitted back, in respect of irregularities.

STEWART, factor for the trustees of M'Kenzie of Seaforth, on the 30th Nov. 1830, presented a petition to the Sheriff of Ross-shire, for sequestration of the stocking on a farm, part of the Seaforth estate, tenanted by Duncan M'Lellan, for £73, 10s., being the rent due at Martinmas 1830. Warrant of sequestration was granted accordingly; but, on the 1st of December, 1830, and before it could be reported, Donald M'Iver, a creditor of M'Lellan, applied to the Sheriff for warrant to sell, under a prior pointing, part of the stocking of the farm. This was granted, "providing always, that so much of the fruits of the ground, and stock on the said farm," &c., "be left thereon, as will be sufficient for the landlord's right of hypothec for the year's rent due him by the debtor at Martinmas 1830." Thereafter M'Iver took possession of, and advertised for sale, certain cattle, which were included in the inventory of the landlord's sequestration; whereupon Stewart presented a petition, praying for interdict "until he shall make payment to the petitioner of theforesaid sum of £73, 10s., and the expense of sequestration." The Sheriff-substitute having, on the 8th December, refused this petition, Stewart appealed to the Sheriff, who issued this note:—"Geanies House, 30th December,

Dec. 9, 1831.
2d DIVISION.
Ld. Fullerton.
T.

No. 61. 1830. In causa Stewart against M'Iver. The case, on the part of Mr Alexander Stewart against Donald M'Iver, being precisely the same as his appeal in his complaint against Charles Simson, and the interlocutor pronounced by his Substitute, appealed from, being exactly of similar import; the Sheriff refers the parties to his interlocutor of this date, in the appeal in the cause of Charles Simson, as in every particular applicable to the within minute of appeal, in his case against Donald M'Iver, and directs his Substitute to proceed on the same principles, in determining the one and the other. (Signed) Don^d. M'Leod." Thereafter an interlocutor was written out, bearing the same date with the above note, and having the name of the Sheriff subscribed thereto, but not in the Sheriff's handwriting. It was to the following effect:—" Geanies House, 30th December, 1830. The Sheriff having considered the within minute of appeal for Mr Alexander Stewart, as factor for the trustees appointed over the estate of Seaforth, against certain interlocutors pronounced by his Substitute in the Lewis; and having read the proceedings in the petition, as relates to the poinding executed by Donald M'Iver, on the effects of Duncan M'Lellan, tenant in Habost, whose stock were sequestrated for rent due to the landlord, in virtue of his right of hypothec over them; he recalls said interlocutor, as being prematurely issued; appoints a full double of the original petition, with this deliverance thereon, to be served on Donald M'Iver complained upon, and him to lodge answers with the clerk, within six days after such service, with certification. In the meantime, grants interdict as craved, and remits the case to his substitute, to determine the matter finally. (Signed) Donald M'Leod."

A copy of the petition, with these deliverances, was served on M'Iver; and, after some procedure, the Sheriff finally granted warrant for recovering and restoring to the farm the cattle, &c., which had in the meantime been carried off by M'Iver, who thereupon brought an advocation, on the ground chiefly that the interlocutor of 30th December, bearing to recall that of the 8th, and granting interdict, was a fabrication, and the subsequent proceedings upon it consequently vicious.

The Lord Ordinary pronounced this interlocutor: "The Lord Ordinary having heard parties' procurators on the proceedings before the Inferior Court, and reasons of advocation, of consent of the counsel for the parties, advocates the cause. Finds the advocator entitled to the expenses incurred since the 19th day of January 1831, in this Court, as well as in the Inferior Court; allows an account thereof to be given in; and when lodged, remits the same to the auditor of Court to tax and report. And having heard parties' procurators on a motion made on the part of the advocator to restore the cattle to him, appoints the cattle to be restored to the advocator, upon his finding sufficient security for the amount of the rent, or consigning the same."

M'Iver then reclaimed, and the Court, considering the whole proceedings so vitiated by the irregularities which had taken place, that there was

Dec. 9, 1831.
M'Iver v.
Stewart.

no room for any order on the merits, recalled the same, and remitted the cause to the Sheriff to proceed de novo.

R. M'KENZIE, W.S.—W. M'KENZIE, W.S.—Agents.

Dec. 9, 1831.
M'iver v.
Stewart.

Forrest v.
Clyne.

JAMES FORREST, Petitioner.—*Marshall.*
DAVID CLYNE, Respondent.—*Maidment.*

No. 62.

Process—Agent and Client—Appeal.—Circumstances in which, after an appeal which was dismissed, the expense of one half of a report which had been ordered by the Court, prior to appeal, from the Solicitor of Stamps, &c., was decreed for against one agent, at the instance of the opposite party, whose agent had paid the whole.

CLYNE and Snody were agents, respectively, for Robb and Forrest, in a petition at Robb's instance, for recall of sequestration,¹ in which a question arose relative to an objection by Robb to the stamp originally impressed on a deed of assignation. The Court ordered a report from the Solicitor of Stamps, and the Deputy-keepers of the Signet, relative to the practice in stamping similar deeds. A report was returned, but the Court did not decide the question, as Forrest transmitted the deed to London, where it was impressed with a new stamp. In the circumstances, no fine was exacted at affixing this stamp. The Court then (July 1830) refused to recall Robb's sequestration, “and remitted to the trustee to consider how far the defender (Forrest's) expenses of process, with one half of the expense incurred in procuring the report of the Solicitor of Stamps, and Keepers of the Signet, ought to be defrayed out of the sequestered estate.” Robb presented an appeal, in which no appearance was made by Forrest. On October 3, 1831, the House of Lords affirmed the judgment of the Court of Session,² which was applied accordingly. Forrest then petitioned the Court for decree against Clyne, for £3, 5s., being one half of the expense of the report by the Solicitor of Stamps, &c., the whole of which his agent, Snody, had paid on the 27th May, 1830, with interest from the date of payment. Clyne objected that this ought to have been craved before the appeal, and that no costs had been given in the House of Lords. Forrest answered, that no costs could be given, as no appearance had been made by him: and that the interlocutor of July 1830, implied a finding that one half of the expense of the report was to fall on each party; and besides, by the practice of the Court, agents were liable jointly for such reports, and Snody having paid the whole of this, Forrest was entitled to relief of one half against Clyne, whose client was bankrupt.

The Court “found the said David Clyne liable to the petitioner in the

¹ See ante, VIII. 889 and 1085.

² See ante, IX. Appendix, No. 55, p. 16.

No. 62. sum of £3, 5s., as one half of the expense of the report referred to, with interest thereof since 27th May, 1830, &c.; found him liable in the expense of this appearance, which modify to £2, 2s.," &c.

Dec. 10, 1831.
Forrest v.
Clyne.

Cox v. Stead,
&c.

A. Snoddy, S.S.C.—D. Clyne, S.S.C.—Agents.

No. 63. JAMES COX (STEAD and PATERSON'S TRUSTEE), Petitioner.—*Robertson—A. M'Neill.*

MISSSES STEAD and Others, Respondents.—*D. F. Hope—Greenshields.*

Process—Bankrupt—Sequestration.—1. Where a disputed election of commissioners on a sequestered estate has taken place, it is incompetent for the trustee to apply by "petition and report" to have it determined which set of commissioners were duly elected; 2. Competent to reclaim against interlocutors, in matters of sequestration, pronounced by the Ordinary officiating on the Bills during vacation.

Dec. 10, 1831. At a meeting for electing commissioners on the sequestered estate of Stead and Paterson, two sets of commissioners were proposed by two different parties among the creditors, each of whom maintained that the set proposed by them was duly elected. Neither set of commissioners having petitioned the Court, Cox, the trustee, in order to have it determined which were duly elected, presented in vacation to the Lord Ordinary officiating on the Bills, a "petition and report," being, as he conceived, the mode intended by the statute, which provides, that "in case of any dispute about the election of these commissioners, the same shall be reported to, and summarily advised by, the Court of Session, or Lord Ordinary on the Bills, in the manner before directed as to the election of interim factor and trustee."

He prayed the Court for warrant of service on both sets of commissioners, and their respective adherents, and to find that the one or other set were duly elected. Misses Stead, and other creditors, objected that the trustee had no title to bring the disputed election before the Court, and that it was the parties alone who could make any application on the subject.

On the other hand, it was contended by Cox, that although the statute did not specify by whom a disputed election of commissioners was to be reported to the Court, it did not exclude the trustee, nor point out the commissioners themselves as the proper parties, but generally directed it to be reported for the purpose of being summarily advised, and that while it was the interest of the trustee to have such a dispute settled for the benefit of the estate, the commissioners, having no interest, would seldom be inclined to involve themselves in expense by commencing a litigation on the subject.

Lord Balgray, Ordinary, pronounced this interlocutor:—"The Lord Ordinary officiating on the Bills having considered this petition, with th-

2d DIVISION.
Lord Balgray.

F.

answers thereto, and having particularly considered the mode of the application relative to the matter mentioned in the petition, finds that the same is not in proper form; therefore, refuses the application at the instance of the present petitioner, and finds him liable in expenses to the respondents, and remits to the auditor of Court to tax the same, and report in common form; reserving always entire to either set of commissioners to apply to the Lord Ordinary on the Bills in the usual and proper form, to be confirmed in the manner pointed out by the bankrupt act, and whereby the rights of the competing commissioners will be legally determined."

Cox thereupon reclaimed to the Court, but was met with the objection, that the Ordinary on the Bills during vacation having, by the bankrupt act, the whole powers of the Court in matters of sequestration, his interlocutor was final. Their Lordships, however, in conformity with the decision in Robertson's Trustee v. Oughterson,¹ repelled this objection, and allowed the case to be stated.

Robertson, for the petitioner.—One set of commissioners have now made an application, so that this case resolves into a question of expenses, which depends on the competency of the application. When there is a disputed election, and neither set of commissioners will apply, it is the duty of the trustee to report to the Court, so as to have it determined who are the true commissioners.

D. F. Hope, for respondents.—There never was a clearer case of incompetency. If the trustee thought one set validly elected, he should have summoned them to meet and act with him, and if neither of them would accept, he should have had a new election.

Robertson.—The trustee could not call a meeting for a new election.

LORD MEADOWBANK.—But he might have come to ask us for power to do so.

LORD JUSTICE CLERK.—There can be no doubt of the incompetency of an application to have parties declared elected who don't apply themselves.

LORD MEADOWBANK.—I am of the same opinion. I think we should reserve the question of whether the trustee should not be personally liable for the expenses of proceeding.

LORDS GLENLEE and CRINGLETIE concurring,

THE COURT adhered, with expenses, reserving the question as to whether these should be allowed to be charged against the estate.

JAMES TAYLOR, S. S. C.—C. J. F. ORR, W.S.—Agents.

¹ June 16, 1827; ante, V. 809.

No. 63.
Dec. 10, 1831.
Cox v. Stead,
&c.

No. 64.

Dec. 13, 1831.

Thomson. v.
Moffat.ROBERT THOMSON, Pursuer.—*Neaves.*
THOMAS MOFFAT, Defender.—*Thomson.*

Proof—Judicial Remit.—Where a defender objected to an account of plumber-work as overcharged, and a remit was made to a plumber to “examine the account, and report his opinion as to the charges;” and a report was returned, stating a variety of items as overcharged, and others as undercharged—Held that the defender could not reject the report as to the partial undercharge, if he founded on it in proof of the partial overcharge.

Dec. 13, 1831. — THOMSON executed plumber-work for Moffat, for which he charged £79, 14s. Moffat had a counter claim of £7, 0s. 7d., and he made a partial payment of £30, but alleged that generally the account was overcharged. Thomson raised an action for £42, 13s. 5d., the balance of his account.

1st DIVISION.
Ld. Corehouse.
H.

The Lord Ordinary remitted to Wilkison, plumber, “to examine the account, and report his opinion as to the charges.” Wilkison reported it to be charged, in some items too high, and in others too low, but on the whole to be just and moderate. Moffat objected to the report, chiefly as it did not specify what items were erroneously charged on either side. A new remit was made to Brodie, plumber, who set off against each article what he thought an over or undercharge. The result was a deduction, on the whole, of £1, 11s. from the account of £79, 14s. Moffat objected to this report, that it should only have noticed the articles which were overcharged, as he did not dispute any but these.

The Lord Ordinary repelled the objection, and found Moffat liable in £41, 2s. 5d., with interest from the date of the citation, and also in expenses, subject to modification.

Moffat reclaimed, and repeated his objection to the plumbers’ report. He also contended, that as the account was at variance, in many of its items, with the charges of the plumbers who examined it, and as some deduction had been made on it, he was justified in lodging defences, and should not have been subjected in expenses.

LORD GILLIES.—It is quite out of the question to allow Moffat to found on the report, so far as it cuts down any items in Thomson’s account, and at the same time to repudiate the same report, in so far as it states other items to be undercharged by Thomson. Such a proceeding would never give true effect to the reporter’s opinion as to the charges in the account, after examining it, as desired by the Court.

LORD PRESIDENT.—I entirely concur. And although a deduction of £1, 11s. has been made on this account of £79, still the reporter has come as near to the same amount with Thomson, as any two tradesmen can well be expected to do in similar matters. I think Moffat was justly subjected in modified expenses.

The other Judges assented.

The Court therefore adhered, and allowed Thomson the expense of the Inner-House discussion.

Mrs LUNDIE or COMPTON, Pursuer.—Sol.-Gen. Cockburn—Robertson. No. 65.
J. F. HOME, Defender.—D. F. Hope—Milne.

Dec. 13, 1831.
Lundie v.
Home.

Process—Issue.—A pursuer having averred that he received an anonymous letter through the Post-Office, on or about the 8th of December, 1830, and, after quoting the letter, and stating it to be false, malicious, and injurious, having averred that it "was composed and sent, or written and sent, or was sent, in the knowledge of its contents," by the defender—Held, that these averments were sufficiently specific to afford matter for an issue.

Mrs LUNDIE, or Compton, and her husband, raised a summons of Dec. 13, 1831. damages against Mr J. F. Home of Wedderburn, founded on an anonymous letter which Mrs Compton had received through the Berwick post-office. In her condescendence, after stating the receipt of the letter through the post-office, about 8th December, 1830, and quoting the letter, and averring its contents to be false, malicious, and injurious; she averred, 5th, "This letter was composed, or was written, or was sent in the knowledge of its contents, or was both composed, written, and sent by the defender." This statement had been previously made, in the same terms, in the summons.

The issue clerks reported that no issues could be framed out of the record. The Lord Ordinary "having considered the summons and re-revised condescendence for the pursuer, on which the issue clerks have reported that no proper issues can be prepared," reported the case to the Court.*

At the advising, the pursuer's counsel, in order to obviate the objection to the two first averments, in Art. 5th, as noticed in the note of the Lord Ordinary, put in the words "and sent," so as to couple the averment of composing or writing, with the averment of sending.

LORD GILLIES.—In drawing a condescendence, a party is bound to state every thing which is requisite to prevent the defender from being taken by surprise at the trial. But I think the condescendence here is sufficiently specific. It first sets forth the receipt of the letter; it then quotes the letter, and avers the tenor of it to be false, malicious, and calumnious; then comes the explicit allegation, that the letter was written and sent, or composed and sent by the defender, or sent in the

* * Note.—The question which the Lord Ordinary has thought proper to bring before the Court, depends on the terms of the 5th article of the re-revised condescendence. The clerks state, that independently of the objection of irrelevancy, to which the two first averments, as made separately and disjunctively, seem liable, the others are in such vague and general terms as to afford no reasonable opportunity to the defender to meet them by a contrary proof. They further state, that since the introduction of Jury trial in civil cases in Scotland, no issue has been sent to a Jury, where the averments were not much more specific than in the present case."

No. 65.

Dec. 13, 1831.
Lundie v.
Home.M'Kechnie v.
M'Farlane.

knowledge of its contents by him. This is both relevant and specific. The averment of writing or composing, separately from sending or publishing, was irrelevant. But coupled with sending, as it now is, I can see no difficulty in framing an issue, and I believe I have seen many cases tried in the Jury Court, where the averments were less specific than they are here.

LORD PRESIDENT.—I have no doubt that there is matter out of which issues may be extracted. The mere contents of the letter by itself, would not support the action; but it is averred that the defender composed and sent the letter, or sent it in the knowledge of its contents, and either of these is enough. I am at a loss to see what difficulty can remain in framing an issue, as the condescendence is sufficiently specific, and perfectly relevant. There are many cases in which a party may eventually be taken by surprise, notwithstanding every previous precaution of which our forms admit; but in such a case there is a remedy by means of a new trial.

LORD CRAIGIE was understood to dissent; and to be of opinion that the condescendence was too vague.

LORD BALGRAY concurred with Lord President and Gillies.

THE COURT "found the condescendence, as amended, relevant, and remitted to the Lord Ordinary to remit to the Jury clerks to frame an issue or issues."

J. GRANT, W.S.—J. FORMAN, W.S.—Agents.

No. 66.

WILLIAM M'KECHNIE, Suspender.—*Russell.*
ROBERT M'FARLANE, Charger.—*Greenshields.*

Bill of Exchange—Diligence, Legal.—Diligence on a promissory-note sustained at the instance of the payee, for behoof of a cautioner who had paid the amount although no assignation of the note and diligence thereon had been granted to the cautioner.

Dec. 13, 1831.

2d DIVISION.
Lord Medwyn.
T.

M'FARLANE was superior of certain subjects, which belonged to M'Kechnie. Over this property M'Kechnie had granted an heritable bond in favour of one Stewart, and thereafter conveyed the property to one Chalmers. The feu-duty having fallen into arrear, M'Farlane threatened to sell the subjects. Stewart, to prevent this, agreed to take the property, and to discharge Chalmers of certain arrears of interest due upon the bond. A disposition was granted to him accordingly by Chalmers, with consent of M'Kechnie. An account of feu-duties was made up of the same date showing the amount to be £46, 12s. 8d., which, under a deduction of £15 M'Kechnie bound himself by holograph obligation to pay, or to grant his acceptance at four months to M'Farlane, for the amount. The money not being paid, the acceptance was granted. When it became due M'Kechnie paid a small sum, and granted a renewed promissory-note for the remainder to M'Farlane, which Stewart undertook to see paid.

M'Kechnie having failed to retire this note, and diligence being raised, No. 66. Stewart paid the amount to M'Farlane, who charged M'Kechnie for be-
hoof of Stewart. Of this charge a bill of suspension was presented, con-
taining a reference to M'Farlane's oath, which established the facts above
narrated. M'Kechnie then maintained, that as M'Farlane had received
payment, he was not entitled to charge, and as Stewart could not do so
without a conveyance of the bill and diligence, so M'Farlane, who could
not be in a better situation than him, could not insist in the charge.

Dec. 13, 1831.
M'Kechnie v.
M'Farlane.

The Lord Ordinary pronounced this interlocutor :—"Repels the rea-
sons of suspension, founded on the ground that the sum in the suspender's
promissory-note having been paid by Mr Stewart, who was not bound to
relieve the suspender, a charge was given in name of the charger, with-
out assigning the debt and diligence to Stewart; and appoints the cause
to be called, that the suspender may say whether any and what claim, by
compensation or otherwise, he has to state against Mr Stewart, so that
he should not make payment of this promissory-note to the charger on
behalf of Mr Stewart."*

The Court, on a reclaiming note, unanimously adhered, without calling
upon M'Farlane's counsel to reply.

ALEXANDER HAMILTON, W.S.—WILLIAM MACKERSEY, W.S.—Agents.

* His Lordship prefixed a note, stating the circumstances, and adding, "It is not explained what occasion there would have been for M'Kechnie being collateral security for Stewart, or how Stewart could be the primary obligant at all; nor why M'Kechnie alone bound himself to pay, without taking an obligation from Stewart to relieve him, if he was not the proper debtor. It being so abundantly clear that M'Kechnie has not established that Stewart is the proper debtor, or that he himself was not so; and as it is thus a debt truly due by the suspender, the Lord Ordinary is unwilling, if the suspender's interest is not affected in any defence he may have against payment, to turn the party out of Court who has given the charge, because another has paid him this bill under a separate agreement with him, merely because the debt and diligence have not been conveyed to that other person, and who might have proceeded with the same diligence used here in the charger's name. The charge is thus perfectly formal, and any injury to the suspender will be effectually guarded against, if he is allowed to plead any objection against payment, which he could have done, if Stewart had been the charger. Any such should no doubt have been stated on the record, and perhaps the Lord Ordinary is incorrect in allowing to do so yet. With this view, the case has been ordered to the roll. At the same time, an interlocutor has been pronounced, which gives the party who has pleaded his objection so keenly, an opportunity of obtaining a review."

No. 67. **Mrs AMELIA MOODIE or ANDERSON, Pursuer.—*More.***

Dec. 13, 1831.

2d DIVISION.

Lord Medwyn.

R.

**Anderson v.
Harley.**

W. HARLEY (ANDERSON's Tutor), Defender.—*Rutherford—G. G. Bell.*

SEQUEL of the case mentioned Ante VIII. 743. In the accounting which followed the judgment there pronounced, a remit was made to an accountant, to whose report objections were given in by Harley, tutor of John Anderson, son of the party in the case above quoted, now deceased, to the effect that he had not been allowed credit for certain items. These objections having been repelled by the Lord Ordinary as not supported by evidence, Harley reclaimed, but the Court adhered, without prejudice to any competent reference to oath.

M'RITCHIE, BAYLEY, and HENDERSON, W.S.—R. WILSON,—Agents.

No. 68. **CHARLES BARNET, Advocate.—*Jameson—Moir.***

THOMAS DUNCAN, Respondent.—*Keay—Patton.*

Executor—Principal and Agent.—1. The executor confirmed, or the agent employed by him, is the only person entitled to uplift the funds, and to the possession of the documents of the deceased; 2. Circumstances in which part of the deceased's estate having been invested by an agent in bonds, conceived in terms of the settlement in favour of the widow in livery, and the executor and his sisters in fee, the agent was justified in refusing to deliver these bonds to the executor, until the consent of the other parties was obtained.

Dec. 14, 1831. **CHARLES BARNET** was appointed sole executor, under his father's settle-
ment, which generally conveyed to him the whole effects and vouchers
1st DIVISION. of the deceased. Barnet had two sisters, one of whom was married to
Lord Newton. James Reid, another to John Dickson. The settlement directed, after

H.
**Barnet v.
Duncan.** several provisions, that the residue should be liveryed by the widow, and at her death be divided equally among Barnet and his sisters. Barnet was also bound, by acceptance, "to lend out the said residue on good security, heritable or movable, at the sight and with the consent of the said James Reid and John Dickson, the said security to be conceived in favour of my said spouse in livery, for her livery use alienarily, and of the said Charles Barnet," and his sisters in fee.

Duncan was the agent who had prepared the settlement. He also expedite the confirmation of Barnet as executor, and he became possessed of the documents and vouchers of debt belonging to the deceased. After he had proceeded to re-invest the greater part of the proceeds of the residuary estate on heritable bonds, conceived in terms of the settlement in favour of the widow in livery, and the children in fee, Barnet required him to surrender the whole documents connected with the estate, and to pay over the balance in his hands to him as executor. Duncan objected that he had obtained these documents on the joint employment of Barnet,

his mother, and sisters, and that he could not give them up, especially No. 68.
 the bonds above mentioned, nor could he pay over the balance to Barnet Dec. 14, 1831.
 singly; but he was ready to exhibit his accounts, and to consign the Barnet v.
 balance in a Bank, in the joint names of himself and Barnet's agent, till it Duncan.
 could be invested in terms of the settlement. Barnet raised an action
 before the Sheriff of Perthshire, to enforce his demand, in which the
 Sheriff, after ordering the widow and sisters to be called, pronounced this
 interlocutor: "Finds that Mr Duncan must be held to have been put in
 possession of the said money and documents, and intrusted therewith, as
 the confidential agent of all concerned, in which capacity he must be held
 to have acted till 17th November, 1828, the date of a letter to him, from
 the pursuer's procurator, requesting to be put in possession of the papers:
 finds that Mr Duncan has exhibited a particular account of his intromis-
 sions and disbursements, balanced by £396, 7s. 10d., due by him, which
 sum was consigned by him in the clerk's hands, and has since been depo-
 sited in the Perth Bank: finds that the pursuer has passed from any
 objections to the said account, and admitted the same: finds the pursuer,
 as executor of the deceased, entitled to the custody of the several writings
 produced by Mr Duncan, and allows him to withdraw the same from the
 process, on his subscribing a particular receipt: finds, in reference to the
 foresaid sum of £396, 7s. 10d., deposited in the Bank, that the same, in
 terms of the deed of settlement, must be lent out on good security, at the
 sight and with consent of the said James Reid and John Dickson, as well
 as of the pursuer, which appoints to be done," &c. He farther "remitted
 to the clerk to procure from the Bank, in whose hands £396, 7s. 10d.
 were deposited, a proper document for the same, payable to the widow in
 liferent, and to the pursuer, and Janet and Helen Barnet in fee, since
 those concerned have not availed themselves of the appointment in the
 interlocutor of the 18th November last, for lending the same on good
 security, in terms of the deed of settlement." The Sheriff afterwards, "in
 respect that the balance due by the defender (Duncan) on his state of ac-
 counts, remains in the Bank, subject to the control of those interested in it,
 according to their different interests of liferent and fee, assoilzied the
 defender, modified his expenses to £18," &c.

Barnet brought an advocation, and contended, that as sole executor
 and universal intromitter, he had exclusive right to the custody of all
 writs and evidents, and to recover the estate of the deceased, without being
 subject to any control from his mother and sisters. So far as Duncan
 could justify his acquisition of these vouchers, and his intromission with
 the estate of the deceased, it could only be on the footing of having been
 his (Barnet's) agent. But as such, Duncan was bound to obey the in-
 structions of him alone.

Duncan answered, that he had acted under the joint employment of
 Barnet and the other relations interested in the succession, and was not

No. 68.

responsible to Barnet alone; and especially, after the settlement was executed to the effect of taking bonds in favour of the widow in liferent, and the children in fee, he could not give up these bonds to Barnet without the consent of the others interested.

Dec. 14, 1831.
Barnet v.
Duncan.

Young v.
Smarts.

The Lord Ordinary pronounced this interlocutor: "Advocates the cause: finds that the advicator being, by his father's settlement, sole executor, and being regularly confirmed as such, was the only person entitled to intromit with, and collect the funds of the deceased, and that the respondent, Mr Duncan, must be held to have uplifted these funds under authority from, and as agent for, the advicator: finds that Mr Duncan was not justifiable in refusing to pay over to the advicator the balance in his hands, on the ground of there being other parties interested in the succession, no averment being made by him or these parties that the advicator was in doubtful circumstances, or not fully responsible for the sum: but finds that the advicator, though entitled to the possession of all documents which had belonged to the deceased, had no right to demand delivery of the bonds, which, in pursuance of the settlement, had been taken to the widow in liferent, and to the children in fee, and that Mr Duncan was justified in refusing to deliver them until the consent of the other parties interested was obtained: finds the advicator entitled to possession of the balance consigned in the Perth Bank, but under an obligation to lend it out with the consent, and in the terms prescribed in the settlement: grants warrant to him to uplift the same from the Bank; and, in order that the document granted by the Bank therefor, in terms of the Sheriff's order, may be restored to them, authorizes the advicator to get up the said document from the clerk of the Inferior Court, or any party with whom it may be deposited, and decerns: finds no expenses due to any of the parties."

Both parties reclaimed. The Court adhered on the merits, but altered as to expenses, and found Duncan liable in them, subject to modification.

Advicator's Authorities.—Dunduff, March 13, 1612 (3843); Steven, Feb. 14, 1622 (3845); Leitch, Feb. 4, 1623 (3844); M'Aulay, 1712 (3848.)

WOTHERSPOON and MACK, W.S.—A. GIFFORD, S.S.C.—Agents.

No. 69.

JOHN YOUNG, Pursuer.—Jameson.

A. W. and G. SMART, Defenders.—Shene—A. Wood.

Sale—Principal and Agent.—Where an agent bought wheat "for a friend," and the seller took the agent's own bill for the price, and the agent refused to part with money belonging to the principal in respect of the bill, and became insolvent while the bill was in the circle—he held that the seller could not claim payment of the price of the wheat from the principal.

ON 11th August 1829, Robert Cowan, grain-merchant in Glasgow, No. 69. bought 320 bolls of wheat from John Young, grain merchant there, and mentioned that the purchase was for a friend, but the name of the party was not asked by Young, who took Cowan's bill at four months for the price. The purchase was for A. and G. Smart, who had an account with Cowan as their agent. Of this purchase Cowan sent them an invoice, intimating that the price was put to their debit. At this time he held several consignments of grain and beans, of which he effected partial sales for Smarts, during the currency of the bill; and on the 5th of November he sent an account sales, stating, "net proceeds, £412, 10s. 5d. at your credit, and payable 14-17th January." Smarts wrote to him on the 6th of November, to remit these proceeds, "and we expect you will do so to-morrow, otherwise you would be getting accommodation from our funds, as the wheat, not being due, cannot yet come to our debit," &c. "Of course, on your paying in this money, we take care to put you in funds to pay the wheat when due, as you will no doubt be under acceptance for it." Cowan answered, "Your wheat, it is true, is not yet actually paid in money by me, but what, as to you, is equivalent, my bill has been granted, and the amount of the grain therefore stands properly at your debit." Messrs Smart again wrote Cowan, on November 9th, desiring him to remit, and saying, "Suppose your acceptance were not paid, might there not be a question whether the seller might not claim the wheat, or hold us responsible for it?" Cowan still refused to remit, and said, "as to my acceptance for the wheat—the seller transacted with me alone, and solely upon my credit. He knew not of you, nor of any other upon the occasion," &c. He accordingly retained the above proceeds, and he effected farther sales of beans and grain, to the amount of nearly £300, the price of which he received. He became insolvent in the end of November, or beginning of December, at which time he was debtor to Messrs Smart on their mutual account, after being credited by them with the price of the wheat. Young having learnt that the wheat was bought for behoof of Smarts, wrote them on December 10th, requesting that they would take up the bill accepted by Cowan for £464, and falling due on 11-14th December. They refused, and he raised an action against them for payment.

The Lord Ordinary "assoilzied, but found no expenses due."*

* **Note.**—The Lord Ordinary concedes this case to be regulated very much by the principles adopted by the Court in deciding that of Hood v. Cochrane, 16th January, 1818. The wheat here, though no mention was made of the defenders at the time of the purchase, was bought by Cowan for them; and the pursuer, if nothing further had followed, might have been entitled to demand payment of the price either from Cowan or from them. But having, when he knew, as he admits in his condescendence, that the purchase was for their behoof, taken a bill from Cowan, undoubtedly he must be held to have made his election, and to have taken him for

Dec. 14, 1831.
1st Division.
Lord Newton.
D.

Young v.
Smarts.

No. 69. Young reclaimed, but the Court adhered.

Dec. 14, 1831.

Young v.
Smarts.

Clyne v. Sclater, &c.

LORD BALGRAY.—When Cowan purchased the wheat, he did not name the party for whom he bought; he merely said it was for a friend. If, however, the matter had rested there, Young might have argued that he was entitled to come against Smarts for the price. But Young takes the bill of Cowan for the price; and Cowan, holding consignments of grain for Smarts, effects sales of these, and refuses to give up their proceeds to Smarts, alleging as a reason that Young had taken his bill for the wheat, and that this, as to them, was the same thing as if it had been actually paid in money by Cowan. From the nature of Young's dealing with Cowan, he enabled him to use this argument, and the effect of it seems to have been that Smarts left proceeds in the hands of Cowan, which would otherwise have been withdrawn prior to his insolvency. I think Young must be held to have trusted himself to Cowan's security; Smarts acted on the faith that the purchase of the wheat from Young was a transaction in which Young took Cowan for his debtor; and, after the insolvency of Cowan, it is impossible for Young to alter the nature of his transaction with Cowan, and throw over the loss upon Smarts. I am clear that the Lord Ordinary's interlocutor is well founded.

LORD CRAIGIE was understood to dissent.

LORDS PRESIDENT and **GILLIES** concurred with Lord Balgray; the former observing, that, in a mutual account between merchants, a sum entered as value in account, was the same thing between them as if an actual payment in money to that amount had passed.

J. CAMPBELL—FOTHERINGHAM and LINDSEY, W.S.—Agents.

No. 70. D. CLYNE, Petitioner.—D. F. Hope—More.

R. SCLATER and Others (CALEDONIAN IRON COMPANY), Respondents.—Rutherford—A. Dunlop.

Expenses—Appeal.—Circumstances in which expenses prior to appeal were found due, subject to modification.

Dec. 14, 1831. An appeal having been taken from the judgment mentioned ante, IX. 248, it was, by the House of Lords, reversed without any special finding, but on the ground, as stated in the speech of the Lord Chancellor in moving judgment, that the calls of stock pursued for had been made by a quorum only, and not by a majority, of the committee of management. The cause was further remitted to this Court “to do further therein as shall be just and consistent with this judgment.” The Court having now

his debtor. By taking the bill also, he put it in the power of Cowan to retain for his relief the price of grain sold by him for the defendants, which they were demanding, and which it was possible they might otherwise have recovered before Cowan's bankruptcy. But as the question is not free of difficulty, the Lord Ordinary has not given expenses.”

applied the judgment, and assoilzied Clyne, he craved the expenses prior to appeal as necessarily following from the judgment of the House of Lords, and the absolvitor thereupon pronounced. On the other hand, while the competency of such a demand was not disputed, it was contended, that had the Court originally assoilzied, they would not, in the exercise of a sound discretion, and looking to the expense caused by the litigation in the numerous untenable points attempted to be maintained by Clyne, have awarded him any expenses.

The Court found him entitled to expenses, subject to modification, and directed the auditor, in his report, to separate those relative to the discussion as to the calls having been improperly made, from those regarding the other points litigated.

D. CLYNE, S. S. C.—J. KENNEDY, C. S.—Agents.

CALEDONIAN IRON and FOUNDRY COMPANY, Pursuers.—*Rutherford*— No. 70.

A. Dunlop.

D. CLYNE, Defender.—*D. F. Hope—More.*

Process—Judicature Act—Expenses.—1: Abandonment of a cause before closing the record not regulated by the judicature act; 2. Circumstances not sufficient to relieve a pursuer abandoning his cause from expenses.

After the appeal mentioned in the preceding case had been taken, the Caledonian Iron and Foundry Company raised a new action against Clyne, for payment of two additional instalments of stock called up subsequently to those sued for in the former action. Besides the defences stated against the former action, Clyne further pleaded that one of the calls now sued for had fallen under the triennial prescription. At the first calling, the Company offered to sist process till the result of the appeal, provided Clyne would consent to decree passing against him, should the judgment of the Court be affirmed. This he refused to accede to, though he was willing that the process should be sisted unconditionally till the issue of the appeal. The preparation of the cause thereupon proceeded; but on the reversal by the House of Lords in the other action, the Company, before the record was closed in the present, consented to absolvitor, under reservation of their right to bring a new action for Clyne's share of loss as a partner of the Company, and leaving to the Lord Ordinary to determine the matter of expenses. On this Clyne contended that the Company could not, under the judicature act, abandon the action without payment of expenses; and, at all events, although it might not be imperative to award expenses, as the condition of their being allowed so to abandon, he was, in the circumstances of the case, clearly entitled to them. The Lord Ordinary reported the matter verbally to

Dec. 14, 1831.
Clyne v. Scater, &c.

Caledonian
Iron & Found-
ery Co. v.
Clyne.

Dec. 14, 1831.
2d Division.
Lord Medwyn.
F.

No. 71. the Court, issuing the subjoined note.* The Court, while they agreed that the question was not affected by the judicature act, directed the Lord Ordinary to find Clyne entitled to his expenses.

Dec. 14, 1831.
Caledonian
Iron & Found-
ery Co. v.
Clyne.

J. KENNEDY, C.S.—D. CLYNE, S.S.C.—Agents.

* "NOTE.—The Lord Ordinary has taken this point to report at the request of the pursuers. The opinion which he has formed upon the point is this: while it is imperative on the Court (in virtue of section 10 of the judicature act) to award full expenses to the defender, if the pursuer, after the record is closed, and all the expense in making it up incurred, wishes to abandon the cause, in order to supply an omission in point of fact, which, at an earlier period of the process, might be supplied by an amendment of the libel, that it is not imperative to award expenses, if the ground for not proceeding with the process be not the improper omission of an averment in point of fact, but arises from some other ground, with regard to which the pursuer is not in fault, by having wilfully withheld or negligently omitted it, more especially if the record is not completed and closed; and that the judicature act has left the effect of such a step as this to the ordinary rules by which expenses are awarded on the dismissal of a process. These rules are to be found in the conduct of the parties. Now the former action against the defender concluded for the amount of four calls of stock, alleged to be due by the defender, which were all that were then due. In that action decree was obtained, and, as the report bears, unanimously. In April the present action was raised for two further calls. The defences are extremely numerous and minute; but it is not stated as a defence that the calls were made by a quorum only, and not by a majority of the directors: neither is this fact stated in the answers, so that the defender plainly did not rest upon this defence. Nay, it is not even stated in the revised answers, nor any plea in law founded on it.

"When this process came before the Lord Ordinary, a proposal was ineffectually made as to sisting process till the result of the appeal of the other action should be known.

"The judgment in the first action was reversed, on the ground that the calls had been made only by a quorum of the directors.

"On this it was intimated to the defender that the pursuers did not mean to proceed with this action, so that he need not revise the answers which were to be given in by the first sederunt-day in November.

"The present minute was lodged on Nov. 14, consenting to absolvitor being pronounced, reserving right to proceed against the defender as a partner of the Company. The defender objects to this reservation, and insists farther, that the pursuers can only abandon their action on payment of expenses.

"Under all the circumstances of the case, it is the opinion of the Lord Ordinary, that if it be not imperative by the statute that the defender shall have expenses on being assoldized, the circumstances of this case do not warrant this claim on any other ground; but farther, it does not appear that any reservation need be inserted in the decree of absolvitor, for the medium concludendi of the proposed action, as well as the sum to be concluded for, are not the same as those contained in the present action, and that an absolvitor from it will not interfere with the right of the partners of the Company to claim a share of the loss from a copartner in a new action, with a proper narrative and conclusions. If the Lord Ordinary is right in this opinion, it is a farther confirmation of the view he takes of the inapplicability of the judicature act to this case, as he understands that such a reservation would be necessary in the case there provided for, to enable the party to institute a second action, and that the price of this privilege is the payment of the full expenses of the first action."

JAMES ORR, Advocate.—*Greenshields—Rutherford.*
 JOHN GRAHAM, Respondent.—*Murray—Cunningham.*
 Et è contra.

No. 72.

Dec. 15, 1831.
 Orr v. Gra-
 ham.

Contract—River—Society.—Circumstances in which one of several manufacturers, whose mills were driven by a stream requiring to be artificially supplied, and who were associated in reference to certain leases of reservoirs taken by them, was held not bound by new leases of these reservoirs, or for the expense of a new reservoir, to which he was no direct party, although he derived his full share of the benefit arising from the supply thus obtained, and his work required it, and the new contracts were not alleged to be injudiciously made.

SOON after 1780, two or three spinning-mills were erected on the Dec. 15, 1831.
 banks of the Levern, a small stream in Renfrewshire, the current of ^{1st DIVISION.}
 which drove the machinery. As the stream proved inadequate and pre-
 carious in its natural condition, it was found expedient to connect it with
 some dams which lay near its source. A lease of the Long Loch was
 taken in 1786, for 19 years, by one of the manufacturers, who sublet it
 among the others; and, in 1800, a reservoir called the Commore Dam,
 was taken from Mr Spiers at a rent of £26 for 91 years. Mr Graham
 of Fereneze was not a party to this tack, but his tenants in the Fereneze
 print-field were. The proprietor of the Commore Dam, and some of the
 proprietors of the Long Loch, (which was a joint property,) held their
 estates under entails which prohibited the granting of leases longer than
 19 years. In 1804, a new lease of the Long Loch was taken, and one of
 the proprietors of the Loch bound himself to renew the lease at any period
 of its currency, for 19 years. Before this time the number of works on
 the banks of the Levern had considerably increased, and included, among
 others, the Fereneze spinning-mill, then possessed by John Cochrane.
 The proprietors of these works were parties to the 19 years' leases, and
 were bound, jointly and severally, for the rent. On January 8, 1805, Mr
 Graham, one of these parties, wrote a holograph "memorandum of agree-
 ment among the proprietors of public works on the Levern." It com-
 menced, "We, the undersigned proprietors of public works upon the
 water Levern, having taken new leases of the Long Loch from Archibald
 Spiers, Esq. &c.; for the payment of the rental of said leases, and two
 former leases, granted by John Airston, &c.; likewise, for the manage-
 ment of the dams and sluices specified in these leases, we bind and oblige
 ourselves to agree to the following articles:" By these it was inter
 alia agreed, that the annual expense should be distributed among the
 works in fifty-one shares, of which two were laid on the Fereneze spin-
 ning-mill, with power to augment the rate on those works which should
 take an increased use of the water.

All parties acted on this agreement in regard to the management, rent,
 and repairs; a committee being appointed, a collector of water-rent named,
 and occasional meetings being called, but, apparently, no regular minutes

No. 72. preserved. In 1808, the Fereneze spinning-mill having been much enlarged, nine of the parties to the agreement resolved, that "it should pay for four in place of two shares, for the benefit of the water." This increased quota was levied accordingly from the Fereneze mill, which afterwards became the property of Mr John Graham, son of Mr Graham.

Dec. 15, 1831.
Orr v. Graham.

In 1816, a new lease of the Commore Dam, for a term of 19 years, was obtained from Mr Spiers, by parties designed as acting "for behoof of the tacksmen of the dam," the rent being raised from £26 to £65. As three years of the current lease still remained, the rise under the new lease was postponed for that period. Neither John Graham, nor his father, was directly a party to this renewal.

In March 1821, at a general meeting, it was resolved, "in order to secure a constant and regular supply of water for their works," to apply for a new lease of the Long. Loch, and for a lease of land called the Hairlaw Bog, which was to be formed into a reservoir, and connected with the Levern; and to apportion the expense among thirteen public works, in sixty-eight shares, of which five were to be allocated on John Graham, whose father was now dead. Graham was not at the meeting. At another general meeting, in November 1821, at which Graham was not present, directions were given for the above objects, and nine of the parties then present subscribed as for fifty-four of the shares of the whole expense. On this occasion several took eight shares, in place of seven, which had been proposed in March. In January 1822, a new lease of the Long Loch was obtained for nineteen years, and a lease of the Hairlaw Bog was also entered into for the same term. The rent of this Bog at first was to be £120, but to be increased afterwards to £195. Graham was no direct party to these arrangements; but he was the proprietor of one of the largest mills on the Levern, and took the full use of the water derived from all these sources, which was highly beneficial to his mill. There were several large public works situated above his, the proprietors of which were parties to the renewals of the leases of Commore Dam and Long Loch, and to the new lease for Hairlaw Bog. The quota levied from Graham and his father, for 1820, and five preceding years, was £16. In 1821, it was £20.

A meeting being held in March 1822, Graham sent a letter, intimating that he conceived himself to be injured by the operations of a neighbouring cotton-mill; "and until I receive satisfaction of it, I shall not concur in any common measures relating to reservoirs for supply of the Levern," &c.

When Orr (who had been named collector of the rents for the water leases) applied to Graham for £22, as his quota of rent for the Levern dams and reservoirs, up to Whitsunday 1822, he refused to pay it; Orr then raised an action against him before the Sheriff of Renfrewshire. The Sheriff, after reciting the facts, found "that, loose as were the arrangements among the socii so concerned in acquiring and preserving the artificial water-power, which is proved to be indispensable

to the watering of the machinery by the stream of Levern, it is implied No. 72.
 in the nature of the case that renewals of the leases of the original reservoirs should be obtained, and the rents and management thereof paid by the said shareholders, so long at least as they take the benefit thereof; ^{Dec. 15, 1831.}
^{Orr v. Gra.}
^{ham.}

and that the defender, by his own acts, following those of his predecessors, lies under an equitable and legal obligation to defray his own proportion of such expenses; and appointed the pursuers to give in an account, showing what is the defender's proportion, as the holder of four shares, upon the foresaid principle. But as to the pursuer's farther claim in relation to the increase of expense caused by the obtaining of the new reservoir or Hairlaw Dam, allowed the defender to be farther heard by memorial," &c.

On considering this memorial, the Sheriff found " no sufficient ground for establishing the pursuer's claim in so far as concerns the expense of the Hairlaw Dam." He afterwards "decerned against the defender for £14, 1s. as his proportion of the expenses of the dams, excepting that of Hairlaw; found the defender farther liable in expenses of process, subject to modification," &c.

Each party brought an advocation ; Graham, in so far as he was found liable under any of the renewed leases, and Orr, in so far as Graham was assizled from the rent of the Hairlaw Dam. The Lord Ordinary ordered Cases, and reported the cause.*

* " *Note.—The Lord Ordinary would have been well pleased had he seen ground for supporting the judgment of the Sheriff, or even for going farther in support of the action; for it appears to him not a little unfair in one of several proprietors of mills, who have once joined in measures for obtaining, for their common advantage, an increased supply of water, to avail himself of the loose manner in which the proceedings for obtaining a continuance of this necessary supply have been conducted, and to refuse to pay his share of the annual expense, trusting that, from the obligations come under by the others, or the necessity of the supply for themselves, it will be continued as before, and that he will thus enjoy, at the expense of the others, what is just as necessary and essential to his works as to theirs.*

" *The ground, besides, on which the advocator Mr Graham chose to put his refusal to pay, appears quite unreasonable, as it would have been improper and illegal in the general body of the proprietors of mills, who had no joint interest but in procuring a supply of water for their common use, to interfere in a dispute betwixt the advocator and a neighbour, regarding their respective rights of fall.*

" *But the Lord Ordinary has some difficulty in finding principles of law sufficient to support even the judgment of the Sheriff.*

" *It can scarcely be maintained, that, where the proprietors of certain mills on a river have, by the construction of dams and reservoirs, obtained a more constant and steady supply of water, the mere circumstance of benefiting by this supply can of itself create an obligation on other proprietors of mills, who have given no authority to the measure, to pay a proportion of the expense. It is, moreover, at least very questionable, if, where the whole proprietors have joined in such works, under leases from the owners of the ground of a definite endurance, this circumstance will authorize a part of the number to enter into renewed leases at advanced rents, so as to bind the others, who have given no authority or consent to such renewals.*

No. 72.

Dec. 15, 1831.
Orr v. Graham.

LORD BALGRAY.—I conceive the views in the Lord Ordinary's note to be well founded, and that there is not enough in the case to subject Mr Graham to the demand of Mr Orr. The renewals of the leases, and the contract for the Hairlaw Dam, were measures directly beneficial to the works which were parties to them. It is true, that Mr Graham's work also derives benefit from these operations. It lies lower down the stream than many of these works. But there are many operations by a superior heritor, which consequentially affect an inferior heritor, without entitling him to claim reparation if he be injured, or subjecting him in recompense if he be benefited. I look on this case as one of these. Mr Graham was not a party to the transactions on which the present claim, so far as he resists it, has been founded. He cannot, therefore, be subjected to it.

LORD PRESIDENT.—I concur; and I do not even see that the claim of Mr Orr is so strongly founded in equity as he represents it. He and the other manufacturers make new contracts of lease for their own behoof, all of which are beneficial to themselves. When they pay for these on the one hand, they receive value on the other, in the advantage possessed by their works. The benefit of Mr Graham is consequential; but it is only derived from proceedings by which the other parties have, in the first instance, benefited themselves.

LORD CRAIGIE.—I am of the same opinion. At the end of the leases which

" In the present case it seems clear, and indeed is not disputed, that Mr Graham is liable for his proportion of the rent of the Long Loch, for the lease of 1804, to which his father was a party, subsisting till Whitsunday 1823, while this action regards only the rent due at Whitsunday 1822. But the case is different as to the Commore Loch. The lease here was renewed in 1816, and holding that, as the increased rent did not become payable till that time, still the old lease expired at Whitsunday 1819, so that unless Mr Graham is bound by the new lease, he cannot be liable for the rent due at Whitsunday 1822. No evidence has been brought, or offered to be brought, that the late Mr Graham authorized or approved of this renewal. It is said, however, that the present Mr Graham homologated the new lease, by paying for one year a higher rent, which had become payable for Commore. But Mr Graham denies that he paid it in the knowledge that the increase arose from this cause; and as the annual payments were variable, embracing not only the rents, but the expense of occasional repairs, the Lord Ordinary thinks it very doubtful, if, in the absence of all proof of knowledge, a single payment of a higher amount than the previous ones, can be held as an homologation of the new lease.

" This is not the ground, indeed, on which the Sheriff rests his interlocutor. He seems to think, that the memorandum, holograph of the late Mr Graham, contemplated an arrangement of a permanent nature, not limited to the currency of the subsisting leases. But this does not appear to the Lord Ordinary to be the case. The memorandum specifies the leases and the precise rent payable under them, and proceeds to fix how this rent is to be apportioned on the different mills, providing also the necessary repairs and a grassum due under one of the leases were to be paid according to the same proportions. There is not a word as to future leases, or the advanced rents which it might be necessary to give to obtain them.

" The Lord Ordinary would, of course, feel still more difficulty in subjecting Mr Graham to a share of the expense of the new reservoir in the Hairlaw Bog.

" But as the question is one of an unusual nature, and the pursuer's claim is supported by strong considerations of equity, he has thought it proper to report it to the Court."

were current at the date of the agreement in 1805, any party to that agreement No. 72.
 might withdraw, if he thought fit. Such being the state of the case, the Court
 cannot make a new contract for parties, and give their obligations a degree of per- Dec. 15, 1831.
 manency not contemplated by themselves. The new leases founded on by Mr Orr ham.
 were for the benefit of those who made them, or have adopted them; and I see no Wright, &c. v.
 ground to subject Mr Graham in a share of their expense. Arthur.

LORD GILLIES.—I can see no sufficient ground for subjecting him. As a party
 to the agreement in 1805, he is liable for its stipulations; but he became bound for
 nothing more, and he refuses to pay more. This Court cannot compel him.

THE COURT then “advocated the cause, altered the interlocutors complained
 of; found that the advocator, John Graham, is bound to pay the proportion
 referring to his works in terms of the agreement dated 8th January, 1805,
 No. 4 of process, of the rents of the leases specified in that agreement;
 found that he is not bound to acknowledge or pay any proportion of the
 rents of any of the other leases subsequently entered into by the pursuer,
 or by those for whom he acts; found neither party entitled to expenses;
 and remitted to the Lord Ordinary to apply these findings, and to proceed
 quoad ultra as he shall see cause.”

Orr's Authorities.—Campbell, July 20, 1725 (9276); Spottiswoode, June 21, 1786 (11605);
 1 St. 8, 7.

GRAHAM and ANDERSON, W.S.—C. J. F. ORR, W.S.—Agents.

JOHN WRIGHT and Others, Pursuers.—More.
 ARCHIBALD ARTHUR, Defender.—Jameson.

No. 73.

Proof—Process.—1. An objection to the examination of an accountant on the plea
 of confidential communication repelled. 2. Where mutual minutes were ordered,
 the Court would not allow a verbal answer to a minute lodged.

A PROOF having been allowed in a branch of the case mentioned ante, Dec. 15, 1831.
 IX. 721, as to whether the defender, Arthur, had been a partner of the 2d Division.
Anderston Victualling Society, the pursuers adduced as a witness an Lord Medwyn.
 accountant, who had been employed professionally to examine Arthur's T.
 affairs some time prior to the question having arisen, and proposed to interrogate him as to the particulars with which he had become acquainted
 in the course of his investigation. This was objected to by the defender,
 on the ground of confidence. The Lord Ordinary repelled the objection,
 and Arthur having reclaimed, the Court ordered mutual minutes. No
 minute was lodged for Arthur, while in that for Wright, &c., it was main-
 tained that the law which prevented an agent from being examined in the
 case of his agency, was inapplicable.¹ The Court adhered to the Lord
 Ordinary's interlocutor, and refused to hear a verbal answer at the bar.

DANIEL FISHER, S.S.C.—CAMPBELL and McDOWALL, S.S.C.—Agents.

¹ 2 Hume, 328; Burnet, 435.

No. 74.

Dec. 15, 1831.
Fergussons v.
Fergasson, &c.R. and E. FERGUSSON.—G. G. Bell.
WILLIAM FERGUSSON and Others.—Keay—Dauney.
Competing.*Contract—Locus paenitentia.*—Circumstances in which a minute of agreement was allowed to be resciled from.

Dec. 15, 1831. ROBERT FERGUSSON died intestate in the month of August 1821,
 2d Division. leaving a brother, William, and four sisters—Elizabeth, Anne, Jean, and
 Lt. Fullerton. Isobel; and three natural children—Charles, Robert, and Elizabeth.
 R.

Shortly after his death, his friends and relations met to open his repositories; and, finding no will, an agreement was proposed and minuted, to divide his property as follows:—"If it shall be found that the deceased has not executed a settlement, the brothers and sisters of the deceased agree to share his whole property among themselves, and his three natural children, Charles Fergusson, Robert Fergusson, and Elizabeth Fergusson: that is to say, the whole subjects are to be divided into eight equal shares." This minute of agreement was not executed in a probative form, but was signed by William Fergusson for himself, and his four sisters, all of whom were present except Isobel. Another meeting of the relations took place a few days afterwards, the minutes of which bore, that the brother and sisters of the deceased were all present except Isobel; that for her Jean was authorized to act; and that the former agreement of division was renewed and confirmed. Nothing followed upon these minutes, and in April 1823 another meeting took place, at which a scheme of division was submitted in terms of the original proposal; but "the meeting (as the minutes bore) objected to the same, on the ground that they were misled, and ill-advised, in any consent they are stated as having given to these minutes, in so far as they authorize an equal participation in the executry, on the part of the defunct's natural children; and also on the ground that these minutes are not in this respect binding on those to whom the defunct's property legally descends." The minute also set forth, that "Charles Fergusson (the eldest of the natural children) attended the meeting, and, for his part, renounced all claim on the executry in consequence of the above minutes, or in any other way except the good-will of his uncle and aunts."

A process of multiplepoinding was then raised in the name of Mr Peter Christian, in whose hands were certain funds belonging to the deceased. In this process, the brother and sisters claimed the whole property of the deceased, while Robert and Elizabeth Fergusson, two of the natural children, claimed each a share under the agreement. In the course of this process reference was made to the oaths of the brother and sisters, who deponed to the facts above narrated, with this addition, that Isobel had neither agreed to, nor authorized in any way, the scheme of division. The

natural children maintained, that the original agreement of the four nearest No. 74.
of kin was binding upon them, though the fifth had not become a party Dec. 15, 1831.
to it; and the case of Foulis v. the Laird of Lammington, 14th Feb. Fergussons v.
1632, (Spotiswood, 70,) was referred to in support of this view. Fergusson, &c.

The Lord Ordinary repelled their claim, adding the note below.*

The natural children reclaimed, but the Court adhered, without calling on the other party to answer.

Caledonian
Iron & Found-
ery Co. v.
Clyne.

LORD JUSTICE-CLERK.—I do not think the argument in support of the note requires any answer. It is clear, from the whole proceedings and depositions in the case, that nothing passed at these meetings but a simple resolution, which the parties were, and considered themselves to be, at liberty to retract. The authorities quoted are inapplicable, being cases where imperfect contracts were perfected *rei interventu*.

LORD MEADOWBANK.—I think there is not a point in the case.

LORD GLENLEE.—The contract might have gone so far as to require reduction; and that the parties had been drawn into it by surprise and solicitation, would have been relevant reasons; but here they were quite entitled to say they had changed their mind.

LORD CRINGLETIE.—There was no obligation whatever—merely a resolution; and Stair puts a case precisely in point as not binding.

DENNISTOUN and CHRISTIAN, W.S.—WALTER DUTHIE, W.S.—Agents.

CALEDONIAN IRON and FOUNDERY COMPANY, Petitioners.—Rutherford No. 75.
—A. Dunlop.

D. CLYNE, Respondent.—D. F. Hope—More—Maidment.

Inhibition.—1. It is competent for parties executing an inhibition to apply to have it recalled, and scored on the record; and, 2. It is no sufficient objection to this being granted, that certain of the partners of a company, pursuers of the action, on the dependence of which it had been used, were dead, and their representatives not sisted.

* * NOTE.—1st, The proposed agreement was absolutely gratuitous on the part of the brother and sisters of the late Robert Fergusson. 2dly, Neither of the minutes founded on by the claimants, Robert and Elizabeth Fergusson, were executed in a probative form, and nothing followed upon them, in regard to these claimants. 3dly, The agreement proposed in the original minute, bears to be a joint agreement between the brother and sisters for the division of the executry into a certain number of shares, and it is now established by the deposition of Isobel Fergusson, that it never was authorized by her, or consented to by her.

"In these circumstances, the Lord Ordinary cannot view these minutes as purporting any thing more than a resolution, which the parties might retract, until it was embodied in a formal deed, and which, at all events, might be retracted by those who did originally consent, on its being found that one of the parties, whose concurrence was necessary to carry it into effect, refused that concurrence."

No. 75.

On the dependence of the action mentioned ante, IX. 248, which was raised in name of Robert Sclater, and upwards of seventy individuals, partners, and for behoof, of the Caledonian Iron and Foundery Company, inhibition was used against Clyne, the defender. The judgment of this Court against Clyne having been reversed, and the pursuers, apprehending some difficulty in settling the terms of a discharge, in consequence of the death and bankruptcy of several of the partners, who had been parties when the inhibition was laid on, presented a petition to the Court in name of the company and the subsisting partners, (with the exception of one or two, who had disclaimed the action,) praying to have the inhibition recalled, and warrant granted for scoring it on the record. This was opposed by Clyne, on the grounds, chiefly, 1. That it was incompetent for the party at whose instance inhibition had been used, to make such an application; and, 2. That it could not be granted, in respect it was not made by the whole of the individuals at whose instance the inhibition was used.

Before this petition came to be advised, decree of absolvitor was pronounced, as mentioned ante, p. 134, on applying the judgment of the House of Lords, so that the inhibition fell, and the Court now granted warrant to have it scored on the record as prayed for.

J. KENNEDY, C.S.—D. CLYNE, S.S.C.—Agents.

No. 76.

WILLIAM WORDIE, Suspender.—*Cunningham*.
THOMAS M'DONALD, Charger.—*Skene*—J. Paterson.

Citation—Partnership.—In an action against “John and William Wordie,” citation having been executed by leaving a copy of the summons with John, who entered appearance for himself and William, but without any evidence of authority from William; and John having died, whereupon decree was taken against William individually—decree suspended in respect of the irregular citation, and held not capable of being supported by proof that John and William were copartners.

Dec. 15, 1831.

2d Division.
Ld. Mackenzie.

T.

IN April 1830, the charger M'Donald presented a summary petition to the Justices of Peace of the county of Lanark, setting forth that he had been engaged as a servant by “John and William Wordie, carriers between Glasgow and Stirling,” and that they were due him a certain balance of wages, for which he craved decree. Service of this petition having been ordered, an execution was returned by the officer in these terms: “Upon the 28th day of April, 1830 years, I, John Allan, constable, passed, by virtue of the within written petition and deliverance thereon, and made due and lawful intimation thereof to the within designed John and William Wordie, and required them to conform themselves thereto, in all points, with certification to them as feffirs. This I did, by delivering a full copy of the foregoing petition and deliverance, with a short

copy of requisition thereto subjoined, to the said John Wordie, personally apprehended." No. 76.

Answers were thereupon lodged in name of "John and William Wordie," signed "John Wordie for self and W. Wordie." Thereafter a proof was allowed, and certain witnesses were adduced by M'Donald. In the course of the proceedings, John Wordie, who was father of William, died, but it did not appear at what precise period, nor whether William had thereafter attended or conducted the proceedings. The proof on the part of M'Donald was concluded on the 27th May, and on the 8th June the Justices pronounced this judgment : "In respect the defender John Wordie is dead, vacates the process quoad him until his representatives be called ; but in respect that the defender William Wordie has failed to prove, circumduces the term allowed him for proving, and concludes the proof, and, on the merits, decerns against him for the balance of wages of £5, 10s. sterling concluded for ; farther, finds him liable in expenses."

Dec. 15, 1831.
Wordie v.
M'Donald.

A charge having been given, a suspension was brought by William, on the ground, inter alia, that the decree being against him as an individual, he should have been cited, but that the only citation had been left with John Wordie, which was an incompetent mode even of citing the individual partners of a company, had there been a partnership between him and his father, which was denied ; and consequently, that as no mandate was produced authorizing the father to appear for him, the decree must be suspended.

On the other hand, it was averred that John and William Wordie were partners in business, which they carried on under that firm ; and it was contended that the petition was directed against the Company, in which case the citation, by leaving a copy in the hands of one of the partners, was sufficient, while, at all events, the appearance of John Wordie for behoof of the Company, warranted the subsequent procedure.

The Lord Ordinary pronounced this interlocutor :—"Finds, that in case there truly was a Company of John and William Wordie, and the debt libelled was due by that Company, as averred by the charger, then the appearance of John Wordie, in defence against the charger's action, as for himself and his partner, before the Justices, was sufficient to warrant them to sustain process against the Company, and to decern against the suspender personally, as one partner thereof ; but finds the existence of the Company, and the contraction of the debt by that Company, denied by the suspender ; and therefore allows the charger a proof of these averments prout de jure, and to the suspender a proof of the contrary ; and grants commission to the Sheriff," &c.

The suspender reclaimed.

LORD GLENLEE.—There is a total blank as to what passed in the proceedings before the justices. The judgment of the justices, which is dated 8th June, sets

No. 76.

Dec. 15, 1831.
Wordie v.
M'Donald.Gowans v.
Oswald.

out, "In respect the defender, John Wordie, is dead," &c. Now, what struck me was, that William may have carried on the proof, which appears to have been concluded on the 27th May, for we don't see whether it was led before or after John's death, or who was present at leading it. A very little would be sufficient to remove the objection.

LORD MEADOWBANK.—We can't go beyond the record, and there is no allegation that William attended the proof. It might have been a good allegation, but it is not made, and we must assume he did not, and that nothing was done to supply the want of the original citation, and so we are left to decide on the bare question of form, whether such citation is sufficient to bring into Court other individual partners than the one specially cited. Now, on that point, there is nothing clearer than that a party can't be brought into Court by any such form. No doubt a man may appear and sist himself, dispensing with citation. But what proof is there of this here? Merely the signature of the other party really cited, and without evidence of authority by William. There is thus no regular citation, and the want of it is not supplied by any thing since happened.

LORD CRINGLETIE.—If there had appeared a dispensation with citation, that would have done. But there is no mandate by William which is necessary in the Inferior Court to warrant an appearance for a party, and no *partibus* is mentioned in the proof.

LORD JUSTICE-CLERK.—I think it would be a very dangerous precedent, and I can't agree with the interlocutor.

THE COURT accordingly altered, and suspended simpliciter, with expenses.

W. ROBERTSON, W.S.—JOHN CULLEN, W.S.—Agents.

No. 77.

JOHN GOWANS, Pursuer.—Shene—Wilson.
DAVID OSWALD, Defender.—More—Brownlee.

Tutor and Curator—Statute 1696, c. 9—Prescription, Decennial.—1. A curator neglecting to make up inventories, does not forfeit the benefit of 1696, c. 9, establishing the decennial prescription. 2. An extrajudicial consent, after the years of prescription, to afford information respecting the affairs of the curatary, does not bar the plea of prescription.

Dec. 16, 1831. **OSWALD**, a farmer, raised an action against his nephew Gowans, a writer in Crieff, for intromissions with the proceeds of certain effects sold under his agency. This was met by a counter action on the part of Gowans against Oswald, who had been by him nominated his curator in 1804, but had not made up inventories in terms of 1672, c. 2. Gowans founded, inter alia, on two letters of Oswald, written in 1827, promising to give him information as to the curatorial funds; and he concluded for count and reckoning. In defence Oswald stated, that Gowans attained majority in 1811—that he had rendered full and satisfactory accounts—that no objection had been made to them till 1827, when he had called on Gowans to account for his intro-

1st Division.
Ld. Corehouse.

D.

missions with the proceeds of the sales; and he pleaded the decennial prescription established by the act 1696, c. 9, by which, "considering the great danger and hazard to which tutors and curators are exposed, by being subject to count and reckonings to their pupils and minors, unless secured by the prescription of forty years after the majority of the said pupils and minors," it is enacted, "that all actions of count and reckoning competent to pupils and minors against their tutors and curators for making their accounts, not pursued and insisted in within the space of ten years after the majority of the said pupils and minors, shall, after that time, prescribe for ever; and the said tutors and curators, and their successors, shall be as fully exonerate and liberate as if the said pupils and minors, after their majority, had fully and amply discharged the same."

To this it was answered, 1. that as Oswald had not made up inventories, he was not entitled to the benefit of the statute; and, 2. that he was barred by his letters from availing himself of it.

The Lord Ordinary found, "that more than ten years had elapsed from the termination of the pursuer's minority, before the present action was brought; that a curator, by neglecting to make up inventories, does not forfeit the benefit of the statute 1696, c. 9, which introduced the decennial prescription of tutorial and curatorial accounts; that the defender did not waive the defence of prescription, by consenting extrajudicially, before the action was brought, to give the pursuer information respecting the affairs of the curator; therefore sustained the defences, assailed the defender, and decreed; found him entitled to the expenses of process," &c.*

Gowans reclaimed, but the Court unanimously adhered, without hearing Oswald's counsel.

LORD BALGRAY.—I think this is a clear case, and that it is for the public interest that we should so treat it. The act 1696, c. 9, is an admirable act, and I certainly will not narrow its operation, so as to exclude parties from the benefit of it, who are as clearly entitled to claim it, as I hold Oswald to be. The office of tutory or curatory, is gratuitous, and it is highly for the interest of pupils or minors that their friends should undertake it. Such friends often, from the natural confidence prevailing among relations, or from their being unacquainted with business, are less accurate and formal in their proceedings than would otherwise be the case, believing that they are safe, and entitled to nothing but gratitude from the minor, so long as they give their best attention to the conscientious administration of his

* "NOTE.—In the case of Mercer v. Irvine (10996), not mentioned in the pleadings, it was found that a tutor has the benefit of the act 1696, c. 9, though he neglect to make up inventories. In other respects, this action is brought in circumstances singularly unfavourable for the pursuer. The pursuer attained majority in 1811; more than sixteen years afterwards; he intromitted with funds belonging to the defender, and having refused to account for them, an action was raised against him by the defender, as a set-off against which he insists in this process."

No. 77. affairs. It would be a case of peculiar hardship, in regard to these parties, if any purpose of calling them to account were not executed soon after the expiry of their office, and while they might yet have it in their power, with comparative ease, to make up their statement. Accordingly, the existence of the decennial prescription, and the protection which it affords, cannot fail to operate beneficially for minors, by inducing their friends to come forward and undertake the office, who would shrink from it, if it were to expose them and their heirs to an accounting at any period during the long prescription. Such being the obvious utility of the statute, Courts are bound to apply it favourably, and I think Oswald stands in the position which entitles him to rely upon it. His conduct gives me the fairest impression of his character; he never meant to waive his right to plead the decennial prescription; and that prescription entitles him to *absolvitor* in this action.

LORD PRESIDENT.—I entirely concur. I conceive we should be giving a very erroneous effect to the letters of Oswald, if we found he had thereby forfeited, or waived, the plea of prescription. His nephew asks explanation regarding the curatorial accounts. Oswald wishes to stand fairly with his nephew, and to indulge him so far as was reasonable. He writes accordingly, that he always understood the account had been settled already, but he gives, once and again, such explanations as are still in his power, adding the natural expression, that he hopes they will be satisfactory. All this amounts to no sacrifice of the plea of prescription. Oswald is clearly entitled to the benefit of it; and it is for the interest of the country that the Court should not too much narrow the scope of the act 1696, c. 9. It tends much to induce friends to accept of the office of tutor or curator, and thus to save to the minor's estate the expense of a salary to a factor *loco tutoris*, while it procures for him the benefit of having his estate protected by the zeal of a friendly administrator.

LORD CRAIGIE concurred.

LORD GILLIES.—I concur with all your Lordships. The Court should beware of giving unnecessary discouragement to near relations to accept the gratuitous office discharged by Oswald. And I have no hesitation in finding that Oswald's letters do not bar him from the plea of prescription. He certainly offers to give every explanation still in his power, regarding his accounts; but it would be odd if that circumstance were to cause him the loss of a good defence, when it is clear that if he had chosen to be surly and obstinate, and refuse all explanation whatever, no pretence would have remained that he had given up his plea of prescription.

W. MERCER, W.S.—A. JOHNSTON, W.S.—Agents.

No. 78.

JOHN BAIRD, Advocate.—*Skene—Wilson.*
WILLIAM OFFICER, Respondent.—*Keay—Cowan.*

Process—Arbitration.—1. Circumstances in which a summary application to the Sheriff, by a party who had sold sheep, which were to remain his property till the price was paid, and who craved warrant to roup as much of the stock of sheep as would satisfy an alleged balance of the price, was sustained. 2. A servant or overseer cannot, without special authority, bind his master as a party to a reference.

OFFICER presented a summary petition, in Dec. 1828, to the Sheriff No. 78.
 of Ayrshire, setting forth, "that in the month of March last, the petitioner agreed to transfer to John Baird, merchant in Ayr, at or about the then ensuing 26th of May, the whole stock of sheep on the farms of Farden and Polinady, in the parish of Barr, on payment of such price as should be fixed by Thomas Wilson in Altonalbany, and Thomas M'Ilwrick in South Balloch, or, in case of their differing in opinion, by John M'Gill in Lingston, who was named as oversman, the one half of said price to be paid in cash on delivery, and for the other half, bill to be granted with security, payable at Martinmas then next: that the arbiters could not agree as to the value of the stock, and by their minute, dated 24th May last, they ordained the said John Baird to pay the petitioner £480 sterling, at delivery of the stock, as part payment, until the oversman could be got finally to fix the amount: that the said John Baird only paid the petitioner £376 on the 29th day of May last, and as an inducement to accept of the partial payment, the said John Baird granted to the petitioner a holograph letter, of which the following is a copy:—‘ Mr William Officer.—Sir,—Notwithstanding of my having paid you £376 on account of the Farden stock of sheep, it is understood betwixt us, that the property of said sheep remains yours, until you are fully satisfied for the price thereof, according to our bargain, and you are at liberty to superintend them at your own expense in the meantime, if you think proper, and I shall allow you, or whoever you may appoint, house-room at the Farden.—I am, your most obedient, (signed) John Baird.—Ayr, 29th May, 1828.’—That the oversman, by his report, dated 10th July last, fixed the price at £1050, 10s. 2d., besides the mark, which was afterwards fixed at £5, 1s. 6d.: that upon the price being so fixed, the said John Baird should have paid such an additional sum as would have made up one half, and he should have granted bill, with security, for the other half, in terms of the agreement; but instead of this, the said John Baird asked the petitioner to retain his right of property in the stock, and go on with the management of it; and upon the 12th of July last, the said John Baird granted a letter, agreeing to allow wages to the petitioner's servant, for superintending and taking care of the stock: that as the petitioner neither received his money, nor bill with security, he had no alternative but to retain the stock as requested; and he did so accordingly, and received the produce of certain sales made by his servant, which, with two partial payments subsequently received from the said John Baird, are credited in an account-current between the parties, herewith produced: that upon this account-current a balance remains due to the petitioner, to the amount of £76, 10s. 6d.; and as the said John Baird seems inclined to be troublesome, and is finding fault with the management which he himself imposed upon the petitioner's servant, the petitioner, in these circumstances, and as he wants his money, deems it expedient to apply to your Lordship for a warrant to roup as much of the said stock as will pay the said balance, with expenses. May it therefore please your Lordship to consider this

Dec. 16, 1831.
 Baird v. Offi.
 cer.

1st DIVISION.
 Lord Newton.
 D.

No. 78. petition and productions, and grant warrant for selling, by public roup,
 Dec. 16, 1831. as much of the said stock of sheep as will pay the petitioner the foresaid
Baird v. Off. balance, with full expenses," &c.
 cer.

In defence, Baird did not object to the competency, but pleaded on the merits, and the case resolved into one of count and reckoning. Among other articles, Baird claimed credit for £20 on account of repairs to houses, which he alleged Officer was bound to make. To this Officer answered, that Baird's manager or servant (who superintended the farm, as Baird lived at some distance) had subscribed a reference, both in regard to these repairs, and a counter claim by Officer for dung and white land, whereby the one claim was found to extinguish the other. On the other hand, Baird denied that his servant had any authority to enter into such a reference, and Officer did not offer to prove that he had.

The Sheriff sustained certain claims, and allowed a proof as to others.

Baird then brought an advocation under 6 Geo. IV. c. 120, § 40, which the Court sustained.¹ Independent of special pleas, Baird maintained, 1. that the claim being illiquid and disputed, summary petition for warrant to sell in satisfaction of that claim was incompetent; and, 2. that the reference as to the houses, &c., was not binding on him. The Lord Ordinary, *inter alia*, "repelled the objection to the competency of the action," found "that the alleged reference and award respecting the repairs of the houses, and the value of the dung and white land, are not binding on the parties;" and granted a proof as to certain items of the accounting.

Both parties reclaimed.

Baird, under his reclaiming note, chiefly insisted on the incompetency of the action; and Officer, that the reference and award were binding.

LORD BALGRAY.—I have no doubt the application was competently made to the Sheriff. Baird could not pay the stipulated proportion of the price, but he consented to have a person named by Officer to superintend the sheep, and see the stock duly managed, which, it was agreed, should remain the property of Officer. This servant effected various sales of the stock, and their balance still remained due to Officer. In these circumstances what could he do? The stock was his; a balance was due to him; he was therefore quite right to ask a warrant to sell the stock, so as to satisfy his claim; and though a question of accounting was raised by Baird, this was merely of an incidental nature, and did not render it originally incompetent in Officer to apply summarily for warrant to roup part of his own stock. Situated as that stock was, he would have been wrong to sell at his own hand; but he was entitled to make a summary application.—His Lordship agreed with the Lord Ordinary, that the reference was not binding.

LORD PRESIDENT concurred, and observed that, had Officer not applied as he did, Baird might have blamed him for leaving the sheep to eat up all the grass on his farm. As to the award, the servant or overseer had no power to bind his master. Without homologation, Baird is not bound by that part of the award; and I am therefore inclined to adhere in *toto*.

LORD GILLIES.—I doubt the competency of a summary application. Officer

¹ June 9, 1830; *ante*, VIII. 893.

was right not to sell without authority; but where no debt was constituted, and the balance of accounts was disputed, I am not satisfied that a summary application to sell for the alleged balance was justifiable. No. 78.

Dec. 16, 1831.
Baird v. Offi-

LORD CRAIGIE concurred with Lords President and Balgray. His Lordship considered the application a wise and expedient proceeding, and the best which could have been adopted. Duguid v. Caddall's Trustees.

THE COURT accordingly adhered.

W. MERCER, W.S.—G. McCLELLAND, W.S.—Agents.

JOHN DUGUID, Pursuer.—Keay—Moir.

No. 79.

Mrs CADDALL'S TRUSTEES, Defenders.—Sol.-Gen. Cockburn—Maitland.

Clause—Feudal Title.—Circumstances in which the titles to a superiority for conferring a freehold qualification, were held not to carry the dominium utile of a small parcel of the lands, for a long time incorporated with another property, possessed by the grantor under different titles.

ACTION of declarator by Duguid, to have it found that under certain titles to the lands of Balmannoche and Ballachdowan, granted him by the late Mrs Caddall, for the purpose of vesting him with a freehold qualification, he had right to the dominium utile of a certain portion of Ballachdowan. The circumstances of the case are sufficiently detailed in the following interlocutor of the Lord Ordinary, to which the Court adhered.

“ Finds that Sir Hew Hamilton having proposed to sell his estate of Ballantrae, it was exposed to public sale in certain lots, in terms of articles of roup, and a relative printed Note of Particulars, which stated lot 10th to consist of Balmannoche and Ballachdewan, and lot 11th of Auchincrush, including Windyedge and Killintringan; and that lot 10th was to be disposed of to the purchaser, to be held feu of the exposer; the printed Particulars further bearing, that Ballachdowan was retoured as a three merk land of old extent, and afforded a freehold qualification; finds, that the lands not having been sold at the public roup, the pursuer made offer, by a missive letter, dated 23d June, 1817, for lots 6, 7, and 11, ‘of the Ballantrae estate, with the freehold on Ballachdowan,’ which was accepted, and he afterwards declared that this purchase was made for the late Mrs Caddall, for whom he acted as manager or factor; finds, that Mrs Caddall obtained a conveyance to the subjects purchased, which excepted from the absolute warrandice ‘the feu and other subaltern rights of the said forty-shilling land of Balmannoche, and forty-shilling land of Ballachdowan,’ and it mentions that a copy of the printed Particulars is delivered along with this disposition; finds, that Mrs Caddall completed her titles to the lands in lot 11th; and in order to give the pursuer a freehold qualification, disposed Balmannoche and Ballachdowan to the pursuer, under the exception of the feu-rights (if any such there be) by one manner of holding of the disposer, under her lawful superiors, and with an

2d DIVISION.
Lord Medwyn.
T.

No. 79. assignation to feu-duties but not to rents ; finds, that the dominium utile had been previously duly separated from the superiority ; finds, that the printed Note of Particulars bears, that lot 11th, consisting of Auchincrosh, &c., comprehended 1015 acres, and it appears, that many years ago a portion of Ballachdowan had been joined to Auchincrosh, and let along with it, and that that portion must be taken into account to make up the full complement of 1015 acres in said lot ; and which portion was sold and conveyed by Sir Hew Hamilton to Mrs Caddall, as now part of Auchincrosh, and passing by that name ; and on that ground the purchaser of the dominium utile of Ballachdowan was unsuccessful in vindicating this small portion from Mrs Caddall ; finds no evidence of the pursuer's averment, that under his title to the superiority of Ballachdowan, Mrs Caddall intended to convey to the pursuer this small portion of land, and dis sever it from Auchincrosh, or meant to convey more than she herself received under the title assigned to him, but the contrary ; and therefore sustains the defences, assoilzies the defenders, and decerns ; finds expenses due, allows an account thereof to be given in, and remits to the auditor to tax the same when given in, and to report."

F. DAVIDSON, W.S.—TOD AND ROMANES, W.S.—Agents.

No. 80.

JAMES SMITH, Advocate.—*Jameson—Monteith.*

JAMES STARK, Respondent.—*Maitland—J. Paterson.*

Bill of Exchange.—Circumstances in which the rule of law, that non-onerosity on the part of an indorsee to a bill of exchange, can only be proved by his writ or oath, held not to apply.

Dec. 16, 1831. ON the 3d of April, 1830, the respondent Stark presented a summary petition to the Sheriff of Lanarkshire, setting forth :—That he had two days before, viz. on the 1st, indorsed and put into the hands of the advocate Smith, private discountner of bills in Glasgow, a bill for £28, 10s. drawn by him (Stark) upon and accepted by one Bryden, for the purpose of discounting it, or getting it discounted, and under the express agreement that Smith should meet him next day to give him the proceeds, or return the bill ; that Stark attended at the place and hour appointed, and that Smith failed to attend, but sent his son with a state of accounts as between him and Stark, in which he on the one hand debited Stark with a £20 bill, accepted by one Cook to Stark, and some time previously by him indorsed to Smith, but alleged by Stark to have been re-tired by Cook, with the expenses thereon, and, on the other, gave him credit for the proceeds of the first-mentioned bill ; thus appropriating them in extinction of the alleged prior bill, and bringing out as due to Stark only a balance of £3 odds. The petition therefore prayed for warrant to apprehend Smith for examination, and thereafter to have him ordained to

2d Division.
Ld. Mackenzie.

T.

restore the bill or its proceeds. In answer to this petition, Smith, while No. 80. he admitted that he had given Stark no present value for the bill, alleged Dec. 16, 1831. that it had been indorsed to him towards a settlement of accounts between Smith v. them, and that at their meeting next day, he was only to pay the balance, Stark. if any, to Stark; and he further now averred, that there was no balance due, and gave in a second state, in which, by charging an additional item of £5, ls. 4d., being the expenses on a bill of one Paton's, indorsed to him by Stark, he turned the balance in his own favour. A holograph receipt, however, for this sum having subsequently been produced, he ultimately abandoned this claim, and stated his willingness to pay the balance brought out by his first state. In point of law, he pleaded, that, as the holder of an indorsed bill, non-onerosity could only be proved by his writ or oath. The Sheriff having allowed a judicial examination of both parties, declarations were emitted by them respectively. Stark stated, that having to pay certain workmen in another county, he put the bill in question into Smith's hands to be discounted, as set forth in the petition, having told him the object to which the proceeds were to be applied; and further, that he knew that Cook's bill had been paid by Cook himself. Smith, on the other hand, adhered to his general averment, but his declaration as to particulars was very unsatisfactory, and in some respects inconsistent, and various questions he declined to answer.

The Sheriff ordained the bill (which had in the meantime been lodged in process) to be delivered up to Stark. Smith thereupon brought an advocation, in which, besides maintaining that the declaration did not support the judgment, he contended that the averments of Stark amounted substantially to an allegation of no value, which could only be established against the holder of an indorsed bill by his writ or oath, and that a judicial examination was incompetent in regard to matters which could be only so established.

On the other hand, it was maintained by Stark, that his averment being that a gross fraud and breach of trust had been committed by Smith, it was not at all the ordinary case of indorsation of a bill, as to which non-onerosity was provable only by writ or oath, and that at any rate, Smith having admitted no value at the time, the rule of law did not apply.¹

The Lord Ordinary remitted simpliciter, adding the subjoined note.*
The Court adhered.

¹ Fell v. Lyon, Feb. 16, 1830 (*ante*, VIII. 543.)

* * The complainant admits, that when the bill was delivered to him, he gave no value for it; but he avers that it was given to him, in order that with the proceeds he might pay himself all claims which he had against the respondent, and pay the respondent the balance; and this the respondent denies, averring that it was given to the complainant to get it discounted, and to pay over the money to the respondent, under a deduction for discount. In these circumstances, it does not appear to the Lord Ordinary that it is a case in which proof must necessarily be by the writ or oath of the complainant, or in which the examination of the parties was incompe-

No. 80.

LORD JUSTICE-CLERK.—If this were an ordinary bill transaction, it is clear non-onerousness would be provable only by writ or oath. But this is no such case. Looking at the statement in the original petition, presented on the instant, for immediate restitution of the bill, the Sheriff did right to order a judicial examination, as the averment amounted to a charge of gross breach of trust. It is clear this is out of the ordinary case; and taking into view the declarations, and the whole proceedings in the process, it is clear there is sufficient foundation for the application. Then the declaration is most shuffling, evading every question that could elucidate the case, and I have no difficulty in thinking that the interlocutor is right.

**Dec. 16. 1831.
Smith v.
Stark.
Pool v. Irving,
&c.****LORDS GLENLEE and MEADOWBANK** agreed.**LORD CRINGLETIE.**—I had some doubts at first, but on consideration I think your Lordships right.

JAMES PATTISON, W.S.—JOHN CULLEN, W.S.—Agents.

No. 81.**ROBERT POOL, Suspender.—G. G. Bell.****BENJAMIN IRVING, Respondent.—Sol.-Gen. Cockburn—G. Napier.****MAGISTRATES OF ANNAN, Respondents.—Greenshields.**

Jurisdiction—Prisoner—Act of Grace.—1. Opinion given by a majority of the whole Court, “that a party being incarcerated, in virtue of Exchequer processa, for non-payment of a duty or tax, the Court of Session has no jurisdiction in regard to any question touching either the justice or amount of such duty or tax, the right of the party incarcerated to aliment during his confinement, or the mode that may be competent to him for effecting his liberation;” and, 2. Question whether the Act of Grace is applicable to persons incarcerated for duties or debts due to the Crown?

Dec. 17, 1831. POOL was incarcerated in the jail of Annan, on December 1, 1830, for payment of £3, 13s. 6d. of game-duty, under a warrant granted by two **1st DIVISION.** Commissioners of Supply of the county of Dumfries, in virtue of the powers conferred on them by 52 Geo. III. c. 93 and 95. He applied to the Solicitor of Taxes for aliment, and was informed that the burgh was liable, and not the Crown. He then, on Jan. 4, petitioned the Magistrates of Annan for aliment. They refused his application, but, at the same time, privately directed their jailer to aliment him at the rate of 4d. per day. Pool presented a bill of suspension and liberation, setting forth that he was starving, and founding, *inter alia*, upon 6 Geo. IV. c. 62, making it unlawful for a jailer to receive a prisoner for civil debt, unless 10s. were at the same time consigned by the creditor incarcerator for his aliment.

Answers were lodged for the magistrates, and also for the collector of taxes, on the part of the Crown. Besides objecting to the jurisdiction of

tent; and if such examination was competent, it is pretty evident that it was almost the only evidence which could exist in the circumstances. Looking to the examinations, then, and comparing them with the other statements of the respondent, the Lord Ordinary is induced to believe the averment of the respondent to be the true one, and therefore thinks he ought to adhere to the Sheriff's judgment.”

the Court of Session, the collector contended, that the burgh, and not the Crown, was liable in aliment, while the magistrates maintained the liability of the Crown. The Lord Ordinary reported the cause, and thereafter "appointed the magistrates and the collector of taxes to prepare and print cases, both on the question of jurisdiction, and on the merits of the question between them; and allowed the complainant, if so advised, to put in any statement which he may think necessary for his interest, &c.; and in the meantime ordained the magistrates to furnish aliment to the complainant at the rate of 10d. per day, from and after intimation of this interlocutor, reserving all questions of relief."*

On advising the case, the Court directed the opinions of the whole Judges to be taken on the following statement and question, as prepared by the Lord President:—"The suspender Pool was incarcerated in the tolbooth of Annan, in virtue of diligence raised against him on a Crown process, by Benjamin Irving, collector of the Crown taxes for the burgh of Annan, for non-payment of £8, 13s. 6d., the tax due for a game license,

"Pool applied to the magistrates, under the act 1696, c. 32, commonly called the Act of Grace. His application having been duly intimated to the collector, in terms of the said statute, he refused to lodge any aliment for Pool, alleging that the Crown is not obliged to aliment persons imprisoned for non-payment of taxes.

"The opinion of the Judges is required, Whether, in consequence of the refusal of the collector, on the part of the Crown, to aliment the prisoner Pool, the magistrates are bound, under the above act, to liberate him?

"N.B.—The Judges will observe from the cases, that the application to the magistrates was not in terms of the Act of Grace; and the First Division were going to refuse Pool's suspension and liberation on that ground, leaving him to apply de novo, in proper form. But the Solicitor-General interposed, and very properly stated that this proceeding could only occasion delay and expense; and therefore he consented that the case should be determined on the footing, that there had been a regular application under the Act of Grace, and proceeding therein as above supposed."

LORDS JUSTICE-CLERK, GLENLEE, CRINGLETIE, MACKENZIE, MEDWYN, NEWTON, and FULLERTON, delivered the following opinion:—

"We have considered the bill of suspension for Robert Pool, and the Cases for Benjamin Irving, the collector of taxes, and the Magistrates of Annan, respondents, with the question submitted to us by the Judges of the First Division; and presuming that the question as to the jurisdiction of this Court, as well as that with

* It had been objected by the respondents, that the bill of suspension was irregular, in consequence of no application having been first made by Pool to the magistrates under the Act of Grace. But it was eventually arranged that this objection should be waived, and that the question should be raised as on the footing that Pool had ineffectually made such application before he presented this bill.

Dec. 17, 1831.
Pool v. Irving,
&c.

No. 81. regard to the application of the Act of Grace to the situation of the suspender, are fully before us, we are of opinion—

Dec 17, 1831. Peel v. Irving, &c. “1st, That as the suspender, in this case, was incarcerated under regular Exchequer process for non-payment of a duty or tax due to the crown, the Court of Session possesses no jurisdiction in regard to any question touching either the justice or amount of such duty or tax, the right of the party incarcerated to aliment during his confinement, or the mode that may be competent to him for effecting his liberation. This point was deliberately considered and determined on the 17th Feb. 1824, in the case of Roy v. Young and Wilson, which was identical with the present, and where the decision of the magistrates of Irvine, refusing to award an aliment, or to liberate under the Act of Grace, had been regularly brought under review by a bill of advocation, and we have seen no reason to doubt of that decision.

“2dly, Although the suspender, Pool, may be said to have been incarcerated for a civil cause, or debt, in contradistinction to a criminal one, it has not been made out to our satisfaction that the Act of Grace is applicable to persons incarcerated for duties or debts due to the crown, and we have seen no case in which its enactments have been found to attach to them. The process for attaching the property as well as the persons of crown debtors, issues either directly from the Court of Exchequer, or is provided by special statutes, and is altogether distinct from ordinary civil process, or captions issued for proper civil debts due to individuals. We are not satisfied, therefore, that crown debtors can be held as comprehended under the terms of the Act of Grace, which contain no words whatever that include the interests either of the crown, or the officers of its revenue; and we cannot but think, that if the provisions of that act had ever been understood to apply to crown debtors, they must have been resorted to long before the recent attempt in the case of Roy. The late statute, providing aliment for persons imprisoned for debts due under the laws of the customs or excise, though unfortunately omitting other descriptions of debtors of the crown, appears to afford, as was noticed by Lord Pitt-milly in the case of Roy, a strong corroboration of the view of the Act of Grace which we have now taken. We must, however, add, that as we conceive that the Court of Session has no jurisdiction whatever in regard to the suspender’s application for liberation from his confinement, under the process of the Court of Exchequer, we are of opinion, that his bill of suspension ought to be refused upon that ground alone, it being always open to him to apply to the Court of Exchequer for every redress that the law can afford.”

LORDS MEADOWBANK and COREHOUSE added, “We concur in the above opinion, that the Court of Session has no jurisdiction in this question, and therefore consider it unnecessary to give an opinion on the merits.”

LORD MONCREIFF delivered this opinion:—“I understand that the opinions of the Judges are required on the law of this case, on the supposition that the complainant, Pool, had presented a petition to the magistrates of Annan, according to the established form, founded on the statute 1696, c. 32, and demanding an order on Mr Irving, as the incarcerating creditor, to lodge aliment, and, failing his doing so within ten days, demanding his liberation; and that, on the prayer of his petition being refused, or on liberation being, after due notice to the creditor, refused by the magistrates, he had applied to this Court by bill of advocation, or by bill of suspension and liberation.

“The question, in the terms in which it is stated, seems to relate simply to the

competency of an application by the prisoner, to the magistrates of Annan, for aliment under the Act of Grace, and the effect of the refusal of the collector of taxes to give the aliment, to render it imperative on the magistrates to liberate the prisoner.

"The law is clear, that, in any other case of civil debt, the prisoner, on making such an application, and taking the oath required, would, if no opposition were made on relevant grounds, have been entitled to the usual order, and, on the failure of the creditor to lodge aliment in due time, must have been liberated.

"The peculiarity here is, that the debt for which the complainer stands imprisoned, is a debt to the crown, for taxes payable to the collector, and the diligence may be considered as substantially a process issuing from Exchequer. It is not strictly so; but I think that it may be so taken. This state of the case appears to raise two questions. 1st, Whether this Court has jurisdiction to determine the question, whether, in the circumstances assumed, the magistrates were bound to grant the liberation or not? and, 2d, Whether, if the Court has jurisdiction, a prisoner incarcerated for such a debt is entitled to the benefit of the Act of Grace?

"It appears to me, that these two questions are inseparably involved in one another. I think, that, if the Act of Grace applies to the case at all, it must follow, that it can only be enforced by an application to the magistrates of Annan, in the first instance, and that this Court, and no other, has power to review the proceedings of the magistrates in regard to it. I am aware, that an idea has been entertained, that the Act of Grace may be held to apply to this case, and even that the application to the magistrates might be competent, and yet that the power of review must belong to the Court of Exchequer. Or, perhaps, it should rather be stated thus: that, in considering the question, whether this Court has jurisdiction or not, the question, whether the Act of Grace applies or not, and how it is to be extricated if it does apply, should be entirely waived. I shall state the reasons why I am unable to concur in this view of the subject, as they appear to me to be fundamental in the question at issue.

"Wherever a question arises, whether jurisdiction in a particular matter belongs to one Supreme Court, or exclusively to another, that question of jurisdiction must be decided by the Court who are called upon to judge of the matter in controversy; and it appears to me to be no argument against this to say, that if the same question were presented to the other Court, it is possible that they might pronounce an opposite judgment. The plain necessity of the case requires, that the Court shall say, whether, in their opinion, they have jurisdiction or not; and the presumption is, that all Courts will have the same opinion. But, before any Court can judge of a question of jurisdiction in a special case, they must take some view of what the special case is, and of the grounds on which it stands under the laws and statutes of the realm. They may see very clearly, that, under a particular statute, another Court has an exclusive jurisdiction in a certain general class of matters and causes. But the question, whether the special matter in controversy is within that exclusive class, must depend on a careful consideration of the nature of it; and if the demand made rests upon another statute of more general operation, and in full force, and the Court see clearly that their jurisdiction (undoubtedly in all other cases relating to it) can only be excluded by holding that statute to be totally inoperative in the particular case, it must be their duty to enquire, according to their own lights, whether it is so ineffectual, either under general rules of law, or by the force of the statute on which the jurisdiction is founded. To assume, therefore, in the present

No. 81.
Dec. 17, 1831.
Poo v. Irving,
&c.

No. 81. case, that it belongs only to the Court of Exchequer to determine, whether the Act of Grace applies to the crown debt or not, appears to me, with all deference, to be an assumption of the point of jurisdiction itself, without extricating the legal grounds on which it must depend.

Dec. 17, 1831.
Pool v. Irving, &c.

" At the same time, it must be observed, that any question as to the effect of the act 1696, which is a general statute, and was in full force before the act for establishing the Court of Exchequer, must be a question much more peculiarly fitted for the determination of the Court of Session, than for that of a new and peculiar Court, whose decisions are not guided by the rules of the municipal law of Scotland.

" It therefore appears to me, that, in order to come to a sound and safe conclusion on the question of jurisdiction, it is necessary to begin with taking a correct view of the effect of the act 1696, independent of the act of the 6th Anne; and then to enquire, how far it has been impaired or limited in its operation by that statute. And if it shall be held to be still in full force, and to reach the case of crown debtors, the question of jurisdiction will then be resolved by considering, 1st, Whether the application to the magistrates of the burgh is competent and necessary? and, 2d, Whether, if it is, the power of review belongs to the Court of Session, or to the Court of Exchequer?

" My opinion on the whole case rests on the following propositions:—

" 1. That the act 1696 did, previous to the Union, apply equally to the debtors of the crown as to other debtors. The terms of the act are quite general, applying to 'any person,' who is a prisoner for 'any civil debt or cause.' It contains no exception. And it appears to me, that the terms of the preamble, far from proving that, previous to the act, the burden of maintaining poor prisoners for debt legally attached to the burgh, do rather imply the reverse; though it seems naturally to presume, that, from motives of humanity, the administrators of the burgh would give some aliment, rather than allow a prisoner to starve. But, at any rate, I see no ground for supposing, that after the act was passed, the crown debtors stood in any different situation from other debtors; and no authority, to show that they had not the benefit of the act, has been produced.

" 2. That the statute 6th Anne, c. 26, does, neither by express enactment, nor by the necessary import and effect of any of its provisions, repeal the act 1696 in its application to crown debtors, or make any change on the legal operation of it in this respect. I cannot see any ground in law on which it can be maintained that that statute produced the effect of withdrawing the crown debtors from the operation of the act 1696. It did, no doubt, in very anxious and ample terms, vest in the new Court of Exchequer an exclusive jurisdiction 'for deciding questions concerning the revenue of Customs and Excise' in Scotland, in conformity to the 19th article of the treaty of Union; and it gave a similar jurisdiction with regard to all 'debts, dues, and profits,' of every kind due to the crown. But whatever may be the effect of these provisions of the statute in regard to the question of jurisdiction, it seems to me impossible to maintain, that if the act 1696 did previously apply to the crown debtors, the force of it was in any respect impaired in this respect by the establishment of the Court of Exchequer. Unless it could be shown that that act 1696 was inconsistent with the treaty of Union, and so fell under the provision of the 25th article (which is impossible), it clearly subsisted in all its strength as a part of the established law of Scotland.

" 3. That if the act 1696 continued, after the act of Union and the act of 6th

Anne, to be legally applicable to the crown debtors, it can only receive effect, in No. 81.
 the first instance, by a complaint or petition presented to the magistrates of the Dec. 17, 1831.
 burgh, in the jail of which the debtor is imprisoned. This seems to me to follow *Pool v. Irving,*
 necessarily from the nature and terms of the act 1696. The magistrates of the &c.
 burgh are the proprietors and custodiers of the public jail. The object was, in the
 case of poor prisoners who had no means of subsistence, to throw on the creditors
 incarceraors the burden of maintaining them. And the provision is, that 'it shall
 be leisome to the magistrates of the burgh where the prison is,' upon a complaint
 by the prisoner, 'and his making faith in their presence,' to intimate the petition
 to the creditor; and on the creditor failing to provide aliment within the ten days
 limited, or to consent to the liberation, 'it shall be leisome to the said magistrates
 to set the poor indigent prisoner at liberty.' These provisions are so peculiar, and
 so specifically applied to the magistrates, as the custodiers of the burgh jail, that I
 can see no possibility of carrying the act into effect in any other way than by a
 petition to the magistrates. I cannot imagine how a complaint under this statute
 could be presented to the Court of Exchequer, or what form it could assume to
 have even the appearance of competency. It would be impossible to express that
 prayer which is essential to the object, viz. that if security for aliment be not found
 within ten days, the court applied to (which should be expressly the magistrates,
 as custodiers of the jail) should set the prisoner at liberty. Neither could the
 prisoner pray that the magistrates should set him at liberty, when the application
 was not made to them. Further, it would be impossible to take the necessary
 oath; for the oath must be taken in presence of the magistrates; and there is no
 warrant for any other authority to administer it. And, finally, the Court of Ex-
 chequer have no power to order the magistrates to set the prisoner at liberty.
 They have no general jurisdiction over jails in Scotland, or over the magistrates of
 burghs, as the holders thereof. Neither the one statute nor the other gives them
 such a power; and, in a question as to the execution of a special statute of the
 Scotch Parliament, which applies indiscriminately to all cases of debtors, I cannot
 think that it could be executed at all, otherwise than according to the precise
 remedy which it has itself provided. I am therefore humbly of opinion, that, if
 the act applies, it was the prisoner's right to apply to the magistrates of Annan,
 and that he could not competently follow any other course.

"4. That if the application to the magistrates of Annan was a competent application under the Act of Grace, the Court of Session, and the Court of Session alone, must have jurisdiction to review any judgment or proceeding adopted by the magistrates under that application.

"The proposition which raises the difficulty in this point is, that the debt was a debt due to the crown, and that the Court of Exchequer has an exclusive jurisdiction with regard to all questions relative to crown debts, and also with regard to all claims made against the crown. I entertain doubt whether the terms of the act are such as to reach all claims of every sort which may be made against the crown, or more particularly, against the subordinate officers of the crown. And I believe that many examples of the contrary exist. But, waiving this doubt, I am very humbly of opinion, that none of the provisions of the statute are such as to comprehend this peculiar case.

"If it be once settled, that the act 1696 reaches the case, and that the application may or must be made to the magistrates of the burgh, I think it inevitably follows, that the Court of Exchequer can have no exclusive jurisdiction in this

No. 81. matter ; for, if they had, it must exclude the magistrates from entertaining such a petition, and render any judgment pronounced by them upon it incompetent.

Dec. 17, 1831. This would contradict the previous positions. But I cannot see, how the admission of a jurisdiction in the magistrates, in respect of the special terms of the statute, can be reconciled with the plea, that, in consequence of the act 6th Anne, no Court in the kingdom can take cognizance of any question relative to the debts or revenues of the crown, or specially of this question upon the act 1696, as being of that description.

The plea founded on the 6th Anne must be good, to the full extent of excluding all interference by any Court ; or otherwise it must be admitted, that there is a specialty in the act 1696, which takes it out of the operation of that statute. And it humbly appears to me, that there is this very great specialty, (if it may be so called,) that the application made under the act 1696 has no reference to the nature or constitution of the debt, or to the validity of the process by which it is to be enforced, but arises out of a quality attached by the statutory law of the land to diligence upon every debt, whatever may be its nature, and whoever may be the creditor, from which the crown has no exemption. I do not think, therefore, that it can be correctly stated, that this question has any relation to matters of revenue, or is one of the things committed to the Court of Exchequer. And if it were so, I should think the consequence inevitable, that the jurisdiction of the magistrates of the burgh must be excluded, which, in my opinion, would render the act inoperative in a case to which, by its terms, it does apply, and as to which it has never been repealed.

" But I have farther to observe, that, if the Court once make up their minds to the point, that an application to the magistrates of the burgh is competent, there can be no review, as far as I can see, of their judgment, except by the Court of Session. I suppose it to admit of no doubt, that, in general, this Court has power to review the proceedings of magistrates of burghs in applications on the Act of Grace. The review, therefore, must be competent in this case, unless it is excluded by the Court of Exchequer. But there is no form of process that I am acquainted with, by which the Court of Exchequer could review such proceedings. Neither advocation, nor suspension, nor reduction, nor appeal, is provided by any statute ; and I am not aware, that the common law powers of the Court of Exchequer afford any process which could be effectual to the purpose. They have, indeed, abundance of jurisdiction to review the proceedings of justices of the peace, and other inferior judges, in cases where special powers are committed to such magistrates by the revenue statutes. But, as a Scotch lawyer, I can discover nothing in the act of 6th Anne, and nothing in the nature of the jurisdiction thereby established, which confers a power of reviewing a sentence of the magistrates of a burgh, pronounced in the exercise of their ordinary powers as magistrates, and under the express provisions of a general Scottish statute. And, unless there be such a mode of proceeding laid down, either generally or particularly, in some statute, I am under the necessity of thinking, that there is no form of process by which such a review could be carried into effect. It will be observed, that it would be to take an appeal from a court which is not a court of revenue, and not acting as a court of revenue, to a court which is solely and exclusively a court of revenue. It would be to make the Court of Exchequer review the act of the magistrates, in ordering their jailer to liberate a prisoner, or their sentence refusing to make that order when they ought to do it. And, supposing that such a case were in any form brought into Exchequer, I do not see how it could be effectually extricated

there. If the magistrates had refused to liberate, and the Court thought that they ought to have done so, I have doubt as to the power of that Court to order the liberation. They could, indeed, order the officers of the crown to consent to the prisoner's liberation. But the question is, whether they could make a legal order &c. of liberation upon the magistrates of a burgh. Again, if the magistrates had liberated the prisoner, or made an order to that effect, in consequence of the collector having chosen to disregard the intimation, would the Court of Exchequer have power to compel them to receive the prisoner again into the jail? Possibly, ways might be found of extricating these last difficulties. But the main difficulty would remain, that there is no statute, and no law yet pointed out, which provides a mode of review in such a case.

"As I am sensible that this opinion differs from the view taken of this question by the Second Division of the Court, in the case of Roy v. Young and Wilson, February 17, 1824; and that it is also different from the opinion still entertained by many or most of the consulted Judges; I have thought it necessary to state fully the grounds on which I am compelled to hesitate in concurring with them; and I mean to express those doubts with all possible respect and deference.

"In answer to the question as stated, I am of opinion, that, in consequence of the refusal of the collector, on the part of the crown, to aliment the prisoner, Pool, the magistrates of Annan are bound, under the act 1696, to liberate him from jail."

The case was then resumed by their Lordships of the First Division.

LORD GILLIES.—The case stands before us in a very awkward position, and is indeed nearly inextricable in any manner which will give literal effect to the opinions of the majority of the consulted Judges. Their Lordships all dispose of the case upon that hypothetical basis on which it was laid before them, and which assumes an application under the Act of Grace to have been made to the magistrates, and refused by them. But the magistrates most strenuously insist, that had such application been made to them, they should have deemed it their duty to grant it; and thus the opinions as given apply to a case purely hypothetical, and which could not arise among the parties. These opinions do not apply to the case of a man who comes to this Court and states, that, between the crown and the burgh, he is left to starve in prison, and therefore praying our immediate interference. Yet such was the case raised by the bill of suspension, and I am therefore at a loss to perceive how this matter can be extricated, so as to give effect to these opinions. But if we are also to take up the case on the same footing with the consulted Judges, I must declare my entire concurrence with the views of Lord Moncreiff. The words of the Act of Grace are extremely plain and simple; and I conceive it to be within the province of this Court to construe them, as it is daily in the habit of doing. They are, "that where any person is made, or shall be made, prisoner for a civil debt or cause, and shall be found or become so poor as that he cannot aliment himself; then, and in that case, it shall be leisome to the magistrates of the burgh where the prison is, to which the said prisoner is committed, upon the complaint of the said prisoner, and his making faith in their presence that he hath not wherewithal to aliment himself, to intimate the same to the creditors, one or more, at whose instance the said prisoner was committed, or is detained, and to require him or them, either to provide and give security for an aliment to him, not under three shillings per diem, or else to consent to his liberation; which, if the said creditors refuse or

Dec. 17, 1831.
Pool v. Irving.

No. 81.

No. 81. delay to do within the space of ten days thereafter, then it shall be leisome to the said magistrates to set the said poor indigent prisoner at liberty," &c.

Dec. 17, 1831.
Pool v. Irving,
&c.

Under these words, it is impossible for any one but the magistrates to exercise the jurisdiction of receiving an application under the Act of Grace. They may or may not grant the application; they may err in judgment; but if a poor prisoner prays for aliment, and if he be imprisoned for a civil debt, it belongs to the magistrates to decide on the application. On this head, Lord Moncreiff's argument appears to me to be conclusive. But if the magistrates entertain such an application, in what Court but this can their proceedings be reviewed? If they intimate to the crown to aliment the debtor, and on the crown's failure to do so, set the debtor at liberty, by what form of process is the Court of Exchequer to grant warrant to re-incarcerate him? I conceive that Court would hesitate much before it entered on such a course of procedure. I apprehend, therefore, that the jurisdiction, in claims of aliment under the Act of Grace, is necessarily in the magistrates in the first instance, and that their proceedings are subject to review in no other Court than this.

But it is said, that even if we have jurisdiction to examine the claim of a crown debtor, yet crown debts are not entitled to the benefit of the Act of Grace. After a careful consideration of the statute of Anne, establishing the Scottish Court of Exchequer, and conferring its jurisdiction, as well as of the subsequent statutes which bear on this question, I am unable to discover any ground for considering that crown debtors do not fall under the Act of Grace. The words of the statute are as broad as it was possible to employ—"any person made prisoner for a civil debt or cause." This act preceded the establishment of the present Court of Exchequer, and conferred an important patrimonial benefit on the burghs of Scotland. Such benefit cannot be taken from them by implication; and where is the statute which abrogates the Act of Grace, in so far that it is only to some prisoners for civil debt, and not to all such prisoners that its benefit extends?

"But it is said that the magistrates cannot relieve the burghs of crown debtors, under the Act of Grace, without thereby interfering with the crown's rights as a creditor. This I apprehend to be erroneous. The crown debt remains entire, after the prisoner's liberation, as much as before it. The magistrates merely administer the policy of this important statute, in its full original scope—and they do so, because, since the date of the statute, there is no enactment which abrogates or abridges their jurisdiction.

"Put the case, that a prisoner in their jail has been the purchaser of a cask of confiscated whisky at an excise roup; that he has failed to pay, and is imprisoned in consequence. The crown diligence against a debtor's property possesses many privileges, but has it any superior privilege as to the debtor's person? If such a prisoner should apply for the benefit of the Act of Grace, are the magistrates to hold that they have no jurisdiction, and that they must aliment the prisoner? I humbly conceive that such is not the law of the country; and, without going more at large into a question which has been already so thoroughly examined by Lord Moncreiff, I merely add that I subscribe to his Lordship's opinion.

LORD BALGRAY concurred.

LORD CRAIGIE.—The case was originally in an awkward shape, but I think the Solicitor-General very properly removed the difficulty by consenting that it should be disposed of on an assumed basis, by which no sacrifice was made on the part of the prisoner. I conceive that where a party is imprisoned under a warrant

from the Court of Exchequer the Act of Grace does not apply to him. The statute No. 81. of Anne, which gave jurisdiction to that Court, is of a most comprehensive scope, and the Act of Grace cannot stand in its way.

Dec. 17, 1831.
Pool v. Irving,
et al.

LORD PRESIDENT.—I am of opinion with the minority. The Act of Grace had a double purpose, and was intended, 1st, to relieve the burghs, and 2d, to lay upon the incarcerating creditor the burden of alimenting his poor debtor. The words of that act apply to all debtors for a civil cause—to “any person made prisoner for a civil debt or cause.” If a crown debtor, therefore, be a person imprisoned for civil debt, the Act of Grace reaches him. How has the establishment of the present Court of Exchequer affected this question? It is true, that it was formed in the time of Queen Anne; but there was an Exchequer Court before. There were crown debts in Scotland prior to that time, and existing at the very date when the Act of Grace was passed. But that act was nevertheless made to apply to all prisoners for civil debt, without exception, and must have included crown debtors as well as others. Since the date of that act I can discover no statute which limits its original scope, and excludes the crown debts which fell, within its provisions at the first. The matter becomes inextricable, if we either cut off the jurisdiction of the magistrates in a case like this, or the power of review of this Court; and if we have jurisdiction, my opinion is, that the case falls under the Act of Grace.

[It was here stated from the Bar, that Pool had been set at liberty.]

LORD PRESIDENT.—Since that is the fact, the ground is removed on which he presented his bill of suspension and liberation. There is no longer a question before the Court, and nothing is left for us except to find, in respect the suspender is at liberty, it is unnecessary to give a decision in this cause.

THE COURT accordingly pronounced this interlocutor: “In respect that it is admitted that the complainant is now at liberty, find it unnecessary to determine this question.”

Pool's Authority.—6th Geo. IV. c. 62.

Magistrates' Authorities.—(2.) 1696, c. 32; 1487, c. 101.; 1579, c. 74; 1617, c. 8, §16; 1661, c. 38.

Irving's Authorities.—(1.) 6th Anne, c. 26, § 1, 6, 7, 8, 9, 11, 15, 17, 22; Duke of Queensberry and Earl of Hopetoun, Dec. 15, 1807 (Appendix, Jurisdiction, 19); Warrender, June 19, 1810, F. C.; 1. E. 3, 31; Receiver-General of Customs, July 12, 1734 (7589); Mitchell, Jan. 27, 1743 (7590); Ramsay, July 17, 1747 (7590); Shaw, Jan. 5, 1750 (Elch. Jurid. 51); Thomson, Dec. 19, 1758 (Elch. do. 59); Martin, 1766 (5 Supp. 495, and Hailes, 186); Roy, Feb. 17, 1824 (ante, II. 719); (2.) I. 597, c. 277; M'Kenzie's Observations, p. 302; 53d Geo. III. c. 21; Ramsay, March 1, 1825 (ante, III. 597); Glasswall, Dec. 28, 1710 (7461); 2 Bell, 554; 1 Blackat. 261; Lealey, Feb. 6, 1783; Hailes, 916; Clark, Dec. 7, 1787 (11818); 52d Geo. III. c. 93. 5th Geo. IV. c. 44, § 7.

T. JOHNSTONE, S.S.C.—JARDINE, STODDART, and FRASER, W.S.—W. MARTIN, S.S.C.—
Agents.

No. 82.

THOMAS MORTON, Petitioner.—*Milne.*

LORD CLERK REGISTER, and DIRECTOR OF CHANCERY, Respondents.

Dec. 17, 1831.

Morton v.

Lord Clerk

Register, &c.

Proof—Public Records.—A specification of letters patent for Scotland, having been enrolled in Chancery,—an application to have it delivered up, to be produced in Parliament, on occasion of applying for an extension of the term of the patent, refused, in respect of the danger to the public records, and because certified extracts of recorded deeds are probative by the law of Scotland.

Dec. 17, 1831. MORTON, inventor of the patent Slip, presented a petition, setting forth that a specification, under his hand, of the letters patent for Scotland, was enrolled by him in Chancery in 1818; that he had petitioned Parliament

1st DIVISION.
H.

for leave to bring in a bill to extend the term of his patent, and it was necessary to produce, in evidence, the original specification. He therefore prayed for warrant “on the Lord Clerk Register, the Director of Chancery, or the Keeper of the Records of Chancery, and his deputies, to deliver to the petitioner the aforesaid original specification, enrolled in Chancery as aforesaid, on his granting a receipt and obligation for redelivery of the same within such time as your Lordships may appoint,” &c.

Appearance was made for the Lord Clerk Register, and for the Director of Chancery, who opposed the application as unnecessary, and as hazardous to the security of the public records.

LORD PRESIDENT.—An extract of the recorded specification is a probative writ by the law of Scotland. In regard to a Scottish patent, and the evidence which is to be produced before a British Parliament, surely the extract, which would be good evidence in all our own Courts, will be received as good evidence there. At present, as the application involves danger to the security of our records, I think it ought not to be granted. If it is afterwards proved to be indispensable, the application to us can be renewed. In the mean time it should be refused.

LORD GILLIES.—I concur. We are not lightly to presume that the extract, which is good evidence in all our Courts by the law of Scotland, will not also be received as good evidence in the Parliament of the country, in proceedings for renewing a patent for Scotland.

The other Judges having assented,

THE COURT, “in respect of the danger attending the removal of the original documents called for beyond the jurisdiction of this Court, and that extracts of all deeds and warrants recorded in the Courts of Scotland, certified by the signature of the proper officer of Court, are, by the laws and practice of Scotland, probative, refuse the prayer of the petition, leaving to the petitioner his right of demanding an extract of the specification called for from the records of Chancery, duly certified by the Director or his deputies.”

P. MACLAREN, Suspender.—Jameson—A. Wood.
MARQUIS OF BREADALBANE, Charger.—Shone—Outram.

No. 83.

Dec. 17, 1831.
Maclaren v.
Breadalbane.

Landlord and Tenant—Stamp.—1. A consent to remove without warning, when given within the time when warning might legally have been executed, is effectual against the tenant. 2. Such consent does not require to be written on stamped paper.

MACLAREN held a lease from the Marquis of Breadalbane of a farm, Dec. 17, 1831. the terms of removal from which were Whitsunday 1831, as to the houses and grass, and the separation of the crop, as to the arable land. On the 15th March of that year, he granted an obligation, written on unstamped paper, in these terms:—"I, Peter Maclaren, tenant, Tullichuil, in Breadalbane, hereby bind myself to remove from my present possession at Whitsunday first as to the houses, yards, and pasture, and from the arable land at the separation of the crop from the ground, and that without any warning or process of removing used against me." In consequence of this no warning was given, but Maclaren having refused to quit at the term, the Marquis presented a summary application to the Sheriff of Perthshire, to have him removed. It was not denied by Maclaren, in point of fact, that he had agreed to remove without warning, but he pleaded, 1. That the letter being unstamped, could not be read. 2. That no agreement dispensing with warning could be enforced.¹

2d DIVISION.
Bill-Chamber.
Ld. Moncreiff.
R.

To this it was answered—

1. A consent to dispense with warning, is not a deed falling under any of the stamp acts, and

2. There is no authority for holding that when the period at which warning may be given arrives, a tenant may not validly dispense with it; and, on the contrary, such consent was enforced under more unfavourable circumstances than the present, in the case of *Brown v. Peacock*.²

The Sheriff pronounced this interlocutor:—"Finds it admitted by the defender, that his lease expired at Whitsunday last as to the houses, yards, and pasture, and the separation of the crop from the ground as to the arable land: that his only defence in bar of the removing is, that he was not legally warned to remove: that the writing executed by him, on which the pursuer founds, dispenses with such warning; and that the writing having been executed within the last year of the lease, and at a time when it was competent to give a legal warning, is sufficient to obviate

¹ Ersk. 2, 6, 50; Bartlet, Dec. 2, 1742 (13882); Stevensons, June 23, 1821 (ante, I. 87.)

² Feb. 27, 1822 (ante, I. 400.)

No. 83. the defence : decerns removing ut petitur, and for £1, 10s. of expenses, and the expense of extract."

Dec. 17, 1831. Maclarens v. MacLaren thereupon presented a bill of suspension, which the Lord Ordinary refused without answers, adding the subjoined note.*

Wallace v. Deas. The Court adhered.

A. CLASON, W.S.—H. DAVIDSON, W.S.—Agents.

No. 84. MRS E. BOWES or WALLACE, Suspender.—*R. Bell.*

MRS S. FERGUS, or DEAS, and HUSBAND, Chargers.—*D. F. Hope—A. M'Neil.*

Fiar and Liferenter—Process.—Bill of suspension and liberation passed as to, 1. Whether a widow infest on a disposition by her husband to himself and her in conjunct fee and liferent, and a third party in fee, be entitled in a question with the fiar to the custody of the title-deeds; and, 2. Whether it be competent to complain in one and the same bill of suspension and liberation of a decree ad factum prestandum in favour of a party, and also for expenses in name of his agent, although the incarceration be not relative to the expenses.

Dec. 17, 1831. MRS DEAS and husband presented, in November 1829, a summary petition to the Sheriff of Fife, setting forth that the deceased William Wallace, husband of Mrs Wallace, had by deed of disposition and settlement, dated in 1829, disposed in favour of himself and her in conjunct fee and liferent, and to Mrs Deas and her heirs and assignees in fee, his whole heritable and moveable property, including, in particular, certain premises in Largo, with the whole vouchers of debt, writs, and evidents; and that Mrs Wallace had, since her husband's death, disposed of part

* “ NOTE.—The Lord Ordinary would have taken an answer, if he had entertained any doubt. But in a case of removing, where the landlord may be involved in inextricable difficulties by delay, he has thought it his duty, after considering the Inferior Court record, and being clear in his opinion, to decide on the complainer's own representation of his case. According to that statement, the complainer is attempting to carry through a most flagrant breach of good faith, for which not even a pretence of apology is offered. And as to the points of law pleaded, the Lord Ordinary is of opinion, 1. That, as it is not denied on the record that the complainer did deliberately, on 15th March, 1831, engage to remove without warning at Whit-sunday and Martinmas 1831, these being the admitted terms of removal by the deed of lease, it is not necessary to consider whether the writing to that effect strictly required a stamp or not. But separately, the Lord Ordinary is inclined to think, that that writing, being merely intended to carry into effect the agreement under the lease, without the necessity of action or warning, must be taken as part of it, or as explanatory of the engagement under it, and therefore, being otherwise probative, may be looked at, though bearing no stamp. 2. He is clearly of opinion, that the plea as to the necessity of warning, even after an engagement on the 15th March to dispense with it, is untenable; and he thinks the case of Brown against Peacock, 27th February, 1822, applicable a fortiori.”

2d Division.
Bill-Chamber.
Lt. Moncreiff.
R.

of the moveable effects left by him. They therefore prayed to have her No. 84.
 decerned to place the bills and documents of debt in proper custody, to Dec. 17, 1831.
 find caution not to dilapidate the moveable effects, and also to deliver to Wallace v.
 Mrs Deas the title-deeds of the heritable property, together with the deed Deas.
 of settlement. Mrs Wallace stated in answer, that the deed of settlement
 had been abstracted or lost, but she produced an infestment taken upon it
 in favour of the disponees, which narrated its tenor, as above set forth.
 The Sheriff having allowed a judicial examination, Mrs Wallace emitted
 a declaration, in which she acknowledged having been in possession of the
 deed of settlement, and gave a somewhat unsatisfactory account as to how
 it had, as she alleged, been lost. Thereafter the Sheriff ordained her to
 place certain bills called for, in the hands of the Clerk of Court, for custody,
 and to deliver up to Mrs Deas the title-deeds of the heritable property
 (which were in her agent's hands), and also interdicted her from putting
 away any of the moveables, till she should produce the deed of settlement,
 or till Mrs Deas should bring a proving of the tenor of it. Expenses
 were further awarded against Mrs Wallace, for which decree was taken
 in name of Mrs Deas's agent. Mrs Wallace having been incarcerated on
 the decree for delivery of the title-deeds, presented a bill of suspension
 and liberation, complaining both of the decree on the merits, and for ex-
 penses, on the ground chiefly, that even assuming the deed of settlement
 to be in existence, and to be of the tenor stated in the seisin, still as her
 right under it and the infestment was one of conjunct liferent with her
 husband, she was entitled to the privileges of a liferenter by reservation,
 and consequently to the custody of the title-deeds, while Mrs Deas had
 no right whatever to possession of them. On the other hand, Mrs Deas
 maintained, 1. That the bill was incompetent, in so far as it complained in
 one and the same bill, both of the decree on the merits, and for expenses
 in favour of the agent; and 2. That Mrs Deas, as fiar, was entitled to the
 custody of the title-deeds, and, at all events, that under the suspicious
 circumstances of the case, Mrs Wallace ought not to be allowed to retain
 them.

The Lord Ordinary, on advising the bill with answers, appointed
 counsel to be heard, adding the subjoined note.*

* * NOTE.—The Lord Ordinary can form no opinion till he knows what the com-
 plainer says to the statements in the answers; but, for the guidance of the parties,
 he may mention, 1st, That he does not think the objection of incompetency well
 founded. Both charges depend upon the same decree, which the complainer is em-
 titled to complain of in toto, if she can show it to be wrong on its merits. The
 interest, indeed, is separate; but the interest of each party may be perfectly well
 defended in one process. The Ordinary thinks that there would have been much
 more ground for complaint if the complainer had presented two bills, and thus
 attempted to make two processes of the merits, and the expenses upon one decree.
 2d, As to the merits, the statements in the answers are very strong. It may only be
 suggested as a doubt for consideration, whether the Sheriff's judgment may not be

No. 84.

Dec. 17, 1831.
Wallace v.
Deas.

Thereafter he passed the bill, on the grounds stated in the note below.* Mrs Deas having reclaimed, Mrs Wallace, who could not offer caution, consented that the title-deeds should be deposited with a neutral person till the issue of the cause, whereupon the Court on this condition adhered.

JAS. TAYLOR, S.S.C.—G. MILL, S.S.C.—Agents.

thought to go too far in ordaining the title-deeds to be delivered to the respondent, who has legally no right to the custody of them; and whether all that the circumstances required was not that they should be lodged in the hands of the Sheriff-clerk, or some neutral person, or recorded for preservation; and the ground of doubt may be greater, if it be really intended that these title-deeds, when delivered, shall be subjected to a hypothec in the hands of the respondent's agent."

* "There is no doubt, that if the complainant has wilfully destroyed the deed of settlement, she has committed a great wrong, whatever may be the nature or effect of that deed. But while the Lord Ordinary is of opinion that the proceedings in the process have been very irregular, and particularly, that the examinations of havers have gone far beyond the legitimate course of such examinations, the main point of doubt on which he passes the bill, is, that he thinks that the prayer of the first petition demands, and the judgment of the Sheriff grants, what the pursuer had no right to ask, and no necessity required, viz. that the title-deeds of the subject should be delivered to the pursuer. By merely passing the bill, the interdict, as to the moveable property, whether right or wrong, will continue in force; and the bill of exchange mentioned, has been lodged with the Sheriff-clerk. The deed of settlement, again, is believed not to be in existence; but if it is, it is not more unsafe than it has been for years. The question therefore is, whether this old woman is to be kept in jail till she consents to deliver to the pursuer the ancient title-deeds of this property, and till she pays the account of expenses awarded on the footing of her being wrong in refusing so to deliver.

"The Lord Ordinary is of opinion that the complainant was not bound to deliver the title-deeds to the pursuer in any view of the case. It may be doubted, whether without the deed of settlement the pursuer had really any title in the Inferior Court, however the facts might warrant another course. But supposing this difficulty to be overcome, it is clear that, assuming the terms of the settlement as stated and appearing from the scisin, the complainant stood infest in a conjunct liferenter with her husband; which, by the established rule, gave her all the privileges of a liferenter by reservation.—(See Ersk.) And the Lord Ordinary is very clearly of opinion, that such a liferenter has a right to the custody of all the writs and title-deeds of the property. If this be true, the application to the Sheriff was directly in the face of the ordinary rights of the parties. Still it might be competent to apply in a strong case. But was it competent for the substitute fair to ask, or for the Sheriff to order actual delivery of the title-deeds to that party? The Lord Ordinary thinks that it was not. If there was a case of necessity or danger, it should have been arranged otherwise. But as the title-deeds are confessedly in the hands of an agent who holds them under hypothec, the alleged damage appears to be imaginary. The double imprisonment, therefore, could only operate to produce acquiescence in the orders of which Mrs Wallace complains, and in the justice of the decree for expenses, which depends on the correctness of that on the merits; and to cripple the complainant in trying the question as to the deed of settlement in the process of proving the tenor.

"The Lord Ordinary understands that the complainant has been liberated since the case was heard; which, if correct, relieves the cause of much difficulty. But it is still his duty to pass the bill."

Mrs SLADE or HAMMOND, Petitioner.—*D. F. Hope.*

No. 85.

Factor loco Tutoris—Pupil.—Circumstances in which the Court granted warrant to a factor loco tutoris to subset a farm held in lease by the pupil, and to grant such sub-lease or other deed as might be deemed necessary to vest the right in the Kirkland, &c. sub-tenant to the occupancy of the farm, during the remainder of the lease. v. Gibson.
Dec. 20, 1831.
Slade, or Ham-
mond.

Mrs HAMMOND, widow of the late John Hammond, farmer, and who Dec. 20, 1831.
 was factor loco tutoris of their infant son, petitioned the Court for auth-
 ority to sell a lease, or at least to grant a subset, for the remainder of its
 term, under the following circumstances. She stated that it was granted
 for 19 years from 1814, and for the lifetime of the tenant in possession at
 the expiry of that period; that, as the landlord was proprietor under
 entail, it was doubtful how far the lease, beyond the 19 years, could be
 valid, except for the lifetime of the grantor; that her husband's moveable
 effects were scarcely adequate to meet his debts, for which purpose they
 were speedily to be sold, by desire of the creditors, and, as he had left no
 other property but the lease, nothing would remain to stock the farm, or
 cultivate it profitably.

Lord President.—This Court very rarely grants power to a factor loco tutoris to sell the pupil's heritage. For even though we did so, he might reduce the sale, after majority, if he could plead lesion.

D. F. Hope for Petitioner.—We limit the prayer of the petition to a power to subset. The circumstances of this case are very urgent; for, if the farm be left on the hands of the petitioner, the pupil's interests are sacrificed instead of being protected.

Lord Gillick.—It is clearly for the advantage of the pupil to grant the power to subset.

THE COURT then "granted warrant to, and authorized the petitioner, as factor loco tutoris to her said son, to subset the subjects in question; to receive and discharge the rent which may be received therefor, for behoof of the pupil; and to grant, subscribe, and deliver in favour of the sub-tenant, such sub-lease, assignment, or other deed, as may be deemed necessary to vest the right in him to the occupancy of the said farm during the remainder of the lease."

J. IMAIN.—Agent.

J. KIRKLAND and J. F. SHARPE, Petitioners.—*Cunninghame.*
 A. GIBSON (WILSON and SON'S TRUSTEE), Respondent.—*Maitland.*

No. 86.

Process.—The prayer of a petition for interim execution against a trustee qua such, not allowed to be amended after answers had been lodged, so as to crave decree against him personally.

No. 86. THE respondent, Gibson, having appealed against the judgment mentioned ante, IX. 596, in the action against him as trustee on the sequestered estates of Wilson and Sons, at the instance of the petitioners Kirkland and Sharpe, they presented a petition for interim execution against him qua trustee. Answers were given in by Gibson, stating that he had no trust-funds in his hands; whereupon they presented a second petition for execution against the individual creditors on the estate; and this being opposed by the creditors, they craved leave in the meantime to amend the prayer of their original petition, so as to demand execution against Gibson personally for the expenses of process which had been awarded. This, however, the Court refused to allow after answers had been lodged, considering a new petition necessary, and they granted execution against Gibson simply qua trustee.

Dec. 20, 1831.
Kirkland, &c.
v. Gibson.

2d Division.
F.

Ballandene, &c.
v. Chrystal.

GREG and MORTON, W.S.—JOHN WIGHT, W.S.—Agents.

No. 87. MRS LILIAS BALLANDENE and HUSBAND, Pursuers.—D. F. HOPE—MOIR.
JAMES CHRYSAL, Defender.—G. NAPIER.
JOHN M'Laurin, W.S., Compearer.—SHENE—G. G. BELL.

Process—Agent and Client—Arbitration.—1. In actions of constitution, the want of the summons not fatal to a reclaiming note. 2. Where an interlocutor was pronounced of consent, decerning for a sum of money, and interponing the Judge's authority to a judicial reference, and allowing an extract, as of an interim decree—held, that although an extract had been taken out, a reclaiming note against the interlocutor, so far as regarded the reference, was competent. 3. Question whether a consent to a reference, which the agent was not authorized to give, being signed by counsel, binds the client in a question with the opposite party.

Dec. 20, 1831. IN an action of constitution at the instance of Mrs Lilias Ballandene against Chrystal, a minute was given in for Chrystal, proposing to consent to an immediate decree against him for a certain sum, and to a judicial reference of the other claims in dispute. To this minute answers for Mrs Ballandene, signed by her counsel, were lodged, consenting to the proposal. The Lord Ordinary, on this, pronounced an interlocutor, decerning for the sum agreed on, interponing his authority to the reference, and remitting to the referee selected. His Lordship, by the same interlocutor, allowed it to be extracted as an interim decree, and an extract was taken out accordingly. Thereafter, Mrs Ballandene gave in a reclaiming note, alleging that M'Laurin, W.S., her agent, had no authority to consent to the reference, and praying for a recall of the interlocutor in so far as it interponed the Judge's authority thereto. In opposition to this, Chrystal contended, 1. That the note could not be received, in respect the summons was not attached thereto. 2. That it was incompetent, in respect of the interim extract; and, 3. That M'Laurin had authority to consent to the reference; but that at any rate, the consent having been signed by

2d Division.
Ld. Fullerton.
T.

counsel, who required no mandate, the reference, as in a question with No. 87.
Chrystal, was effective and binding.

To this it was answered—

1. Actions of constitution are excepted from the regulations of the Judicature Act. *Act of Sederunt, 12th July 1828, § 77.*

Dec. 20, 1831.
Ballandene, &c.
v. Chrystal.

2. The extract could only be of the decree for the sums of money, that part of the interlocutor sanctioning the reference and remitting to the referee not being a decerniture; and besides, an interim extract does not preclude reclaiming; and,

Kirkland, &c.
v. Slater.

3. An agent requires a special mandate to authorize him to refer; none such was given here, and the signature of counsel cannot give efficacy to a consent which the agent had no power to instruct him to sign.

The Court overruled the two preliminary objections, and quoad ultra, before answer, remitted the cause to the Lord Ordinary. Before his Lordship compearance was made by M'Laurin, the agent, who produced the correspondence between him and his client, with the view of instructing that he was authorized to consent to the reference. The Lord Ordinary thereupon ordered minutes of debate, which, on being lodged, he reported to the Court. On advising these, their Lordships were satisfied that the correspondence did not afford sufficient authority for consenting to the reference; but as the referee had not accepted, they delayed, to see whether, after what had passed, he would accept or reject. The referee having declined accepting, the reference consequently fell, and the Court thereupon found it unnecessary to decide, but remitted the cause to the Lord Ordinary, with power to determine all questions of expenses.

WOTHERSPOON and MACK, W.S.—G. and W. NAPIER, W.S.—J. M'Laurin, W.S.—Agents.

JOHN KIRKLAND and Others, Pursuers.—D. F. Hope—Shaw.
JOHN SLATER (Rowley's TRUSTEE), Defender.—Sol.-Gen. Cockburn—
Cunninghame—Wilson.

No. 88.

Proof—Bankrupt.—In an action at the instance of parties claiming to be ranked on a sequestrated estate, against the trustee for reduction of a composition contract and discharge granted by them to the bankrupt—held, (without deciding the general question of law,) that, in the circumstances, the statutory declarations of the bankrupt were not admissible in evidence.

KIRKLAND and others, creditors of Josiah Rowley, accepted a composition of eleven shillings in the pound, and granted a discharge in 1818. Rowley re-commenced business, but his estates were sequestrated in 1822. In this sequestration he underwent the usual examinations by the Sheriff, emitted declarations, and made a deposition in common form. He thereafter absconded, and went to America. In consequence of the investigations which had taken place, Kirkland, &c., were led to believe, that the composition contract and discharge in 1818 had been obtained from them

Dec. 20, 1831.
2d DIVISION.
Jury Cause.
R.

No. 88. by fraud, and they now claimed to be ranked on the estate for their original debts, under deduction of the eleven shillings received by them.

Dec. 20, 1831.
Kirkland, &c.
v. Slater.

Their claims being rejected by Slater the trustee, in respect of the discharge, they instituted a reduction of it. That action was remitted to the Jury Court, and an issue taken as to whether the discharge was the deed of the pursuers. In the preparation for this trial, the pursuers moved for delay, in order to obtain the evidence of Rowley and another witness abroad; and the affidavit in support of the motion bore, *inter alia*, that they had reason to believe that Rowley was resident in the neighbourhood of Hoboken Ferry, in North America. The trial was postponed accordingly, and a commission granted to take the depositions. Thereafter Slater gave notice, 28th June, 1830, of a motion to recall the commission, "in respect that, although repeatedly required, the pursuers had failed to give in the interrogatories to the witnesses proposed to be examined by them, and therefore appear to have no intention of acting under the said commission." Upon this motion the Court "ordered that the interrogatories for the examination of the witnesses abroad be finally settled on or before the 30th current; and that the commission be reported by the 30th of November next." A correspondence on the subject, betwixt the agents of the parties, followed this order; in which the pursuers declined to lodge the interrogatories, or to say that the intention of examining Rowley and the other witness abroad was abandoned; but they ultimately notified, that "it is not our intention to act under the commission granted by the Court."

The case having come on for trial on the 17th January, 1831, before the Lord Justice Clerk, and the Lord Chief Commissioner, the pursuers, *inter alia*, tendered in evidence the declarations of Rowley, emitted before the Sheriff under the sequestration. These were objected to as not admissible; but the Court overruled the objection, and allowed them to be received, whereupon the trustee gave up the case, and a verdict was returned for the pursuers.

On a motion for a new trial, the Court ordered Cases, in which the parties argued the general question of law as to the admissibility as evidence of a bankrupt's statutory declarations,¹ as well as the special question

¹ The trustee founded mainly on the case of Goddard and Company, v. the British Linen Company, 5th July 1809, (not reported, but referred to, 2 Bell, 347,) and of which the following notes by Lord President Blair were laid before the Court.

"Goddard and Company, v. the British Linen Company.—First question, whether the writing produced by the British Linen Company is to be considered as a bill, a legal document probative *per se*, and constituting a debt against Robb to the extent of £21,000 and upwards—of this have great doubt. Alteration of the date admitted to have been done with the knowledge of Rennie the holder. Date not legible; what is said to be October might be any thing. A promissory-note upon the same surface of paper. Said that the bill was first written; but where is the evidence of this? If the promissory-note was written first, the bill must be null upon the stamp-

arising out of the proceedings in this cause, with reference to the commission for examining Rowley. The Court ordered them to be laid before the other Judges for their opinions.

The consulted Judges returned the following unanimous opinion:

"In the particular circumstances of this case, as set forth in pages 14 and 15 of the revised case for Slater, and not in any shape contradicted in that for Kirkland, &c., we are of opinion that the declarations of the bankrupt Rowley, taken in the sequestration, ought not to have been admitted as evidence on the trial.

"It appears from the statement above referred to, that on 1st June 1830, an affidavit was emitted by the pursuer's agent, 'that on the 16th of May preceding, he was informed, and verily believes, that the said Josiah Rowley resides in the neighbourhood of Hoboken Ferry aforesaid,' i. e. on the Jersey side, New York.

"On producing this affidavit, the pursuers obtained from the Jury Court a commission to examine Rowley, and one Neilson, also sworn to be residing at the same place, and for that purpose were ordered to prepare interrogatories.

"Not having done so, on 28th June 1830 the defender gave notice of a motion for the recall of the said commission, in respect of the failure to give in the interrogatories.

"On 1st July, the Court ordered 'that the interrogatories for the examination of witnesses abroad be finally settled on or before the 30th current, and that the commission be reported by the 30th November next.'

acts. Had this bill been offered to the market as it now stands, would any dealer have taken it as a bill, or been entitled to the privileges of an onerous indorsee? That not the question here; but if not entitled to the extraordinary privileges of a bill, neither can it be considered as probative, being neither holograph nor regularly tested. 2d, Can this improbatative writ be converted into a legal document by acknowledgment of subscription?

"No proper acknowledgment of subscription ought to be judicially acknowledged in this process.

"Statutory examinations before the sheriff are not evidence.

"Supposing acknowledgment to be repeated here, this would come to the question whether the assertion of a bankrupt upon oath, or not upon oath, can raise up a debt against his creditors.

"But whatever objection lie to the document, the debt may be a very just one, and cannot look at the declarations before the sheriff. They no doubt afford strong suspicions that this is the case. But these declarations are no evidence, only a sort of preognition for the information of creditors.

"Must also observe, that this is a debt competent to be proved by parole evidence—claim of British Linen Company arises from a gross fraud—embezzlement of their cash—Robb art and part, and liable to them conjunctly and severally with Rennie. Case of the Bank against Somerville. Neither can there be any difficulty. Heggie and Simpson, although socii criminis, might be received. The bill itself would be a strong circumstance of evidence. Had Heggie and Simpson been examined as witnesses, and their oaths had contained what is in their declarations, should have thought the debt sufficiently instructed.

"Ought to allow British Linen Company to instruct their debt, the proof to be reported to the Court, and taken up quam primum.

"Minute lodged 5th December 1831, by objecting creditors consenting to their objections to British Linen Company's claim being repelled."]

No. 88.

Dec. 20, 1831.
Kirkland, &c.
v. Slater.

No. 88. "But on 29th July, the pursuers' agents wrote to the defender's agent, that
 Dec. 20, 1831. 'after having prepared our interrogatories for Rowley and Neilson, our counsel
 Kirkland, &c. has, for reasons unnecessary to be explained, deemed it unnecessary to lodge them.'
 v. Slater.

"On this the defender's agent enquired, 'whether he mistook this communication,
 by inferring from it that the intention of examining Rowley and Neilson had
 been abandoned.'

"To this the pursuers' agents answered, 'that our communication of the 29th
 ultimo did not state that we did not mean to examine Rowley and Neilson, but
 merely that our counsel did not deem it expedient to lodge the interrogatories
 allowed by the Court.'

"On the defender's agent applying for an explanation of this, the pursuers'
 agents answered on 10th August, 'that it is not our intention to act under the
 commission granted by the Court.'

"Under these circumstances, the cause came on for trial on 17th January, 1831,
 when the proceedings took place on which our opinion is asked.

"Now, as it is not stated that any new affidavit had been put in, either stating
 that Rowley was since dead, or even that the pursuers had since learned that they
 were misinformed as to Rowley's place of residence, and did not know where to
 find him, so as to execute the commission (though we doubt if this would have
 been sufficient reason to dispense with the examination of Rowley), we are of op-
 nion that it was not competent to receive as evidence any declaration or deposition
 of Rowley, whether taken in the sequestration or in any other manner, seeing that
 on the face of the proceedings it appears to have been quite possible to have the
 deposition of Rowley regularly taken by commission, on which occasion his very
 former deposition might have suggested to the defender a variety of matter on
 which to cross-question him, and thereby obtain very material explanations, per-
 haps even contradictions, of what he had formerly deposed.

"We hold it therefore to be unnecessary and premature to give any opinion as
 to the competency of admitting Rowley's former depositions as evidence under a
 different situation of matters."

THE COURT, in respect of the opinion, granted a new trial; reserving the
 question as to previous expenses for further discussion.¹

Pursuers' Authorities.—54 Geo. III. c. 137, § 32, 36, 65; Thomson's Creditors, June 6, 1822
 (ante, I. 463); Gordon, Feb. 5, 1824 (ante, II. 675); 1 St. 10, 16; Cases, Mor. 12471-3-5-6;
 Main, July 11, 1829 (ante, VII. 902); Graham, Feb. 10, 1831 (ante, IX. 419); 1 Bell,
 334; Tait on Evid. 276; 4 Mur. 100-1; 2 Bell, 482; Tait on Evid. 370; 1 Phillips, 118;
 1 Starkie, 262; Burnet, 600-2; 4 Mur. 68; Tait, 430; 2 Mur. 541; 2 Rose, 51.

Defender's Authorities.—2 Bell, 482, 429; Goddard and Co., June 5, 1809; Dundas, June
 10, 1806; 1 Mur. 28, 180; 2 Mur. 298, 340; 3 Mur. 232; 4 Mur. 104, 545; 1 Starkie, 271.

BOWIE and CAMPBELL, W.S.—JOHN B. BAODIE, W.S.—Agents.

¹ At the new trial, the counsel for the pursuers intimated that they proposed again to tender the declarations, so that in case of the verdict being against them they might appeal; but the defender consented to a verdict in favour of the pursuers on an arrangement as to expenses.

MRS EUPHEMIA INNES, Pursuer.—*Shene—Innes.*
DUKE OF GORDON, Defender.—*Lumsden.*

No. 89.

Dec. 20, 1831.
Innes v. Gor-
don.

Entail—Clause.—Circumstances in which a power in an entail of contracting debt to a certain extent, and prohibiting it quoad ultra, was held to have been exhausted by the act of a single heir in possession.

In this case, reported ante, IX. 632, (which see,) the Court, after repelling Mrs Innes's claim for meliorations on general grounds, remitted to the Lord Ordinary to hear further with reference to a power allowed by the entail to contract debt to the extent of 20,000 merks. It appeared, that the entail of Durris contained a clause prohibiting the heirs from contracting "debt thereupon exceeding the sum of twenty thousand merks Scots money." The late Earl of Peterborough, an heir of entail, granter of the lease, borrowed from Hogg of Raemoir this precise sum, which he acknowledged in a bond granted by him in security thereof over the estate of Durris, and dated 23d February 1792, upon which indentment was taken in March following, and it still remained undischarged. With reference to this, Mrs Innes contended, that the power of contracting debt to the extent of 20,000 merks could not be interpreted as contemplating merely the act of any individual heir of entail, and so exhausted by Lord Peterborough's bond, but must be held as a general relaxation to that extent of the prohibition to contract debt, of which each succeeding heir of entail was entitled to avail himself; and, therefore, that the bond had not exhausted the power in a question betwixt the present parties. She also maintained, that the Duke of Gordon was bound to prove that the bond was actually granted under the clause of the entail, so as to exhaust the relaxation, though she admitted her inability to instruct that this bond was merely the renewal of an old security, or any debt not falling under that clause.

His Grace replied, that the Earl having borrowed the precise sum allowed by the entail of Durris, and granted a bond over that estate for the amount in explicit terms, there was no room to doubt that the special power was exercised, and that the obvious meaning of the clause was a restriction to the precise sum once contracted, as in any other view the estate might be burdened to an enormous extent.

The Lord Ordinary pronounced this interlocutor: "Finds it proven by the writings produced, and admissions of the pursuer, that the power reserved in the entail of Durris to contract debt on the entailed estate to the amount of 20,000 merks, was exhausted by the late Earl of Peterborough, in the year 1792, as averred by the defender; and, therefore, that this power can afford no foundation for any claim by the present pursuer against the present defender: therefore, in reference to the claim to which the remit relates, sustains the defences, assuizes the defender, and

2d Division.
Ld. Mackenzie.
F.

No. 89. decerns; finds the pursuer liable to the defender in expenses of process
 Dec. 20, 1831. subsequent to the remit."

Innes v. Gordon. The Court unanimously adhered.

Scott and Livingston.

DALLAS and INNES, W.S.—A. Scott, W.S.—Agents.

Gillespie v.
Donaldson's
Trustees.

SCOTT and LIVINGSTON, Petitioners.—J. Anderson.

ALEXANDER DONALDSON, Respondent.

No. 90.

Process—Reference to Oath.—After a cause has been decided by the Court, and a reference is made to oath, an incidental petition is requisite.

Dec. 22, 1831. SCOTT and LIVINGSTON raised action against Donaldson. The Lord Ordinary assizied with expenses, and the Court adhered, (ante, p. 107.)
 1st DIVISION. D. Scott and Livingston put in a minute of reference, at moving which, on December 20th, the LORD PRESIDENT observed that he had advised with the other Judges, and their Lordships were of opinion that an incidental petition was requisite, craving the Court to allow the reference; that practice of late had varied upon this subject, but the rule now laid down was to be enforced in future.

The minute was therefore superseded, and a petition was presented, craving the Court "to sustain the minute of reference now lodged; to grant commission and diligence for taking the defender's oath in common form," &c.

The Court granted the prayer of the petition.

J. LIVINGSTON, W.S.—D. CAMPBELL, W.S.—Agents.

No. 91. MISS M. F. GILLESPIE, and Others, Claimants.—Keay—Anderson.
 DONALDSON'S TRUSTEES, Claimants.—D. F. Hope—More.

Testament—Legacy—Writ.—1. Circumstances in which a double legacy of the same sum was held to have been made; 2. A testator, by his deed of settlement having declared that all legacies should be effectual which he should bequeath by separate writings or memorandums, "although the same be not formally executed provided the same express my will and intention, and are written, dated, and signed by me;" and having left two holograph documents, bequeathing legacies, one consisting of a single sheet, the first page of which was dated, but not signed, and the second page, bearing a subsequent date, was signed; and the other document setting forth his name and designation, and was dated but not subscribed—held, that the first page of the former of these documents was in law signed by the signature attached to the second page; and that the insertion of his name and designation in the other document, was a sufficient compliance with the declaration, and therefore the several legacies were due.

THE late James Donaldson of Broughtonhall left a large fortune, said to exceed £200,000, to be applied, after satisfying some comparatively small bequests, in founding an hospital. In his general trust disposition, he directed Mr Irving, W.S., his donee and executor, "to pay all gifts, legacies, annuities, and bequests, which I have already, by separate writings under my hand, of various dates, made and granted in favour of any person or persons whatsoever, and also all other gifts, legacies, annuities, and bequests, which I may at any time hereafter make and grant in favour of any person or persons, by any separate deed of legacies, or codicils, or by any separate writings or memorandums, although the same be not formally executed, provided the same express my will and intention, and are written, dated, and signed by me."

No. 91.

Dec. 22, 1831.
Gillespie, v.
Donaldson's
Trustees.

1st Division.
Ld. Corhouse.
H.

After Mr Donaldson's death, there was found in his charter chest, besides his settlement, a holograph writing, on one sheet of paper, the first page of which bore as follows:—" 85, Prince's Street, 16th April, 1829.—Additional codicil, confirming to hospital for children, formerly left by will.

- " 1. I leave to Margaret Fullerton Gillespie, twenty pounds a-year additional.
- " 2. To Jane Wood, twenty pounds a-year additional.
- " 3. To George Augustus Frederick Wood, twenty pounds a-year additional.
- " 4. Elizabeth Wood, ten pounds a-year additional.
- " 5. Thomas Wood, ten pounds a-year additional.
- " 6. William Wood, ten pounds a-year additional.
- " 7. John Wood, ten pounds do. do.

Children of
Mr William
Wood, sur-
geon."

This page was not signed. On the other side was written, also holograph: "Edinburgh, 25th April, 1829.—I repeat, and leave to the seven persons mentioned on the preceding page, exactly the same legacies as is therein specified. (Signed) James Donaldson.—Also to James Donaldson Gillespie, ten pounds a-year additional. Signed before these witnesses, William Forrest, my clerk, and John Fairley, my servant. (Signed) William Forrest, witness; John Fairley, witness." The paper was marked on the back, " Additional codicil, April 16th, 1829. J. D."

There was also found, in a book which Mr Donaldson was alleged to have preserved with great care, another holograph writing, on a sheet of paper which was marked on the back, " Additional codicil, 1st May, 1830."—It was in these terms: " Additional codicil. 85, Prince's Street, May 1, 1830. I, James Donaldson of Broughtonhall, leave the following additional legacies to my former codicils:—

- " 1. Ten pounds a-year to Miss Margaret Fullerton Gillespie.
- " 2. Twenty pounds a-year to Miss Jane Wood.
- " 3. Twenty pounds a-year to George Frederick Augustus Wood.
- " 4. Ten pounds a-year to James Donaldson Gillespie."

No. 91.
Dec. 22, 1831.
Gillespie v.
Donaldson's
Trustees.

In virtue of these documents, Miss Gillespie claimed £20 a-year, as bequeathed under the writing on the first page of the sheet bearing date 16th April, 1829; £20 a-year, as bequeathed under the writing on the second page of the same sheet, bearing date 25th April, 1829; and £10 a-year, as bequeathed under the separate writing bearing date 1st May 1830. The other legatees made claims on similar principles. On the other hand, the trustees contended, 1. That as the deed of settlement expressly provided that no codicil should be valid unless "written, dated, and signed by him;" and as the first page was only dated, but not signed, the claimants had no right to the legacies there specified, and their claim must be confined to those mentioned on the second page, this being written, dated, and signed by Mr Donaldson: 2: That at all events they could not claim both the legacies on the first and on the second page, as it was plainly not the intention that both should be due; and, 3. That as the codicil of 1st May, 1830, was not signed, no claim could be made under it. To this it was answered, 1. That as the first page of the document dated April 1829 was written and dated, and the second page was signed, the signature must be held to apply to the whole contents of the sheet; and besides the holograph marking on the back of the sheet being initialed J. D. of even date with the first page, was sufficient to bring it within the meaning of the declaration; 2. That there being thus a valid legacy constituted on the first page of date the 16th, and another on the second page, both were due; and, 3: That as the codicil dated 1st May, 1830, was holograph, and commenced thus—"I, James Donaldson, of Broughtonhall, leave," &c.—this was, in law, equivalent to a signed document.

To determine these, and other claims, Mr Irving brought a multiple-poinding. The Lord Ordinary "repelled the claim of Miss Margaret Fullerton Gillespie and others to the annuities disputed in the present process, and to that extent preferred the claims of Mr Donaldson's trustees, and decreed in the preference in their favour, and against the raiser of the multiplepoinding, accordingly; but in respect of the circumstances of the case, found Miss Gillespie and others entitled to the expenses incurred by them out of the trust-funds, and the raiser also entitled to his expenses, as well as the said trustees, all out of said funds," &c.

Miss Gillespie and others reclaimed, and the Court, after having called on Donaldson's trustees to support the interlocutor, altered, except as to expenses, and preferred Miss Gillespie and others.

LORD BALGRAY.—I must interpret the settlement so as to give effect to the intention of the testator. Mr Donaldson directs his donee to pay all legacies left in any codicil or memorandum, "although the same be not formally executed, provided the same express my will and intention, and are written, dated, and signed by me." In regard to the codicils dated respectively on 16th and 25th April, I have no doubt whatever as to their expressing the will and intention of the testator. He gave a legacy to each of seven legatees, on April 16th, and afterwards he gave

as much more to the same parties, on the 25th. He says, "I repeat and leave to No. 91.
 the seven persons mentioned on the preceding page, exactly the same legacies as
 is therein specified." Can any man hold this not to be an additional bequest, a Dec. 22, 1831.
 re-duplication of the first? Had the writing on the second page borne the same Gillespie v.
 date with that on the first, I should have had more doubt; but as it is, the matter Donaldson's
 appears clear. But it is said, we can only give effect to such memoranda as are Trustees, &c.
 written, dated, and signed by him, and that the second only is signed at all. —
 According to my understanding of the Law of Scotland, that plea is erroneous. Balerno Distil-
 Signature is not synonymous with subscription. The king signs, for example, but
 not by subscribing. Now, it is certainly fixed in the law, that where a deed is
 written on two or three pages of the same sheet, the adhibition of a single sub-
 subscription at the end, is the same as the signature of every page. This was first
 fixed in the case of Williamson,¹ and it was so held in several subsequent cases,
 of which I shall only instance the recent one of Smith.² Therefore I conceive
 the subscription by Donaldson on the second page, is equivalent to the signature
 of both pages. In regard to the last codicil, dated 1st May, 1830, which is also
 said not to be signed, I consider it to be legally signed to all intents and pur-
 poses. It is holograph of Donaldson, and it begins, "I, James Donaldson, of
 Broughtonhall, leave the following additional legacies," &c. This is not followed
 by a new signature of the writer's name below the legacies, but I cannot doubt that
 it is in law a signed memorandum. Suppose he had granted a promissory-note for
 £100, beginning, I, James Donaldson, of Broughtonhall, promise to pay, &c., and
 that he had not adhibited a subscription, would that not have been a good legal
 obligation? The case is not imaginary, for it has been expressly decided; and
 though summary diligence was refused on such a bill, yet it was held that the name
 inserted holograph as above, "was equal to a subscription."³

LORDS PRESIDENT and GILLIES concurred.

LORD CRAIGIE was understood to dissent.

THE COURT accordingly "adhered to the interlocutor in so far as it finds that the whole expenses incurred by both parties shall be paid out of the trust-funds in the hands of the raiser, and quoad ultra altered the said interlocutor; sustained the claim of Miss M. F. Gillespie and Others, for whom this note is presented, to the full amount of the annuities claimed by them, and preferred the said claimants," &c.

C. C. STEWART, W. S.—W. COOK, W. S.—Agents.

BALERNO DISTILLERY COMPANY, Pursuers.—Skene—Marshall.
 JAMES BROWN, Defender.—Cunninghame—A. Lothian.

No. 92.

Partnership.—This was a special case—the question being, whether Dec. 22, 1831.
 there was evidence sufficient to find that Brown had become a partner of
 the Balerno Distillery Company. The Lord Ordinary found that, as in 1st Division.
 question with the Company, there was not, and assailed, and the Court Ld. Corehouse,
 adhered. D.

¹ Dec. 21, 1742 (16955).

² 4th July, 1816 (F.C.)

³ A. v. B. July 1750 (1442.)

No. 93.
—
Dixon, &c. v.
Dixons.

WILLIAM DIXON and Others, Petitioners.—*D. F. Hope—Forsyth.*
ANTHONY and JOSEPH DIXON, Respondents.—*Greenshields—More—Rutherford.*

Judicial Factor—Partnership—Circumstances in which the Court appointed a judicial factor to wind up a company concern, though the principal and last surviving partner (who was now dead) had appointed trustees, who accepted and acted.

Dec. 22, 1831. JOHN DIXON of Levengrove held ten shares of the Dumbarton Glass-Work Company; his uncle, Jacob Dixon, twenty-one shares; and Jacob's eldest son, Jacob Dixon, junior, held the remaining ten. Each share was rated at £2400. John Dixon died in 1828; and in March 1831, William Dixon and others, his executors, raised an action against Jacob Dixon, senior and junior, libelling that the contract of copartnery contained a clause by which, on the decease of a partner, the Company estate was to devolve on the survivors, "exclusive of the successors of the deceased, who shall have no right to examine the books or accounts of the Company, or the balance sheets thereof;" "and the surviving partners shall be bound to pay to those having right the value of the deceased partner's share and interest in the said concern, as ascertained by the minute authenticating the last balance of the Companies' books preceding such decease, at the expiration of one, two, and three years after such decease, by equal portions, with interest from the time of the preceding balance, till payment;" that this clause bound the survivors to report discharges of the Company debts, within three years after the death of a partner; that at the last balance of the Company books, before John Dixon's death, a sum of £11,787 stood at the credit of his account-current; and that his stock was valued at £24,000. They therefore concluded for payment of the sum of £11,787, and of two-thirds of the value of his stock, and of the remaining third, as soon as three years from his death had elapsed.

In defence it was pleaded, *inter alia*, that the contract referred to prior stages of the Company's existence, and had never regulated the copartnery with John Dixon; and that at his death, his representatives had merely the common-law right of receiving his proportional share of the proceeds after winding up the concern.

In October 1831 Jacob Dixon, junior, died intestate, leaving two children in pupillarity. His father died on the day following, having executed a trust-disposition, by which, after making several provisions, and among others £4000 to each of his younger sons, under deduction of sums previously paid to them for outfit, he left the residue of his estate to Jacob Dixon, junior. The father had named five trustees, of whom only the two younger sons, Anthony and Joseph, accepted. They were confirmed as executors, entered themselves as glass-makers with the Excise, and began to carry on the glass-work. They realized funds belonging to the

estate sufficient to pay £30000 due to government on 24th October, 1831. No. 93. Another sum of nearly equal amount was to fall due on 24th November. Dec. 22, 1831.
Dixon, &c. v.
Dixons. William Dixon and others, (the executors of John,) then transferred the action which had been raised against Jacob Dixons, senior and junior, and directed it against Anthony and Joseph Dixon. On the dependence they executed inhibition and arrestment, whereupon Anthony and Joseph stopped the works, and a writ of extant was issued by the Crown, in consequence of which an Exchequer sale was impending for recovering the November duties.

In these circumstances, William Dixon and others, as executors of John, presented a petition to the Court, craving them to appoint "a manager, with power to wind up the affairs of the Dumbarton Glass-Work Company, and other companies composing the same copartnership; or as curators, or judicial factor, to protect the funds and estate of the said companies, for behoof of the minors and the petitioners, and all others having interest," &c. They rested their petition, not only on the claim which they had made as creditors in the depending action, but also on the liability which attached to them for the debts of the Company due at the death of John Dixon, and for any obligations still outstanding which were due at the death of his father (who had also been a partner of the Company); and contended, that the clause in the contract conferring exclusive management on the surviving partner, implied a *delectus personæ*, and did not reach to the trustees of that partner after his decease.

Anthony and Joseph answered, that, as trustees of the late Jacob Dixon, senior, the last surviving partner, and the holder of one-half of the shares, they could not be deprived of the administration of the Company's business, but were entitled to wind it up. It was only in a case of necessity that the Court could exercise so extraordinary a power, the effect of which would probably be highly prejudicial to the concern. They did not admit the subsistence of the contract; but if it did exist, it proved that the whole Company effects belonged to Jacob Dixon, senior, at his death, and consequently they, as his trustees, could not be deprived of the management.

At advising, appearance was made for the representatives of Mr Houstoun, who had ceased to be a partner in 1821, but who alleged that some of the Company obligations of that date were still outstanding. They were stated as concurring in the prayer of the petition.

LORD BALGRAY.—Are the works of this establishment entirely stopped? And, if so, what is the reason of this?

Rutherford, for respondents.—They are stopped, because the use of inhibition and arrestment by the petitioners on the dependence of their action, has locked up the Company funds.

LORD BALGRAY.—The petitioners are possessed of a twofold character, and separate rights arise to them from this circumstance. They are creditors of the partners who survived John Dixon; they have raised an action in that character,

No. 93. and have used inhibition and arrestment, thereby exercising a right which the law allows to them, and to which their opponents must in the meantime submit.

Dec. 22, 1831. Dixon, &c. v. Dixon. Again, they are liable for all the debts of the concern, as at the death of their predecessor; and from this it results that they have an interest and right to see to the management of that concern. Nor are they barred from this by the alleged clause in the contract, for it clearly implies a *delectus personæ* among the parties, and, on the death of the last surviving partner, cannot entitle his trustees to exclude parties, in the situation of the petitioners, from all share in the management of the estate. It is in these circumstances that the diligence used by the petitioners has produced the effect of stopping these extensive works, and a writ of *extent* has been issued, the consequences of which may be most disastrous, unless means be immediately taken to provide for their management, by naming a judicial factor, as craved by the petitioners. I am therefore inclined to grant their petition.

LORD CRAIGIE dissented, and thought there was not such a case of necessity made out as could alone justify the Court in naming a judicial factor. Expediency was not sufficient to warrant that step, and any urgency in this case appeared to be occasioned by the acts of the petitioners in their use of arrestments.

LORD GILLIES.—I concur with Lord Balgray. I am satisfied that the clause in the alleged contract, excluding the successors of a deceased partner from all share in the management, is modified in its operation by the principle that there was a *delectus personæ* among the parties. The very circumstance that the successors of a deceasing partner were not to have the right to examine the books or balance sheets of the Company, clearly shows that it was only during the lifetime of a surviving partner, and not after the concern had passed, on his decease, into the hands of his trustees, who might be strangers, that the clause was to have effect.

LORD PRESIDENT.—I concur; and would observe, that during the lifetime of a surviving partner, the successors of a deceased partner possessed the security that the survivor had his whole interest at stake in the concern of which he was allowed the management. But in the present case, the last partner's trustees have comparatively a small interest as such in the concern.

THE COURT, in respect the parties did not agree on a person to be named as factor, appointed Mr Watson, accountant in Glasgow, to act as *interim* factor.

D. FISHER, S. S. C.—GIBSON-CRAIG, WARDLAW, and DALZIEL, W. S.—W. A. G. and R. ELLIS, W. S.—Agents.

No. 94.

DANIEL M'NAB, Pursuer.—D. F. Hope—J. Anderson.

JAMES HAMILTON, Defender.—Robertson—Tait.

Process.—Where a party was called as defender in one action as factor on a trust estate, and a defence, rested on an averment in fact, was finally repelled; and another action was brought against him personally, held competent to plead the same defence in the second action.

Dec. 22, 1831. The pursuer, M'Nab, engaged himself as a clerk to the defender, Hamilton, W.S., in the year 1815; and Hamilton having executed a trust-deed in favour of his creditors, in which he acted as factor, M'Nab was also

2d Division.

14. M'Kenzie.

R.

employed as a clerk in the trust affairs. In 1826 M'Nab raised an action No. 94. against the trustee, and Hamilton, as factor, for the amount of an account Dec. 22, 1831. alleged to have been incurred to him for writings. The trustee gave in M'Nab v. Ha-
defences, denying the employment, and referring the pursuer to Hamil-ton, who also defended himself against the claim, on the ground, inter alia, Burntisland
that M'Nab had been engaged by him at a fixed salary, which had been Fishery Co. v.
fully paid. In this action the Lord Ordinary (M'Kenzie) found, that Leven, &c.
M'Nab must be paid according to the writings actually executed by him; in which finding Hamilton acquiesced. While the first action was still in dependence, M'Nab raised a second, for the amount of an account of writings against Hamilton individually, who again pleaded, among other defences, that the pursuer had been engaged at a fixed salary, and was not to be paid for the specific writings. The Lord Ordinary, "in respect it has been found, in the first action betwixt the same parties, that the pursuer is not bound to accept of a fixed salary, as offered by the defender, but is entitled to claim payment for the writings executed by him at the ordinary rate in such business," found it "incompetent, in this process, to maintain the contrary."

Hamilton reclaimed.

LORD JUSTICE CLERK.—On looking at the former summons, I find Mr Hamilton is there called, not in his individual capacity, but in his official connexion with the trust. I cannot agree with the Lord Ordinary, for I see no such identity betwixt the actions, as to render the plea incompetent in the one before us. I say nothing on the merits; the sole question here is, as to the competency of this plea, which I do not think Mr Hamilton is barred from urging in this action, where he is called individually.

LORD GLENLEE.—I agree with your Lordship. This plea of incompetency is not stated among the pursuer's pleas in law; and I cannot see how the defender is to be held as barred, personali exceptione, from using this defence now, by any thing which occurred in the other action.

The other Judges concurring,

THE COURT recalled the interlocutor, and remitted to the Lord Ordinary to proceed accordingly.

JOHN M'GILL, S.S.C.—A. HAMILTON, W.S.—Agents.

BURNTISLAND WHALE-FISHERY COMPANY, Complainers.—Robertson— No. 95.
A. M'Neill.

JOHN LEVEN, W.S., and JOHN MORRISON, Respondents.—D. F. Hope
—Rutherford.

Process—Suspension—Protestation.—A certificate that letters of suspension have been duly lodged in order to calling, for the purpose of having a protestation scored, may be granted by the clerk, although no Reasons have been lodged prior to the time of calling.

No. 95. LETTERS of suspension and interdict having been expedited by Trotter,

Dec. 22, 1831. &c., on the passed bill against the Burntisland Whale-Fishing Company, mentioned ante, IX. 144, but not having been called, protestation was put up for the Company on the 15th November. This would have fallen to be extracted on the 25th; but, on the day previous, the letters were

Burntisland
Fishery Co. v.
Leven, &c.
2d DIVISION.
T.

lodged by the respondent, Leven, W.S., agent for Trotter, &c., and a certificate was obtained from the other respondent, Morrison, assistant clerk of Session, that the letters had been duly lodged for calling. In consequence of this certificate, the protestation was scored by the keeper of the minute-book. It appeared, however, that although the letters had been lodged when the certificate was granted, the reasons had not been lodged along with them, nor till Tuesday the 29th, which was two days before the day of calling. Founding on this circumstance, a petition and complaint was presented by the Company against Leven and Morrison, praying to have it found that their conduct, in taking and granting a certificate when the reasons were not lodged, was irregular, and that the protestation ought not to have been scored, and for warrant to rescind the scoring. In support of this petition it was contended, that as, in order to warrant the calling of letters of suspension, it was required by the Act of Sederunt, 12th July, 1828, (§ 25,) that reasons should be lodged "therewith," and as protestation could only be scored on a certificate by the clerk that the letters had been "duly lodged with him in order to calling," (§ 30,) the clerk could not regularly give a certificate that they were so lodged, when, at the time of granting it, the reasons were not in his hands, so as to ensure that the letters would be called; for otherwise the protestation might be scored, and yet the letters might not be capable of being called, in consequence of a total failure to lodge reasons.

To this it was answered, that the object of the Act of Sederunt being merely to secure that the reasons should be in the clerk's hands before the actual day of calling, the words ought not to be construed so strictly as to require the lodging of the reasons at the same instant with the letters, but that it was enough if they were lodged any time before calling; and that if this were the true construction, then the clerk was entitled to grant a certificate as soon as the letters were in his hands.

LORD CRINGLETIE.—I have no doubt Morrison and Leven acted fairly, but we must look at the words of the Act of Sederunt, and I think they cannot bear any other construction than that the reasons must be lodged with the letters, and that it is not enough that they are in the clerk's hands at the calling. The Act of Sederunt may be wrong, but the provision in it is clear, that they must be lodged "therewith." And then, by § 30, the clerk's certificate must be, that the letters have been duly lodged in order to calling. I therefore think the clerk cannot grant such certificate, unless the reasons be lodged.

LORD GLENLINE.—The sense of the Act of Sederunt is, that the letters are not to be called, unless the reasons are lodged. But it is maintained, that the reasons must be lodged at the same identical moment with the letters. Now, I see no

reason for that construction. The lodging of the letters and reasons is a continuous act, and if the whole be complied with before the calling, the Act of Sederunt is obtempered. Then § 80 does not say that the certificate must bear that the reasons are lodged. I do not think it a reasonable interpretation which is Fishery Co. v. insisted for, and, if it is an error, it is universal. Then, what purpose would it serve? Nothing could be gained by it.

LORD MEADOWBANK.—I am clearly of opinion with Lord Glenlee. A penalty Kirk-Session is attached, and if we can find we are not bound to enforce it, we must adopt the milder construction; and I think the reason of the thing warrants that construction.

LORD JUSTICE-CLERK.—I agree. Giving fair play to the Act of Sederunt, and considering the purpose in view, viz. that there should be no calling without the reasons being there at the time, I do not think it will bear the construction, that the moment of lodging the letters and the reasons must be the same, and that the loss of a day is fatal. And I see nothing in the words to prevent three or four editions of the reasons being given in before calling. I cannot put such a rigid construction as the complainers contend for.

The Court accordingly dismissed the complaint, with expenses.

A. P. HENDERSON—J LEVEN, W. S.—Agents.

RODERICK MATHESON, Pursuer.—*M'Neill—J. Anderson.*
HEIRITORS AND KIRK-SESSION OF FODDERTY.—*D. F. Hope—Walker.*

No. 96.

Poor—Jurisdiction.—Action of recourse by a third party, who was maintaining a pauper infant, against the alleged parish of its settlement, competent *prima instantia* before the ordinary Civil Courts.

THE natural child of a servant girl having been put to board with the pursuer, Matheson, by the reputed father, who subsequently absconded, Matheson raised an action before this Court against the father and mother, and also against the Heiritors and Kirk-Session of the parish of Fodderty, in which parish he alleged the mother was settled, concluding for a yearly sum of £8 for support of the child, till he should be relieved of it. The only appearance made, was for the Heiritors and Kirk-Session of Fodderty, who averred, in point of fact, that the mother was settled in Inverness, where the child had been born, and where she was now in service; and they pleaded, that the action was incompetent before this Court, and that the only competent mode of procedure was by application to the Heiritors and Kirk-Session, whose judgment might be brought under review of this Court by advocation. The Lord Ordinary, in reference to this and other pleas, pronounced this interlocutor.—“Repels the plea that the pursuer, who has brought the mother of the child into the field as a defender, along with these defenders who have litigated the question, has no title to insist in his own name in this process; repels also the plea, that it was not competent for him to bring this process, in the first instance,

Dec. 22, 1831.
Burnthiland
v.
Fishery Co.

Matheson v.
Leven, &c.

2d DIVISION.
Lord Medwyn.
T.

No. 96. before this Court, in respect that all the defenders were not subject to the jurisdiction of the same Inferior Court; finds that, prior to the institution of the present process, the mother of the child in question had not acquired a legal settlement in the parish of Inverness, and of course was still entitled to claim support from the parish of Fodderty for herself or her child; that the claim against the defenders cannot be carried back further than 27th January, 1829, when an application was made by letter to the minister of Fodderty, as moderator of the Kirk-Session, and that the pursuer is entitled to £6 yearly since said date, till the child attains the age of twelve years, or till it is taken off his hands; but, as the mother is bound, so far as in her power, to contribute what she can to the maintenance of her child, finds, that she must relieve the defenders to the extent of £2 yearly of said aliment, so long as she is in a situation capable of doing so; therefore, decerns for aliment at the rate of £6 sterling per annum, from and since the 27th of January, 1829, payable quarterly per advance, with interest from each term till paid, aye and until the child attains the age of twelve years, or shall be taken off the pursuer's hands by the defenders; and decerns against the defender, Catherine MacLennan (the mother) in relief of said aliment, at the rate of £2 annually."*

The Heritors and Kirk-Session reclaimed, mainly on the question of competency; and with reference to the case of Orr v. Parish of Glassford,¹ they attempted to take a distinction, viz. that in the present case the mother had not absconded, and was not admitted to be incapable of maintaining the child. The Court, however, adhered to the Lord Ordinary's interlocutor, in so far as it repelled the objection to the competency, but in respect of the Heritors and Kirk-Session persisting in their averments of fact regarding the settlement, and alleging that they had not abandoned them before the Lord Ordinary, their Lordships remitted for investigation.

L. MACKINTOSH, S. S. C.—WALKER, RICHARDSON, MELVILLE, W. S.—Agents.

* "NOTE.—When aliment is awarded at the instance of the mother against the father of an illegitimate child, a smaller sum is usually given than what is allowed here, on the ground that the mother is also bound to contribute a part to its maintenance. In the present case, part of the aliment is laid upon the mother, who is enabled to go to service from not having the charge of the child, and whose earnings should be made to contribute in part to its maintenance, as it is only when this fund fails that there can be a claim against the parish. This has been decerned for by way of relief, although, perhaps, not precisely according to strict form, in case the mother's power to contribute should fail by death, or bad health, or losing her employment as a servant."

¹ July 9, 1831, ante, IX. 928.

JAMES WYNDHAM WILLIS, Pursuer.—*W. Bell.*
JOHN HOWDEN and Others, Defenders.—*Buchanan.*

No. 97.

Dec. 23, 1831.
Willis v. Howden, &c.

Cautioner.—WILLIS raised action against Howden and others, to have them decerned to implement a letter of relief which they had granted in his favour. The Lord Ordinary “decerned against the defenders, conform to the conclusions of relief,” and found them liable in expenses; the Court, without hearing the pursuer’s counsel, unanimously adhered.

1st Division.
Ld. Carsehouse.
D.

Anstruther, &c.
v. Anstruther.

J. SMALL, S.S.C.—Howden and Robertson, W.S.—Agents.

No. 98.

Mrs ANSTRUTHER and HUSBAND, Petitioners.—*D. F. Hope—Jameson—H. Bruce.*

SIR W. C. ANSTRUTHER, Respondent.—*Bell—Murray.*

Sequestration Judicial.—Circumstances in which the Court granted sequestration of execruty funds without a depending action.

SIR JOHN CARMICHAEL ANSTRUTHER, died in October last, a minor. Dec. 23, 1831. He left entailed estates, the rents arising from which, accumulated by his tutors, amounted to about £65,000, invested partly on heritable securities, partly on personal bonds, and partly in the Government funds. The heritable succession fell to his uncle, Sir Wyndham Anstruther, the respondent, as heir of entail and at law, and the moveable succession to the petitioner, Mrs Anstruther, Sir Wyndham’s only sister. Sir Wyndham, some years before, had sold his reversionary interest in the estates, and granted a conveyance, under which the purchaser was infest. The tutor had re-purchased this right with the personal funds of the minor, and became bound, in the event of his death during minority, to convey to Sir Wyndham, upon his repaying the advances, and fulfilling other conditions of the deed.

2d Division.
F.

On Sir John’s death, Mrs Anstruther claimed the whole execruty, including the funds vested by the tutors on heritable security, and the rents of the estate due at the preceding Whitsunday, but which had not been levied, agreeably to the practice of the tutors to allow a delay of payment till a term later than that fixed by the leases. In the course of making up titles to this succession, a claim was intimated to Mrs Anstruther, on the part of Sir Wyndham, to half of the execruty without collation of his life interest in the entailed estates. An attempt was then made to settle the dispute amicably. A long correspondence ensued with that view, betwixt the agents of the parties; but while this was in progress, Sir Wyndham uplifted a portion of the rents of the estates, amounting to about £3000, and also intimated, through his agent, that he meant to make up titles, and to uplift heritable bonds to the extent of £25,000, being part of the

No. 98. accumulated rents; leaving Mrs Anstruther "to call him to account for these bonds, as falling under the personal estate," in the event of "the whole executry being afterwards found to belong to her." Mrs Anstruther, on the 25th of November, presented a petition for sequestration of the whole funds claimed by her; and on the 2d December, she obtained decree dative as executrix of Sir John. She at the same time libelled a summons of declarator and adjudication against Sir Wyndham, for determining their respective rights, but it was not signed till the 14th. The petition for sequestration came on for advising on the 10th, and on the day preceding, Mrs Anstruther had been served with a summons of multiplepoinding in name of Sir Wyndham's agent, as to the redemption money for his reversionary interest in the estate, which was set forth as having been paid by Sir Wyndham to the agent.

Dec. 23, 1831.
Anstruther, &c.
v. Anstruther.

The Court having doubts both as to the competency and grounds of the application, ordered minute and answers. Mrs Anstruther produced with her minute the decree dative in her favour, and she referred to the correspondence which had passed with a view to an amicable arrangement, as affording additional grounds for sequestration. Independently of this, however, she contended that the disputes between the parties, and the conduct of Sir Wyndham, in levying the rents which fell to be considered executry rents, were sufficient to warrant sequestration, if competent before an action was brought into Court. Then, as to the competency, she pleaded that it was only where one of the parties was in possession that the Court would not interfere till an action was in dependence; and that accordingly sequestration had been granted in the Roxburghe case, when there were only competing brieves before the macers, and in the late case of Cathcart, before the inducise of the summons were expired.

Sir Wyndham, on the other hand, contended, 1. that without some depending process to which an application for sequestration was incidental, the Court had no power to order sequestration; and, 2. that as to his having levied rents, he was entitled to take the leases as the rule of the tenant's payment; and, consequently, to levy at Martinmas the rents then due by the leases, without regard to the previous usage, and that these undoubtedly belonged to him as heir.

LORD JUSTICE CLERK.—I am perfectly sensible of the importance and delicacy of the jurisdiction involved in this question; and I have no hesitation in confessing, that as the case was presented to us at the former advising upon the petition and answers, I had great doubts as to our right of interference. I was then inclined to refuse the application; but the case has returned to us materially altered by supervening circumstances, which I think are now sufficiently before us. I formerly stated, that I, for one, would not allow any reference to a correspondence, occurring in the course of attempting to come to an amicable arrangement, for the purpose of extracting inferences or admissions; but the mere facts appearing on the face of that correspondence, I think are fairly before us, and may be regarded. We

were told formerly, that Mrs Anstruther was in course of making up her title; and we have now the material circumstance of the production of her extract decree dative, dated 2d December last; and also this important circumstance, of which there is ample evidence, that Sir Wyndham, who does not mean to collate, has v. Anstruther, in some way or other raised money from the estate, which he put into the hands of his own agent, who forthwith raises a process of multiplepoinding. Under these circumstances, I am bound to pay particular attention to positive averment on the part of Mrs Anstruther, that, according to the custom of this barony, the terms of payment on the Carmichael estate are Martinmas 1831, and Whitsunday 1832. The tenants, though taken bound in their leases at the usual terms, are entitled to adhere to this custom. Now Sir Wyndham, while Mrs Anstruther is in course of confirming, and he having no manner of right to that first year's rents, proceeds by his agent to collect the rents. He does so avowedly in the face of this custom—he says that he is entitled to disregard the custom, and go by the legal terms—so he claims at Martinmas what is not due till Whitsunday, and then tells the tenants they are to be held in arrears for the previous terms. This shows the absurdity of the grounds upon which he proceeds; and such being the facts, it is absolutely impossible to say, while we see Sir Wyndham brevi manu helping himself, that there is no competition here, or that there may be no depending action eventually. The process of multiplepoinding got up by Sir Wyndham, though one, I must say, of a most extraordinary nature indeed, sufficiently proves a competition which calls for sequestration. I have no difficulty in saying, that to protect the rents from such interference, Mrs Anstruther might have applied for an interdict. Now, all that she demands, is, that a disinterested person be appointed to protect the executry funds. But can she competently claim sequestration? that is the question before us. Now, this is not a case of disturbing possession—no one is in possession; Sir Wyndham, so far as we see, has no right to take the heritable bonds; and, with the exception of the rents he collected, holds no possession whatever; but there is decidedly a competition. This lady has shown no aversion to follow the proper steps of law; she insists seriously on her rights as executrix. The cases referred to I do not think in point. There is here a legal process going on. I look to the substantial justice of the case, and to me the necessity of this sequestration, to protect the rights of all concerned, is obvious. We are told the heritable bonds are sufficiently protected; but the interest of these bonds requires some looking after, as well as the principal. My opinion is, that we are bound to grant the prayer of the petition.

LORD GLENLEE.—I am quite of the opposite opinion. I knew of no instance, and do not think there is one to be found in any of our collections of decisions, where an application of this kind has been considered and discussed as an independent process. It is always incidental to some action or process in Court, and the view which I take of the matter, is, that it must be regarded truly as a step in that other process; but I am sure there is no instance of a petition of this kind being treated independently as a process sui generis. I do not deny that peculiar circumstances of danger to the property might call upon us to interfere, without a depending action; but viewing the matter generally, it seems to me, that it would be a contradiction in terms, to call such a petition an incidental procedure, without requiring that it should refer to any case in dependence. In the case of Cathcart of Carlton, it does not appear that the point, as to the inducement not having run, was ever argued; at least, I am sure we do not gather that fact from any report of the

No. 98.
Dec. 23, 1831.
Anstruther, Esq.

No. 98. case. It may possibly have been a case where de facto sequestration was granted, though the inducement of the action had not expired; but it is impossible to state Dec. 23, 1831. this as an authority where it was so decided. I am impressed with the necessity Anstruther, &c. v. Anstruther. for a pending process, and unless a clearly contrary decision stared me in the face, I must adhere to that rule. It is said, this lady has produced her decree dative—really that does not make much difference in my mind. Is a party who has obtained confirmation of a moveable estate, and who hears that some one is to disturb her in the right, entitled at once to come forward, without taking any other step, and require the Court to place the funds under their protection? It is also said that we have a process of multiplepoinding of part of those funds in Court. I rather think that an argument the other way; the process is of a nature to protect its own fund, and what more is required? I cannot exactly see the object of the present application; what is there requiring such extraordinary protection? It is said that Sir Wyndham has collected rents, but you cannot sequester what he has collected; though, where he does, a multiplepoinding may be raised, and Sir Wyndham forced to consign. The criterion as to the competency of sequestration is this—that there is in Court an action in which some interlocutor may be pronounced, or some order issued, requiring sequestration as a proper and necessary step to give effect to such order; but here there is no possibility of issuing any order, to which the sequestration would be incidental; it is absurd to call it incidental in this case, and I think we could not grant it unless it could be clearly shown that the property was in danger. Your Lordship said that this lady asked no more than a sequestration, which was simply to protect the property; but I think it involves a great deal more. No one can touch these heritable bonds. Until Sir Wyndham makes out his title, he has no more right than any one else. Now, why should we give a factor that power which none of the parties themselves possess? I am for refusing hoc statu.

LORD CRINGLETIE.—I have very little doubt that this is a case for sequestration, if it be competent for us to grant it; and the question just is,—have we, in our equitable powers, a right to interfere for the sake of all parties? I admit that, generally, such a process is to be received as incidental, and where it is so, the Court will refuse to entertain it without an action in dependence before them. But the principle in those cases is, that there is a party in possession, who is not to be lightly disturbed. Now, that very principle shows the propriety of interference in the present case. Here, no one is in possession. Sir Wyndham had no right or title to touch any of those rents until he had paid the advances, and fulfilled the conditions of his re-purchased right. Here is a lady in titulo to claim certain funds. Sir Wyndham, upon a plea of appartenency, which in fact he had not until he paid under the arrangement, and in the face of all the other circumstances, steps in and interferes with the rents. Mrs Anstruther, jealous of her rights, and the proceedings of the other party, comes forward. She rests upon her decree dative; a title which the Court must recognise. There is thus a decided competition, and neither are in possession. Under these circumstances, I must agree with the doctrine quoted in these papers from Bankton. It may be true, as Lord Glenlee observes, that the point was not precisely argued in the case of Cathcart, but I am of opinion that the circumstances of the present case are such that the Court can and ought to interfere.

LORD MEADOWBANK.—Upon a former occasion, when this case was before us, the inclination of my mind was adverse to the opinion now expressed by a majo-

rity of your Lordships. I had then great doubts of our power to interfere under No. 98.
 the circumstances, there being no depending action. Whether we have such a
 power is the question now tabled for our consideration; and I have formed a very
 decided opinion that we have. We all now admit—I understand my brother Lord v. Anstruther,
 Glenlee to admit—that there are circumstances in which that power cannot be dis-
 puted—where property, namely, is in such danger as to demand judicial protec-
 tion. Now, I do think, that where parties are obviously opposed, the mere cir-
 cumstance that they have not yet had time to take certain steps of process neces-
 sary to bring them technically into Court, is an argument for, rather than against,
 our judicial protection of the estate. That we have the power I cannot conceive
 to be the subject of a dispute. Unquestionably the old Privy Council of Scot-
 land, when the judicatory functions lodged with them, had such a power; and,
 by the original institution of this Court, all those powers were transferred from the
 Privy Council. It would be strange to deny our power in the present instance; in all
 the other cases of the kind, such as an application for the appointment of curator
 bonis, or factor loco tutoris, it is never doubted, and your Lordships have been in the
 practice of exercising that right of interference to an extraordinary extent. There
 was the case of Colebrook. Your Lordships took not only the estate, but the parties
 under your protection. On the statement of Sir James Gibson Craig as to the
 situation of those parties, you did exercise the power, and the House of Lords
 affirmed. Then the question comes to be, has the Court ever exercised such a
 power, in reference to an estate, without a depending process? I appeal to the
 case of Roxburghe. Immediately on the death of the Duke of Roxburghe, applica-
 tion for sequestration was made. That petition said nothing whatever about
 a competition; it came in with no summons. There were competing briefes to
 be sure, but only before the macers, and your Lordships know that that forms no
 depending process until finally reported by them to this Court. Before any such
 steps were taken, or the summons in Court, and Bellenden Ker being infest, your
 Lordships, on the petition of Sir James Innes, sequestered. It is a mistake there-
 fore to say, that such an application can only be viewed as incidental. Where was
 the depending process in the case of Roxburghe? What process did they extract,
 when they went to the House of Lords? It was a process by itself—was extracted
 by itself—and went to the House of Lords by itself. Now, really, if our powers
 be ascertained, and seeing the necessity for our interference under the circum-
 stances before us, I think the case is exhausted. I cannot disregard the case
 of Cathcart. I think it confirms the authority of the case of Roxburghe. The
 Court must have seen when the summons was signed, and the matter was not
 entirely sub silentio. I am for granting sequestration in this case, and I rest my
 opinion upon these grounds: first, we have the power to do so even without a de-
 pending process; and, secondly, the circumstances of the case call for our interfe-
 rence.

THE COURT awarded sequestration accordingly.

Petitioners' Authorities.—Bankton, 1. 15. 15. Ersk. 2. 12. 55. and 3. 1. 30.

Respondent's Authorities.—Bankton (*ut supra*); Ersk. 2. 12. 56.; Graham, Feb. 13, 1745
 (11345); Creditors of Simpson, Jan. 18, 1730 (14345); Douglas, Nov. 28, 1761 (3966);
 Blackwoods, July 24, 1781 (14349); Hawley, 1712 (*ante*, VII. 394, foot-note); Innes and
 Ker v. Bellenden Ker, July 6, 1812 (F. C.); Cathcart, Feb. 11, 1829 (*ante*, VII. 392.)

No. 99. JOHN MINTO, &c. (formerly SIME), Pursuers.—*Murray—J. Paterson.*
 JOHN KIRKPATRICK, Defender.—*Shene—Rutherford.*

Dec. 23, 1831.
 Minto, &c. v.
 Kirkpatrick.

Process—Act of Sederunt, 11th July, 1828.—Where cases were ordered by a Lord Ordinary to be lodged by the box-day, and one of the parties previous to it lodged a note, praying for a prorogation, in respect of the absence of his counsel, and the necessity of employing a new counsel; and the Lord Ordinary pronounced decree against the party in consequence of his failure to lodge his case by the box-day, found that the party was entitled to be reponed without payment of previous expenses.

2d Division. IN a process of count and reckoning, originally at the instance of Sime against Kirkpatrick, and which had been in dependence for about 30 years, and twice in the House of Lords, the Lord Ordinary, on the 1st July 1831, appointed the parties “respectively to prepare and lodge cases upon the whole cause, and that by the first box-day (1st September) in the ensuing vacation.”

Mr M'Bean, agent for Kirkpatrick, wrote more than once to Messrs Scott and Finlay, agents for the opposite party, to return the process, adding in his last note, dated 10th August 1831, “Mr M'Bean begs to intimate, that in consequence of its being thus withheld from him, it may be impossible for him to have Mr Kirkpatrick's case prepared by the box-day, as ordered.” The process was returned on the following day to Mr M'Bean, with a note apologizing for the delay, which had been caused by the absence of the counsel for the pursuers.

The counsel for Mr Kirkpatrick was at this time engaged in the House of Lords, and the process was sent to another gentleman to prepare the case, but he from peculiar circumstances was unable to overtake it, and the agent thereupon requested from the agents of the opposite party a prorogation of the order to the second box-day. This they refused to accede to, as there had been much delay in the case, and they were anxious to bring it to a conclusion. A note was then addressed to the Lord Ordinary, intimated and lodged on the 31st of August, stating, that as the process had only been sent on the 11th of that month to counsel who was new to the case, it had been impossible to obey the order by the first box-day, and a prorogation was craved to the third sederunt day. Answers were lodged objecting to this, and the Lord Ordinary, when the case came before him in November, “refused the note, and in respect the defender's case was not lodged in terms of the order to that effect, on the application of the pursuers, decreed in terms of the second conclusion of the libel, for the sum of £5000 sterling, with the legal interest thereof, from the death of the late John Sime, senior, agreeably to the finding as to interest in the interlocutor of the 12th day of November, 1801: found expenses due, &c.

Kirkpatrick reclaimed, produced his case, and prayed to be reponed

without payment of the previous expenses, amounting to upwards of No. 99. £1000. He maintained, that this was not an instance of contumacy or neglect; that as a note craving prorogation was lodged during the currency of the order, it had the effect to prevent the order from becoming final; and therefore the question as to whether proper cause had been assigned was competently before the Lord Ordinary, although the consideration of the note could not take place till posterior to the box-day—that sufficient cause for a prorogation had being assigned; and he founded on the 109th section of the Act of Sederunt, in support of this view, The pursuers, on the other hand, maintained that the 62d section of the Act of Sederunt was imperative; that the Lord Ordinary had no discretion but to do what he had done; that, in like manner, their Lordships could only repon on payment of the whole previous expenses, as the rule must be strictly applied to all cases where the order had been disobeyed.

The Court altered the Lord Ordinary's interlocutor, and allowed the case now lodged for Kirkpatrick to be received.

LORD JUSTICE CLERK.—I think this a very important question in practice; and certainly, if I could bring myself to be of opinion that this party could not be reponed without payment of the previous expenses, which are enormous, I would not have inflicted so serious a penalty without proposing to your Lordships that we should consult the other division of the Court. But I think we are by no means bound by the terms of the Act of Sederunt under the circumstances of this case. If the matter rested with the 62d section, I could have little doubt that there was no discretion; but then comes section 109, which is just a general proviso regulating all cases of prorogation upon the merits of the application. The party claiming previous expenses, is bound to show that this last clause is inapplicable to the case, before they can find their argument of strict interpretation. I cannot confine this broad clause to particular papers, such as minutes and answers. I must include cases; and I think the party must have looked to this very clause when he gave in his note. The only consideration is, whether the note was lodged in time; but that is not disputed—it is admitted, and it was answered. We have then evidence of due application for delay, and I agree that that is only to be granted on cause shown. Now, in regard to this, it is material to observe, independently of other circumstances, that the counsel was new to the case. Your Lordships are in the daily practice of listening to that very excuse. We grant such notes lodged on the box-day, and why may not the Lord Ordinary? I cannot give effect to this severe penalty; for if ever there was a case where the whole circumstances supported the application for prorogation, it is the present.

LORD GLENLEE.—I perfectly agree. The Lord Ordinary refused the note, and the party reclaims, on the ground that it ought to have been granted, and I think he is right.

LORD MEADOWBANK.—I am of the same opinion, that the Lord Ordinary was wrong in refusing the note, and I can see no doubt as to our right to review his judgment.

LORD CRINGLETIE.—I concur with your Lordships. The Lord Ordinary was

Deo. 23, 1881.
Minto, Esq. v.
Kirkpatrick.

No. 99. wrong in the interlocutor he issued, and we may pronounce a judgment to the effect of altering.

Dec. 23, 1831.

Minto, &c. v.

Kirkpatrick. LOCKHART, HUNTER, and WHITHEAD, W.S.—SCOTT, FINLAY, and BALDERSTON, W.S.—ENEAS MACLEAN, W.S.—Agents.

Ramsay v. Roberts.

Philip, Jervis, &c.

JAMES RAMSAY, Suspender.—D. F. Hope.
WILLIAM ROBERTS, Charger.—Jameson—Neaves.

Fisher v. Scott.

No. 100. SPECIAL case, in which the Lord Ordinary, having found a charge orderly proceeded to the extent of a certain sum, and quoad ultra suspended, but without expenses to either party; the Court adhered, with 2d Division. I.d. Mackenzie. this alteration, that they found the party entitled to interest on the sum sustained, which had been omitted.

WOTHERSPOON and MACK,—THOMAS DEUCHAR, Agents.

No. 101. THOMAS PHILP, ALEXANDER JERVIS, and Others, Complainers.—
Murray—Cuninghame.

Royal Burgh.—The election of Magistrates and Council of a royal burgh being reduced on the last day before the Christmas recess, the Court, on a written application, made an appointment of interim managers of the burgh, with the usual powers, to subsist till the third sederunt day after the recess.

Dec. 24, 1831. A PETITION and complaint having been presented against the last election of Magistrates and Council for Dysart as illegal and null, the Court, 1st Division. on the last day before the recess, decerned, and declared in terms of the prayer of the petition. On the same day, a written application was presented, craving an interim appointment of managers of the burgh till the hird sederunt day in January. The Court pronounced this interlocutor:—“ The Lords having advised this petition, appoint the two first named parties, Messrs Philp and Jervis, interim managers of the burgh of Dysart, and that until the third sederunt day in January next, with the usual powers, and appoint this petition and deliverance to be inserted in the Books of Sederunt.”

R. M'KENZIE, W.S.—Agent.

No. 102.

DAVID FISHER, Petitioner.—Sol.-Gen. Cockburn.
PETER SCOTT, Respondent.—Moir.

Dec. 24, 1831. *Inhibition, Recall of.*—INHIBITION being used on an action of damages, 1st Division. laid at £1000, the pursuer consented to its being recalled on caution for D. £600, and the Court refused to limit the caution to a smaller sum.

A. MACLEAN, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

Mrs M' MIKIN TORRANCE, Pursuer.—*Buchanan.*

Mrs CRAWFURD and Others, Defenders.—*Greenshields—Handyside.*

No. 103.

Jan. 17, 1832.
Torrance v.
Crawfurd, &c.

Entail—Process—Expenses—Appeal.—1. Circumstances in which expenses were refused to a defender in an action of declarator relative to improvements on an entailed estate, under 10 Geo. III. c. 51, although successful except to a small extent; 2. Where the House of Lords in part reversed a decree with expenses in favour of a pursuer on the merits, but was silent as to expenses, and remitted the cause “to proceed farther therein as is consistent with this judgment, and as is just”—expenses refused to the defender; but observed that it was competent to award expenses to the defender, if due under the circumstances.

Mrs M' MIKIN TORRANCE, the heir in possession of an entailed estate, Jan. 17, 1832. raised an action of declarator under 10 Geo. III. c. 51, against the next heir, the late Mr Crawfurd, W.S., concluding for three-fourths of £1572, as disbursements on the estate. The Court, on 1st December 1820, found “that the outlay had been duly made and authenticated in terms of the act, and therefore deemed in terms of the libel, and found the defender liable in expenses,” &c. The expenses were afterwards modified, and deemed for; and were recovered, with the dues of extract. Crawfurd having appealed, the House of Lords ordered “that the interlocutors complained of be reversed, except as to the sum of £230, as to which it is farther ordered and adjudged that the said interlocutors be affirmed; and it is farther ordered and adjudged, that the said interlocutors, with respect to the costs thereby awarded against the appellant, be, and the same are hereby, reversed; and it is farther ordered, that the cause be remitted back to the Court of Session in Scotland, to proceed farther therein as is consistent with this judgment, and as is just.”¹

1st DIVISION.
Ld. Newton.
S

The case having then returned to the Lord Ordinary, he ordained repetition of the expenses, and Crawfurd having in the meanwhile died, and his representatives being sisted, they made a claim for expenses, in relation to which the Lord Ordinary found, “that there is no incompetency in the claim; and in respect that the pursuers claimed to burden the substitute-heirs with three-fourths of the sum of £1572, and that the House of Lords has sustained the claim only to the extent of three-fourths of £307, 5s. 8d., being less than one-fifth of the sum demanded; and that of the sum so sustained, £227, 1s. 6½d. was admitted by the defender in his information to the Court, found the pursuers liable in expenses.”*

¹ 2 Wilson and Shaw, 429.

* “Note.—It seems to be established by various late cases, particularly that of Stirling against Dunn, 14th January 1831, that it is competent to give expenses prior

No. 103. Mrs Torrance reclaimed, but intimated at the bar that she did not question the finding as to the competency.

Jan. 17, 1832.

Torrance v.

Crawfurd, &c.

LORD BALGRAY.—The rigorous interpretation which the House of Lords has given to the statute 10 Geo. III. c. 51, will not only have the effect of checking its operation, but in truth renders it, with its cumbrous machinery, a practical snare for heirs of entail, who run the greatest hazard of disburuing their money in favour of strangers alone, when they expend it in reference to the provisions of this statute. The question now before us is, how far the claim of the defenders for their expenses is well founded. The pursuers claimed reimbursement of three-fourths of a sum expended on an entailed estate which has now gone to the defenders. In the proceedings founded on by the pursuers, a very general practice of the country had been followed and relied on; but there was a failure to comply with all the forms prescribed by the statute; and though this Court considered the claim to be duly authenticated, and therefore sustained it, the House of Lords thought otherwise, and reversed our judgment as to the chief part of the claim. The House of Lords only sustained the pursuer's claim to the amount of £230, being greatly less than was concluded for. But does the result follow that there is a necessity for subjecting the pursuers in expenses? I apprehend that there is no such necessity, and that we must look to all the other circumstances of the case. The whole claim made by the pursuer was supported by considerations of equity; but, by the application of strict rules of interpretation, it was cut down to its present amount. The entailed estate, however, received the full expenditure, though the pursuer could not recover the statutory proportion of more than a small part of it. The defenders have been successful in obtaining the benefit of a large share of the disbursements, without being liable to the pursuer in any part thereof. In these circumstances, are we bound to award expenses to the defenders because they have successfully evaded a large part of a claim, to the whole of which they were liable in equity? I conceive that we are not. It is a matter of discretion with the Court to give or withhold expenses, and I think this is not a case to entitle the defenders to receive them. I am the more inclined to this result from reflecting, that the claim in question, when made at all, must, by the statute, be made in Court. I am for altering.

LORD CRAIGIE was for adhering, and was understood to say, that, in general, where a pursuer made a claim which was fully five times as great as was ultimately

to appeal, when the judgment of the House of Lords is silent as to this matter. It was, no doubt, found incompetent to do so in the cases of Reid against Hopes,¹ 18th November 1823, and M'Tavish against Turner,² 12th February 1831. But the remit in the former case was limited specially to repelling the defences and discerning, giving no discretionary power to do any thing farther; and in the latter, there seems to have been no remit at all. In the present, there is a remit in the same terms as in that of Stirling, viz. 'to proceed further therein as is consistent with this judgment, and as is just;' and the Lord Ordinary sees nothing which ought to make a different rule applicable to the two cases.³

¹ Ante, IV. 198.

² Ante, IX. 431.

sustained, and especially where the defendant admitted the greater part of the claim .No. 103.
which was so sustained, it was a salutary rule to subject the pursuer in expenses.

His Lordship considered this to be a case in which that rule ought to be applied. Jan. 17, 1892.

Torrance v.

Crawfurd, &c.

LORD GILLIES.—In every case the question of expenses is one of discretion on the part of the Court. We decided this case originally in favour of the pursuer : Johnston v. the House of Lords altered the judgment, but said nothing on the point of expenses ; from this it might seem no unfair inference that they did not mean any to be awarded by us when the case returned here. But, without resting on that view, Elder.

let us look at the circumstances which occur here. If a party states a claim mala fide, and attempts an undue advantage against another ; or, if he rashly pursues a litigation in which he has no *probabilis causa litigandi*, I can see good ground for subjecting him in expenses. But neither of these things occurs here. There is no suspicion of mala fides in regard to this claim. There is no doubt that the disbursements on the entailed estate, were intended by the party who made them to found the pursuer in the precise claim which she afterwards made. But owing to the number of forms with which the statute is encumbered, the intentions of the pursuer have been frustrated, and the defenders have received a benefit, at a much cheaper rate than was intended for them. It is therefore impossible to hold the claim to have been made mala fide, since the whole of it was supported by the most equitable considerations. On the other hand, it is equally impossible to hold that there was no *probabilis causa*, since the whole claim was sustained by a unanimous judgment of this Court. In these circumstances, according to the rules of sound discretion, I am satisfied that we ought not to subject the pursuer in expenses.

LORD PRESIDENT.—We not only sustained the claim of the pursuer formerly, but subjected the defenders in expenses. It is clear, therefore, that we must consider her to have had at least a *probabilis causa litigandi* ; and since this is the case, and the whole claim made was of an equitable sort, I concur with the majority of your Lordships. I am therefore disposed to alter, to the extent of refusing expenses to the defenders. But, in order to prevent any misapprehension of the grounds on which we alter, I would incline to sustain the finding as to the competency at the same time.

LORD GILLIES.—I conceive that to be unnecessary ; and as the point of competency has not been argued before us, I am doubtful of the propriety of doing anything more than simply to alter, and refuse expenses.

THE COURT then altered, and refused to allow expenses to the defenders.

J. and A. SMITH, W.S.—W. ALEXANDER, W.S.—Agents.

WILLIAM JOHNSTON, Claimant.—*Robertson.*

COLIN ELDER, Compearer.—*Ivory.*

No. 104.

Process—Expenses.—Where an arresting creditor was not cited in a multiple proceeding, and decree in his absence was pronounced, preferring another party—Held that he was entitled to be repaid simpliciter.

No. 104. IN a process of multiplepoinding, brought by a debtor of M'Kenzie,
Jan. 17, 1832. decree of preference, for aught yet seen, was pronounced in favour of
^{1st Division.} Johnston. Elder presented a reclaiming note, stating that he had not
^{Lord Newton.} been called at all, though also an arresting creditor of M'Kenzie, and
^{D.} therefore craving to be reponed against the decree, without being subject-
^{Johnston v.} ed in any expenses. Johnston objected, that, though Elder had never
^{Elder.} been cited in the process, he was sufficiently certified by the minute-book,
^{Graham, &c. v.} and by public advertisements, and therefore ought not to be reponed, ex-
^{Graham.} cept under the usual penalty of such expenses as the Lord Ordinary
^{Kirk Session of} might see fit to award.
^{Duddingston}
^{v. Halyburton,} The Court repelled the objection, and reponed Elder, without subject-
^{&c.} ing him in any expenses.

J. DICKIE, W. S. Agent.

No. 105. MRS LAWRIE OF GRAHAM, and Others, Petitioners.—Ritchie.
 WILLIAM GRAHAM, Respondent.—Jameson—Hunter.

Jan. 17, 1832. *Process—Factor loco tutoris.*—THIS was a special case, in which a peti-
^{1st Division.} tion having been presented to ordain a factor loco tutoris to lodge certain
^{B.} accounts and vouchers, and to remove him; and answers having been
 lodged, the Court refused the petition with expenses, without making up
 a record.

GOLDIE and PONTON, W. S.—GIBSON and HECTOR, W. S.—Agents.

No. 106. KIRK-SESSION OF DUDDINGSTON, Pursuers.—Skene—Marshall.
 LT.-COL. HALYBURTON, and Others, Defenders.—D. F. Hope—Russell.

Churchyard—Exclusive Privilege.—A body of Dissenters cannot be prevented,
 by the Kirk-Session or Heritors of the parish, from establishing a place of sepulture
 of their own.

Jan. 17, 1832. COLONEL HALYBURTON, and certain other individuals, having taken a
^{2d Division.} feu in the village of Portobello, which is situated within the parish of
^{Ld. Mackenzie.} Duddingston, and erected thereon a chapel, in connexion with the Scot-
^{R.} tish Episcopal communion, proposed to convert the ground surrounding
 it into a cemetery for the use of the congregation, and those persons who
 might acquire burying-places within it; and with this view they had i-
 duly consecrated, according to the ritual of the Episcopal Church. A
 attempt was immediately made by a neighbour to interdict them, on the
 ground that the churchyard would constitute a nuisance; and pending
 the proceedings which ensued, (mentioned ante, VIII. 637,) the Kirk
 Session of the parish for themselves, and taking burden on them for th-

heritors, raised an action against Halyburton, &c., concluding to have it No. 106. declared that they, or the heritors, had the exclusive right of managing the parish churchyard, and letting out mortcloths to hire, and that no other parties were entitled to establish within the parish a place of common sepulture, and to have Halyburton, &c., interdicted from keeping up their cemetery. In support of this action, they maintained that the heritors, who were bound to provide sufficient burying-ground for the parish, or the Kirk-Session acting for them, had the exclusive privilege of keeping up a place of common sepulture for the parish, and of making profit by disposing of and selling parts thereof to individuals; and that the Kirk-Session had also the exclusive right of levying mortcloth and other funeral dues, the collection of which would be materially impeded if parties were allowed to bury elsewhere than in the proper churchyard.

In defence it was pleaded, that as the defenders had never interfered with the management of the proper churchyard, or the right to let out mortcloths, the conclusions as to these matters were improperly directed against them; that as to the other conclusions, there was no authority whatever for maintaining an exclusive right on the part of the heritors or Kirk-Session to keep up a place of sepulture; that any dues for the use of mortcloths could be equally well levied, if the Kirk-Session were entitled to them, whether the interment took place in the churchyard or an other burying-place; that all the other dues were for services performed, and went to the persons who performed them, and not to the poor or the Session, and that it was contrary to law to make a profit by selling to private individuals parts of the churchyard, which (except the heritors' private burying-grounds) was appropriated to the common use of the inhabitants; but that at any rate the Kirk-Session or heritors could never prevent the establishment of other places of sepulture, in order to increase these dues or profits; and, further, that the burial of the dead in consecrated ground being, in the view of the Episcopal Church, part of their religious ritual, it was contrary to the toleration act to interfere with it, so as to compel the members of that communion to bury their dead in unconsecrated ground.

The Lord Ordinary sustained the defences and assailed, adding the subjoined note.* The Kirk-Session reclaimed, but the Court, without calling on the defenders' counsel to answer, adhered.

A. Scott, W.S.—A. and J. PATERSON.—Agents.

* "Note.—The conclusions, as expressed in the libel, relate partly to the right of managing the existing churchyard of Duddingston, and hiring out mortcloths in that parish. So far they ought not to have been insisted on against the defenders, who have not interfered with that management, or attempted to hire out mortcloths. In so far, on the other hand, as the conclusions import a right in the Kirk-Session, or even the heritors, to prevent any other persons from making and keeping up a

No. 107.

THOMAS DRYSDALE and Others, Pursuers.—*Robertson.*
JOHN WOOD, Defender.—*Rutherford—Cavendish.*

Jan. 17, 1832.
Drysdale, &c.
v. Wood.

Landlord and Tenant—Process.—1. Circumstances in which the assignee to a lease was found not liable for arrears of rent during a period when he had acquired, right, but before he had taken possession; 2. An averment on the record of no possession not being contradicted, the party held to be foreclosed.

Jan. 17, 1832. KENNOWAY held a lease of 18 acres from Wight for 19 years, commencing at Martinmas 1798. The landlord was taken bound to grant

2d DIVISION.
Lord Medwyn.
R.

a new lease after the termination of the original one, for eleven years more, if the tenant required it, with an increase of rent. In 1813, Wight sold to the late John Drysdale a property called Viewfield, in which was included one of the 18 acres, retaining the other 17. Kennoway, in 1814, assigned his lease to Thomas and John Wood. Some months previous to Martinmas 1817, (the date of the expiry of the first period,) the lease was exposed by Woods to public roup, and purchased by one Gilchrist, who made over his right to John Wood. Wood entered into possession at Martinmas, and thereafter continued to possess under the obligation to renew. Kennoway had fallen in arrear to Drysdale, for the rent of the single acre; and after Drysdale's death an action was raised by the pursuers, Thomas Drysdale and others, tutors of his sons, against John Wood, for the rent of this acre from August 1813 to August 1827.

Wood admitted his liability from Martinmas 1817; but averred that although his assignation was dated in 1814, he had not entered into possession till Martinmas 1817, Kennoway having continued to possess till the sale to Gilchrist. This averment was not denied by the pursuers on the record; and Wood maintained in defence, that he was only liable from the date of his possession, subsequent to Martinmas 1817, and that his possession under the second period of the lease, could not render him liable for the arrears during the first period of Kennoway's possession.

cemetery within that parish, and selling or letting parts of it, or the use of parts of it, for the burial of the dead, the Lord Ordinary sees no authority in law produced sufficient to support them. It is the law of Scotland, that the dead may be buried in churchyards, though not in churches, and even that the churchyard must be made sufficiently large to receive the bodies of all dead parishioners whose relations choose to make use of it as a cemetery, no other public cemetery being provided within parishes, and it may be law that certain payments are exigible by the kirk sessions from persons burying bodies in churchyards; but it does not follow, that, in order to increase the amount of such payments, the formation of all private cemeteries, or letting out the use of such for price or hire, is illegal. No statute, decision or dictum is cited, which appears to be to that effect."

The Lord Ordinary having repelled the defences, and decreed in No. 107.
terms of the libel, Wood reclaimed.

Jan. 17, 1832.
Drysdale, &c. v.

LORD GLENLEE.—So far as the interlocutor finds the defendant liable to pay the rent from the date of his possession in 1817, I am inclined to adhere. To that extent I think he has no right even to qualify his liability by a reservation of any payments made to Wight; but he is liable for no more. It is said he was assignee in 1814. So he was, and had he taken benefit by possession, I would understand the argument; but it is only in the event of his possessing under the assignation that he could be liable. Is it to be said that an assignation neither used nor intended could have that effect? It is specifically stated, that he held no possession before Martinmas 1817, and I see no denial of that statement on the record.

Philip and
Others.

LORD JUSTICE-CLERK.—I am of the same opinion. I cannot get over the averment of no possession prior to 1817. I do not think the defendant can qualify by any reservation his liability since he entered into possession.

The other Judges concurring,

THE COURT altered the Lord Ordinary's interlocutor, and assailed from the claim for rents prior to 1817, refusing to admit a statement at the bar, that possession had been taken by the defendant under the first assignation, as it was not so stated on the record.

CAMPBELL and MACK, W.S.—R. WILSON,—Agents.

THOMAS PHILP, and Others, Petitioners.—Murray.

No. 108.

Burgh Royal.—The election of magistrates and counsellors of a royal burgh having been reduced, the Court named three managers to receive resignations, &c., and generally to exercise the functions of the magistracy and town-council until the corporate rights of the burgh should be restored.

ON December 24th, the Court reduced the election of the magistrates Jan. 18, 1832.
and council of Dysart, which had taken place on 27th September, 1831, ^{1st Division.}
and appointed Thomas Philp and Alexander Jervis, "interim managers D.
of the burgh of Dysart, and that until the third sederunt day of January
next,"¹ &c. A petition was then presented by Philp and Jervis, the interim managers, and by George Beveridge and others, residing in Dysart, praying the Court "to appoint the petitioners, Thomas Philp, and Alexander Jervis, or some other proper and qualified person or persons, to be managers of the affairs of the said burgh of Dysart, until the corporate rights and privileges of the burgh shall be restored, for the special purposes of receiving resignations, or giving sesines in any lands held burghage of the said burgh, appointing taxers or stentmasters to collect King's subsidy, regulating the weights and measures within the said

¹ See Ante, p. 192.

No. 108. burgh, and taking charge, in the meantime, of such funds and patrimonial interests as fall under the management of the different office-bearers of the burgh, and generally to act instead, and exercise the functions of, the magistracy and town-council of the said burgh, and with such other powers as it may appear to your Lordships proper to entrust to them in this case," &c.

Jan. 18, 1832.
Philip and
Others.

Laing v.
Cheyne.

On advising, it was moved that a third person should be added to the interim managers, three being stated to be the usual number.

LORD PRESIDENT.—It seems to be necessary to do so, in order to provide for cases where a difference of opinion may arise among the managers.

THE COURT then " appointed the said Thomas Philp, Alexander Jervis, and George Beveridge, to be managers, in the terms, with the powers, and for the purposes, all as prayed for; and decerned, and dispensed with the minute-book."

R. MACKENZIE, W. S.—Agent.



No. 109.

PETER LAING, Pursuer.—*Shene—A. M'Neill.*
PETER CHEYNE, Defender.—*D. F. Hope—Maitland.*

Fraud—Stat. 1621, c. 18.—1. Circumstances in which the Court reduced the discharge of a debt, on the statute 1621, c. 18.—2. Held by the Lord Ordinary, (1.) that a party who acted as tutor, curator, or trustee, for the illegitimate son of his deceased brother, was a conjunct and confidant person; and, (2.) that the discharge of a debt was an alienation in the sense of the statute.

Jan. 18, 1832.
1st Division.
Ld. Corehouse.
T.

EDWARD CHEYNE was the natural son of a deceased brother of Peter Cheyne. Edward's father had bequeathed him a legacy of £1000, with which Peter intromitted. During his popularity and minority, Edward lived for many years in the house of Peter, who managed his whole affairs for him as his trustee and pro-curator. He came of age in 1825, and, in January 1828, he raised an action of count and reckoning against Peter, concluding for payment of £1280, as the amount of his legacy and interest. Defences were stated, and revised condescendence and answers were lodged. A remit was made to Mr Barstow, an accountant, who reported, that, according to one view, Peter was indebted to Edward in the sum of £421; according to another view, in the sum of £711; and, according to a third view, in the sum of £874, as on 31st December 1827. Parties were then allowed to re-revise their condescendence and answers, and the record was closed on 30th June 1829. The cause had been ordered to the debate roll, when Peter produced a discharge from Edward, dated 12th November 1829, by which, after narrating the action, he stated he was " now satisfied that the said Peter Cheyne expended the whole of

said legacy on my behalf, and for my advantage, before said action was No. 109, raised, and duly accounted to me for all that was due, and that I have no claim on him relative to said legacy, and that he has, since said legacy was expended on my behalf, paid various sums on my account, for which I am indebted to him, and that it is therefore reasonable that I should grant the discharge underwritten: Therefore, I do hereby exoner, acquit, and simpliciter discharge the said Peter Cheyne, his heirs, executors, and successors, of the whole intromissions had by him with the foresaid legacy of £1000 sterling, or any part thereof, and of all claims and demands competent to me thereanent, or for any other cause or occasion whatsoever, at and preceding the date hereof: And I do hereby also renounce, disclaim, and discharge the foresaid process raised at my instance in the Court of Session against him, and all claim under it, and consent that decree of absolvitor be immediately pronounced in favour of the said Peter Cheyne therein, and instantly extracted."

In December 1829, Peter Laing, as a creditor of Edward, raised a reduction of the discharge on the act 1621, c. 18, as having been granted to Peter Cheyne, his paternal uncle, and who had been his guardian, and was a conjunct and confident person, without any true, just, and necessary cause, to defraud the pursuer, to whom he was previously indebted.

Peter pleaded, 1. that a mere discharge of a claim, and relative action, was not an alienation within the sense of the statute; 2. that as Edward was illegitimate, he, Peter, could not be held a conjunct and confident person; and 3. that the discharge was not in prejudice of any creditor, but was granted for a full consideration, as Edward not only had no just claim when he raised his action, but had received considerable advances during its dependence.

The Lord Ordinary, on 17th Feb. 1831, found "that the defender, who acted as tutor, curator, or trustee to Edward Cheyne, and who was his father's brother, is to be held a conjunct and confident person in respect to Edward Cheyne, although Edward was illegitimate; that the discharge of a debt is to be held an alienation in the sense of the statute 1621, cap. 18. But, in respect it is alleged that the discharge under reduction was not gratuitous, but granted for a just and necessary cause, before answer, remitted to Mr Charles M. Barstow, accountant in Edinburgh, to report on the state of accounts between the defender and the said Edward Cheyne, at the date of the discharge."

The accountant adhered to the report which he had formerly made in the action at Edward Cheyne's instance against Peter. He carried down the account, however, to a later date, giving credit to Peter for advances which he had made after Edward's action was raised; and stated three views, as before, according to which the sum of £267, or of £585, or of £764, was due by Peter Cheyne, as on 12th November 1829, the date of the discharge. Objections, of a special nature, were lodged

Laing v.
Cheyne.

Jan. 18, 1831.

No. 109. ^{Jan. 18, 1832.} to the report; on considering which, with answers, the Lord Ordinary, on 29th Nov. 1831, "having considered the whole process, and in particular the interlocutor of date 17th February, 1831, now final, repelled the objections to the accountant's report; found that the discharge granted by Edward Cheyne to the defender, brought under reduction, was without a true, just, and onerous cause; and therefore reduced, decreed, and declared, in terms of the libel; found the defender liable in expenses," &c.

Cheyne v.
Cheyne.

Peter Cheyne reclaimed, and repeated his objections to the report, but the Court adhered.

L. MACKINTOSH, S.S.C.—A. G. SUMMERSIDE, W.S.—Agents.

No. 110.

EDWARD CHEYNE, Pursuer.

PETER CHEYNE, Defender.—D. F. Hope—Maitland.

LACHLAN MACKINTOSH, Conappearer.—Shone—A. McNeill,

Agent and Client—Expenses—Process.—Where a party raised an action of count and reckoning, concluding for a balance of £1280; and a record was made up, and a report obtained from an accountant exhibiting three views, under any of which the defender was indebted in a considerable balance; and the record was closed; and a debate ordered, when a discharge was granted by the pursuer, which was afterwards reduced by a creditor under the statute 1621, cap. 18,—held that the pursuer's agent was entitled to sist himself as a party in the action of count and reckoning, to the effect of recovering payment of his necessary disbursements as agent in the cause, with a reasonable remuneration for his professional services in conducting it.

Jan. 18, 1832.

1st Division.
Ld. Corhouse.

S.

THE question raised in this action arose out of the circumstances detailed in the immediately preceding case. When Peter Cheyne produced the discharge granted by Edward in the process of count and reckoning; Lachlan M'Intosh, S.S.C., who had hitherto acted as the agent of Edward, craved leave to sist himself as a party, and to carry on the action, to the effect of recovering his expenses. He alleged that Edward Cheyne was insolvent, and that the discharge was a fraudulent contrivance between Peter and Edward, to deprive him of his expenses; and he contended, that, as the action had previously so far proceeded, that, by the report of the accountant, there was at least *prima facie* evidence of Edward being entitled to recover decree for a considerable balance, he, as Edward's agent, had a right to sist himself. Peter alleged in this action, as in the reduction, 1. That the discharge was not fraudulently obtained, and that it was granted because there was truly nothing due. 2. That, as at the date when the discharge was produced, the case had never been debated on the merits, and the accountant's report was open to objection by either party, and as he was in cursu of stating objections to it, the cause was

not in so advanced a stage as to permit an agent to sue himself, where the principal party discharged the action.

The Lord Ordinary, on 12th Nov. 1831, (being the same date when Cheyne v. he reduced the discharge in the action at Laing's instance,) pronounced Cheyne v. this interlocutor:—“ Finds that Mackintosh is entitled to sue himself as Menzies v. a party in this action, to the effect of recovering payment of his necessary disbursements, as agent in the cause, with a reasonable remuneration for his professional services in conducting it; and appoints parties to debate upon the merits.”

Peter Cheyne reclaimed; but the Court, without calling on counsel to support the interlocutor, unanimously adhered; and, on the motion of Mackintosh, reserved all questions of expenses.

Lord President.—I have no doubt of Mackintosh's right to sue himself in a cause which stands in the situation of this one. We have found to this effect again and again.

Lord Balgray.—The discharge was just a device, for the purpose of imposing on Mackintosh.

Lords Craigie and Gillies assented.

L. MACKINTOSH, S. S. C.—A. G. SUTHERLAND, W. S.—Agents.

Mrs Margaret Menzies, Pursuer.—*Buchanan.*
James Livingstone, Defender.—*Forsyth.*

No. 111.

Proof—Process.—Circumstances where a party having been allowed, and having taken a proof, and failed to establish his averment, a farther proof refused, although a ledger was produced bearing marks of erasures, made apparently for the purpose of concealing the fact, but new action on fraud, &c. reserved.

Mrs Menzies raised an action of accounting against James Livingstone, her brother consanguinean, embracing, inter alia, a claim for the payment of certain legacies bequeathed to her and a brother-german deceased, (in whose right she now stood,) which she averred had been paid to their father, now deceased, with the whole of whose property the defendant had intrusted. As to the averment of payment of the legacies to the father, a proof before answer was taken on commission, when one witness was examined whose evidence was contradictory. The books of the father were also produced. These, however, contained nothing relative to the payment, but it was now alleged by the pursuer that there had been fraudulent erasures made on them, for the purpose of concealing the fact; and a further proof was craved to establish this. The Lord Ordinary pronounced the following interlocutor, adding the subjoined note:—“ Finds,

2d Division.
Ld. Fullerton.
T.

* “ Now.—A proof before answer was allowed in this case, in the expectation that evidence might have been obtained, which, even in this action of accounting,

No. 111: that, in hoc statu, there is no sufficient evidence of the payment to the late James Livingstone, of the legacies of £50 sterling each, bequeathed by David Hynd to the pursuer, and her brother, the late David Livingstone, and therefore assoilzies the defenders from the conclusions of the action regarding these sums; reserving to the pursuer to bring any action which she may be advised against the defender, founded on the undue or fraudulent erasure of any article relating to the payment of these legacies in the books of the late David (James) Livingstone: Finds neither party entitled to the expenses of this discussion, and decerns."

Jan. 18, 1832.
Menzies v.
Livingston.
Morrison.

Mrs Menzies, in supporting a reclaiming note, pointed out the state of the books, and maintained, that this afforded sufficient *prima facie* evidence to entitle her to an enlargement of her proof.

LORD JUSTICE-CLERK.—Notwithstanding the state of this ledger, we cannot interfere with the Lord Ordinary's interlocutor. The party condescended upon certain witnesses—he went to issue upon the evidence of this single one, which is of no value, being full of contradiction. Now she claims a proof at large. She may refer to the defender's oath, or bring another action, but we must refuse the note.

LORD MEADOWBANK.—But I think there should be no expenses allowed. No one can look at the books, without perceiving that there has been some *ex post facto* erasures.

The other Judges concurring,—

The reclaiming note was refused, but without expenses.

JOHN YOUNG, S.S.C.—THOMSON PAUL, W.S.—Agents.

No. 112.

JAMES MORRISON, Petitioner.—*Rutherford.*

Judicial Factor.—Circumstances in which the Court granted authority to the judicial factor on a sequestered land estate, to let, by public roup or private bargain, certain grazings for a period of three years.

Jan. 19, 1832. MORRISON, judicial factor on the sequestered estate of Fincastle, presented a petition, stating, that the tenants of the grazings of Richael, &c. part of the estate, rented at £111, were about to leave their premises at Whitsunday 1832, being the termination of their nineteen years' tack; that the tack contained a clause binding the tenants "to deliver, and the

1st Division.
S.

might have been considered conclusive. But, upon hearing the argument on the proof, it appeared to the Lord Ordinary, that the import and weight of the evidence, the credibility of the single witness, and the presumption materially affecting the case, depended upon various circumstances which were not within the limits of the proof allowed, and which could not well be brought out in a mere question of accounting like the present. He has therefore assoilzied, in hoc statu, leaving the pursuer, if so advised, to raise another action better suited to the grounds upon which the claim appears to be maintained."

proprietor or incoming tenant to receive, the stock of sheep upon the premises, and the crop upon the arable ground, at the expiry of the lease, at such a valuation as may be put thereon by men mutually chosen by the parties;” that, in all probability, the estate would soon be sold, and in the meantime no tenant would accept of a lease for one year, under the obligation of taking the stock at a valuation, except on terms occasioning a most serious loss to the creditors in the ranking. He therefore craved authority “to let the grazings of Richael, &c. upon a lease of three or five years to the highest bidder, either by public roup or private bargain.”

LORD PRESIDENT.—The Court very rarely grant such authority as is here craved.

Rutherford.—There will be a positive loss to the estate if it be withheld. We shall only ask authority for the term of three years, and to that extent there is a direct precedent in the case of Shaw.¹

THE COURT then “authorized the petitioner to let the grazings of Richael, &c. upon a lease for three years to the highest bidder at a public roup, or by private bargain.”

M'INROE and DUCAT, W.S.—Agents.

SAMUEL BLACK, Advocate.—*Brown.*

WILLIAM AULD, Respondent.—*Marshall.*

No. 113.

Process.—In an advocation on the ground, *inter alia*, of the alleged incompetency of the action, the Lord Ordinary has power to decide upon the competency, previous to making up and closing the record.

THE Sheriff of Wigton having decided against the advocate Black, Jan. 19, 1832, under a summary petition presented by the respondent Auld, on which a record had been made up in the inferior court, Black brought an advo-^{2d Division.} _{Ld. Mackenzie.} cation, on the grounds, 1. That the action was incompetent before the Sheriff, as being an action of declarator, and as being brought in a summary form; and, 2. That important facts had been omitted in the inferior court record, and he maintained that the new record which thereby was rendered necessary, must be made up and closed before discussing the point of competency. The Lord Ordinary reported the case to the Court upon the point, “Whether he has power to decide upon the competency of the original action before the Sheriff, previous to making up and closing the record in this Court?” After consulting with the other Division, the Court were unanimously of opinion that the Lord Ordinary had the power, and instructed his Lordship to proceed accordingly.

CAMPBELL and MACDOWALL—JAMES WEMYSS—Agents.

¹ June 19, 1750 (4070.)

No. 114.

MURDO M'LEOD, Pursuer.—*Shene—W. Bell.*

Jan. 19, 1832.

COLIN M'KENZIE, Defender.—*D. F. Hope—Wilson,*M'Leod v.
M'Kenzie.

SPECIAL case, in which the Lord Ordinary dismissed an action founded
 2d Division. on alleged warrantice of servitude of passage. The Court adhered.
 Lt. Mackenzie.

T.

Denovan v.
Johnstone.

JOHN M'KENZIE, W.S.—JAMES ADAM, W.S.—Agents.

No. 115.

MARY DENOVAN, Advocator.—*Shene—A. M'Neill.*JAMES JOHNSTONE, Respondent.—*Cunningham.*

Possessory Judgment—Fiar and Liferenter.—The Judge Ordinary having regulated the state of possession of a vacant piece of ground used as a dunghill for a neighbouring tenement, in a question with the fier, who, jointly with the liferentrix, his mother, occupied the premises,—held conclusive as to the possession in a process subsequently raised by the liferentrix.

Jan. 19, 1832. THE advocator, Mary Denovan, and her son, Thomas Primrose, occu-

2d Division. pied together a small tenement and yard in the town of Alloa, of which Lt. Fullerton. she was liferentrix and her son fier. On a piece of vacant ground betwixt

F.

this property and one belonging to the respondent Johnstone, Primrose had for some time been in the practice of depositing dung; which use of it Johnstone complained of as a nuisance, and presented a petition to the Sheriff of Clackmannan to have Primrose interdicted. After some litigation, and a view by the then Sheriff, (Lord Moncreiff,) an order was pronounced for the erection of a wall round the site of the dunghill, and for otherwise regulating the possession, whereby the nuisance might be prevented. Primrose delayed for some time properly erecting the wall, as ordered; and, in the meantime, a petition was presented in name of his mother, as liferentrix of the property, against him and Johnstone, praying to have them interdicted from proceeding with it. The Sheriff having dismissed the petition, she brought an advocation, in which the Lord Ordinary pronounced this interlocutor:—“ Finds that this is substantially a question of nuisance or police, and that it has been already so treated and decided, on the inspection of the Judge Ordinary, in a litigation between the respondent and the fier occupying the house, along with the advocator and liferentrix, his mother; finds, that in these circumstances the judgment pronounced in that litigation must at all events regulate the possession, which forms the only subject of the present litigation, and therefore repels the reasons of advocation, remits the cause simpliciter to the Sheriff, and decerns; finds the respondents entitled to the expenses incurred by them,” &c. The Court adhered.

J. MACKINTOSH, S.S.C.—GARD AND MORRISON, W.S.—Agents.

T. MEGGETT, W.S., and R. CHRISTIE, his Trustee, Pursuers.—

No. 116.

*Rutherford—J. W. Dickson.*JOHN SPENCE, Defender.—*Shene—Whigham.*Jan. 19, 1832.
Meggett, &c.
v. Spence.

Bankrupt—Sequestration—Trustee.—A sequestered bankrupt having been discharged under a condition that he should pay the trustee's expenses, when ascertained by the commissioners,—1. Held that the certificate of the commissioners was conclusive as to the reasonableness, &c., of the trustee's claims, and prevented any discussion on their merits before the Court; 2. Notified that the Court would not in future grant discharge, without at the same time absolutely exonerating the trustee.

THE estates of the pursuer Meggett having been sequestered in 1826, Jan. 19, 1832, the defender Spence was appointed trustee thereon. After a dividend of 2d Division. five shillings in the pound had been paid, an offer of composition by a Ld. Fullerton. further payment of 2s. 3d., and the expenses of the sequestration, was 8. accepted by the creditors, and a petition for approval and discharge presented in 1830. This petition did not, however, include a prayer for the trustee's exoneration, and the Court refused to proceed on it till such prayer was inserted. This was done accordingly; but Meggett still insisted on certain objections to Spence's management. After some procedure, however, he and his cautioner gave in a minute withdrawing these objections, and they at the same time deposited £432 in a bank, to answer Spence's claims for expenses of the sequestration, as to which the minute bore, "And in the event of the said sum of £432 being insufficient to discharge all the claims for expenses of the sequestration, the said Thomas Meggett and James Roy (the cautioner) bind themselves to pay the same as soon as ascertained by the trustee and a majority of the commissioners." The Court thereupon, "in respect of what is set forth in the above minute," approved of the composition, and granted Meggett his discharge, although Spence's claims for expenses were still unsettled. Thereafter Spence was required to execute a conveyance of the whole outstanding effects and estate of Meggett to the pursuer Christie, as trustee for his behoof; but this he refused to do, except under a reservation of his claims for expenses, and for damages on account of proceedings instituted by Meggett against him pending the sequestration. After some unsuccessful attempts at an arrangement, Meggett raised an action, (as a party to which Christie subsequently styled himself,) concluding to have Spence ordained to execute a reconveyance, and to hold count and reckoning in regard to his claims as affecting the property to be reconveyed. Shortly after the action came into Court, Spence gave in a minute, stating that he did not mean to insist for his claim of damages in this process, though he reserved his right to proceed therefor in an action at his own instance, and he consented to execute a reconveyance under reservation of any claim on the estate reconveyed, which might be ascertained in the present process. A reconveyance in these terms was accordingly executed; and

No. 116. in regard to Spence's claims, the Lord Ordinary remitted his accounts to the persons who had been commissioners on Meggett's estate to certify the same. The commissioners thereupon examined the accounts, and returned a report, certifying the amount which they considered due to Spence. To this report Meggett gave in objections, to the effect that certain of the claims, and in particular the amount of commission, ought not to have been allowed, in consistency with the principles laid down in the case of Boaz. Spence, on the other hand, maintained, that in terms of the minute, in respect of which alone the Court had granted Meggett his discharge, without his having previously settled Spence's claims, the amount of these claims fell to be determined by the commissioners, whose certificate precluded any discussion on the merits of the claims, which besides, he contended, were perfectly just and well founded.

The Lord Ordinary pronounced this interlocutor: "In respect the reconveyance has already been delivered up to the pursuer, finds it unnecessary to decide upon the two first conclusions of the summons; farther, finds, that in respect of the Minute, No. 26 of process, the parties are bound by the reference therein contained to the commissioners, for the purpose of ascertaining the expense of the sequestration: approves of the said report, but finds it incompetent in this process to pronounce a decree in favour of the defender for the sum due to him: assoilzies the defender from the conclusions of the libel, and decerns. Finds the pursuer and Robert Christie, who sisted himself as a party to this process, liable in expenses."

Meggett and Christie reclaimed, but the Court adhered.

LORD JUSTICE-CLERK.—There is not much difficulty here. We only agreed to discharge Meggett before decree in favour of the trustee was pronounced, in respect of the terms of the minute; but the litigation that has followed will be sufficient warning to us against deviating in the slightest degree from the provisions in the act, in exonerating a trustee absolutely at the time of the discharge. The subsequent proceedings have been a breach of the agreement inserted in the decree that the expenses were to be paid, as ascertained by the commissioners. This was not at all a matter of reference to the commissioners, but a condition of the decree, and a certificate by them was all that was required. The expenses should then at once have been paid. The certificate is enough, and we cannot enter into an enquiry as to the justice of the claims. But even if we could, this is a very different case from that of Boaz, the principles of which we will not depart from. This is a case of composition, and there has been a great deal of trouble as to the heritable estate. I would therefore adhere.

The other Judges concurred, and particularly in the observation, that the Court would not in future grant a discharge without at the same time absolutely exonerating the trustee.

J. ROY.—T. SYME, W.S.—Agents.

GILLIES, Suspender.—Miller.
SMITH, Charger.—Neaves.

No. 117.

Jan. 19, 1832.
Gillies v.
Smith.

Process—Admiralty.—In a suspension of a decree in a maritime cause, pronounced by the Sheriff as coming in place of the Judge Admiral, the charger is bound, on the death of his original cautioner, to find new caution de damnis et impensis.

Dixon, &c. v.
Watson, &c.

SMITH raised a maritime action against Gillies before the Court of Admiralty, in which, according to the practice of that Court, he, as pursuer, found caution de damnis et impensis, while Gillies, as defender, found caution judicatum solvi. On the abolition of the Admiralty Court, the action proceeded before the Sheriff, and decree having been given against Gillies, he brought a suspension. In the meantime, Smith's cautioner had died, and Gillies contended that he was bound to find new caution, while Smith, on the other hand, maintained, that having got his decree, and being now in a suspension which came before the Court of Session, not as substituted for the Admiralty Court, but as exercising their former jurisdiction of reviewing Admiralty decrees, he was not bound to renew his caution as if he were still a pursuer in an Admiralty Court. Their Lordships, however, held that he must find new caution, and pronounced an order accordingly.

Jan. 19, 1832.
2d Division.**WILLIAM DIXON and Others, Petitioners.—D. F. Hope.**

No. 118.

WILLIAM WATSON and Others, Respondents.—Jameson—More.

Judicial Factor.—1. Circumstances in which the Court appointed a new judicial factor, although the previous factor, who held an interim appointment, contended that no cause was shown for it; 2. Observed, that an undischarged bankrupt cannot be named a judicial factor, at least if any party having interest object.

SEQUEL of the case reported ante, p. 178. At the date of the interlo- Jan. 20, 1832.
cutor appointing Watson, accountant in Glasgow, to be judicial factor, ad interim, on the estate of Dixons, that gentleman happened to be in Ireland. Before his return, several steps were extrajudicially taken, during the recess, by the parties interested, for devolving the management of the estate on another party. When Watson returned, he lodged a bond of caution, and claimed right to enter on the office. William Dixon and others, executors of the late John Dixon junior, presented a petition craving the appointment of another factor, on the ground that the business of winding up the estate of this concern (being a glass manufactory) was not of a sort for which Watson, an accountant, was qualified; and as his appointment was merely ad interim, some party should be named who was so. Watson appeared, and contended that his appointment ought

1st Division.
D.

No. 118. not to be recalled without cause shown ; and that if suspended, he must be allowed the expenses incurred by him on the faith of the appointment in his favour.

Jan. 20, 1832.

Dixon, &c. v.
Watson, &c.

The children of Jacob Dixon junior supported the nomination of Mr Watson. Several persons were suggested, and, in particular, a party who was an undischarged bankrupt.

LORD PRESIDENT.—Had all parties agreed, we would have nominated any manager who was acceptable to them ; but as they do not, we cannot name an undischarged bankrupt as judicial factor.

LORD GILLIES considered that Watson had a good title to appear, and oppose the petition for a new appointment. His Lordship was understood to be averse to supersede Watson, because no ground was shown for this ; and he considered a bankrupt to be ineligible.

LORD CRAIGIE concurred in thinking that a bankrupt ought not to be appointed by the Court as judicial factor ; and that no confidence which parties might privately feel themselves warranted to repose in him, could sanction the Court in such an appointment.

LORD BALGRAY.—If this were the appointment of a factor on an ordinary estate, with the mere duty of collecting rents, &c., I should be satisfied that any nominee of respectable professional character would protect the interests of all parties. But the estate here is of a peculiar sort ; it will require much delicacy and discretion, and an acquaintance with other business besides that of ordinary accounting, to enable a man to act with benefit for all concerned. I am of opinion, therefore, that we are bound, if possible, to consult the wishes of all parties. The Court would not have appointed Watson even ad interim, had it not been understood that parties were satisfied with him ; and as many of those having a most material interest now object to the continuance of the appointment, I think a new factor should be named. I am the more inclined to this, because we have had occasion already to see that some of these parties have it in their power to use legal diligence, which will probably paralyse the whole concern, unless they be satisfied with the administrator named over it. In regard to the bankrupt nominee, I conceive the objection to him to be so strong, that if insisted in by any party possessing the smallest interest, the Court must give effect to it.

THE COURT then “ having heard counsel for the parties, and also for James Watson, interim factor (his appointment as such being only interim), they nominate and appoint Samuel Caw, merchant in Glasgow, judicial factor on the funds and estate sequestered by the interlocutor of 24th December last, with power to take the same under his charge, and to manage and wind up the whole affairs of the said companies, and with the other usual powers ; the said Samuel Caw, before extract, finding sufficient caution,” &c.

D. FISHER, S.S.C.—CAMPBELL and MACDOWALL, S.S.C.—Agents.

MAGISTRATES OF MONTROSE, Pursuers.—*Rutherford.*

No. 119.

GEORGE ROBERTSON SCOTT, Defender.—*D. F. Hope—H. J. Robertson.*Jan. 20, 1832.
Magistrates of
Montrose v.
Scott.

Church—Glebe.—1. Lands which belonged to the Dominicans at the Reformation, and were granted by James VI. to the burgh of Montrose for behoof of the hospital, held church lands; 2. A glebe being designed out of church lands, no claim of relief lies against the heritors of temporal lands in the parish.

THE Presbytery of Brechin designed a glebe out of lands called the Hospital Lands of Montrose, which had belonged to the Preaching Friars, or Dominicans, at the Reformation, when they fell to the Crown. James VI. granted these lands to the Magistrates of Montrose, in 1570, and 1587, for behoof of the hospital. There has been no hospital in Montrose since the date of the grant, but the revenues of the lands have been applied for behoof of the poor. After the Presbytery's designation, the Magistrates of Montrose brought a suspension, in which the reasons were repelled, and they then raised an action of relief against Mr Robertson Scott, and other heritors of the parish. In defence, Scott stated that his lands were temporal lands, and that the hospital lands were church lands, which were therefore liable to designation in the first instance, and that the pursuers had consequently no claim of relief against his lands. The pursuers denied that their lands were church lands, but relied chiefly on the plea that, although the Presbytery, in designing a glebe, might be bound to select church lands, if there were any, it did not necessarily follow that the lands selected had no right of relief, except against other church lands. There was an order of priority among the several kinds of church lands themselves, such as parson's, vicar's, abbot's, bishop's, and friar's; according to which order, the Presbytery were to proceed in designing a glebe, first, out of parson's lands, if there were any; next, out of vicar's, and so forth. But so soon as a designation was made, though out of parson's lands, which were liable in the first instance, there was a right of relief against all other church lands in the parish, notwithstanding their different degrees of original liability to a direct designation by the Presbytery. And thus, though temporal lands ranked last in the series, in a question as to a designation, yet when the lands designed sought relief against others, the whole lands in the parish were liable to that relief, without distinction between church lands and temporal lands, any more than there was among the several species of church lands, *inter se*.

Both parties relied on the case of Kingsbarns. The pursuers founded on the report in Connell's Law of Parishes, 370 and 372, and the judgment on 11th June, 1799. The defenders founded on the report in the Faculty Collection, and also on the previous judgment on 10th June, 1794.

The Lord Ordinary found, "That the lands in question, which be-

No. 119. longed to the Preaching Friars, or Dominicans, at Montrose, at the Reformation, and which were granted by James Sixth to the Magistrates and Council of the burgh, for behoof of the hospital, are to be held as church lands, and liable, in that character, to be designed for the glebe of the minister: Found, that the pursuers, in consequence of the designation, are not entitled to relief from the heritors of temporal lands in the parish; and therefore sustained the defences, assoilzied the defender from the conclusions of the action, found him entitled to expenses," &c.*

* " NOTE.—There are two questions in this case. 1st, Whether the hospital lands are subject to designation as church lands, or only as temporal lands? 2dly, If they are designed as church lands, what is the extent of the pursuers' right of relief?

"On the first point, it may be remarked, that the statute 1644 excepts church lands mortified to universities, schools, and hospitals, from designation. That statute fell under the act rescissory; but as it is held by Stair, and all the other text-writers, to have revived in many respects by the act 1663, there is no reason why it should not have been revived in this respect also. The point was considered as doubtful in the case of Lord Forrest, Feb. 6, 1678, and reserved for farther consideration; but the result of the case is not reported. It appears, however, from the authority of Stair, b. 2. t. 3. sec. 40, that the statute is not in force in this respect; for he lays it down, that lands mortified to a college are liable to the burden as church lands; and so it was found by the first interlocutor in the case of Kingsbarns, June 11, 1799, a finding which is not affected by any of the farther proceedings in that case.

"On the second point, the authority of Stair and Bankton is express, that the glebe is to be designed out of church lands; and that it is only in the case of there being no church lands in the parish, that temporal lands are subject to designation. The opinion of Erskine, who refers to Stair, is to the same effect, although there is an expression in his larger work which is somewhat ambiguous. In his Principles of the Law of Scotland, no such ambiguity occurs. These authorities are agreeable to the doctrine laid down by the Court in the first case of Kingsbarns, June 10, 1794, and by the first interlocutor in the second case of Kingsbarns, June 11, 1799. That interlocutor was recalled in the special circumstances of the case, namely, a virtual agreement on the part of the heritors of the temporal lands, at the time of the disjunction of the parish of Kingsbarns from that of Crail, and on an express obligation, on their part, afterwards, that they should be liable for the minister's glebe, or a sum paid in lieu of it. The last decision, therefore, does not touch the general principle, as laid down by the text-writers; and the note in Connel on Parishes, p. 370, relative to that case, as a late writer observes, (Bell's Principles of the Law of Scotland, p. 302,) is not to be relied upon. If it is clear, therefore, that temporal lands cannot be designed for a glebe while there are church lands in the parish; it follows, that if church lands are designed, there can be no claim of relief against the owners of temporal lands. A passage in Erskine, which has sometimes been quoted to the contrary, is decisive against this claim of relief. He states, in general terms, that 'a right of relief, or recourse, is competent to the heritors whose lands are set off for the manse, or glebe, against the other heritors in the parish.' But he afterwards explains, that that relief is in terms of the second part of the act 1644, which ordains, 'that the whole heritors in the parish contribute proportionally for making recompence to the heritors out of whose lands the said manse and glebe shall be taken respectively, viz., heritors of kirklands, when kirklands are designed, and the heritors of all lands of other holding, when the designation is of other lands, not kirklands.'"

The pursuers reclaimed, but the Court, without hearing the respondent's counsel, unanimously adhered. Their Lordships made no observations, being understood to coincide in the views expressed by the Lord Ordinary. No. 119.

Jan. 20. 1832.
Magistrates of
Montrose v.
Scott.

Pursuers' Authorities—Minister of Kingsbarns, 11th July, 1799; Connell's Law of Parishes, pp. 270, 272. Boyd v. Lang.

Defender's Authorities—Minister of Kingsbarns, 10th June, 1794 (5140), and 11th June, 1799 (Glebe, App. I. No. 2.); Laidlaw, Dec. 2, 1800.

GIBSON-CRAIGS, WARDLAW, AND DALSTIELL, W. S.—PEARSON, WILKIE, AND ROBERTSON, W. S.
—Agents.

JOHN BOYD, Advocate.—Skene—Maitland.
JAMES LANG, Respondent.—D. F. Hope—Cunninghame.

No. 120.

Process.—A party, who had sisted himself as a party in an action in the Inferior Court, in which he had not been cited, and containing no conclusions against him, but to which he had been ordered to sist himself as a party—found barred from stating in an advocation the plea of the incompetency of giving decree against him not having put a plea to that effect on either record.

LANG, factor for Hill's trustees, brought an action before the Sheriff Jan. 20, 1832. of Ayrshire, against one Cochrane, for the price of a horse bought by Cochrane at a sale of Hill's effects. Cochrane admitted the purchase, but alleged that he had paid the money to the advocate Boyd, as authorized by Hill's trustees to receive it, and that the trustees had got credit for the sum in their accounts with Boyd. The Sheriff ordained Boyd to be called as a party; and he accordingly sisted himself, and then stated that he had attended the sale of Hill's effects as one of his trustees authorized to act, had received the price of the horse from Cochrane, and was quite ready to account for the money to the trust estate. Lang denied Boyd's authority to uplift the price, and averred that he was indebted to Hill's trustees. The question then arose as to the state of accounts betwixt Boyd and Hill's trustees, and the Sheriff-substitute ultimately found that Boyd "must account, and is liable for the price of the horse, which he acknowledges he received from the other defender Cochrane, unless he can produce satisfactory accounts to extinguish the same owing to him by the deceased Mr Hill or the trust estate;" and as to Cochrane, found "him jointly and severally liable to the pursuer for the price of the horse in question, but reserved to him his recourse against Boyd, if he is obliged to pay the price of said horse." Thereafter, having advised with the Sheriff, he superseded the cause as to Cochrane, and allowed the accounting to go on as to Boyd; and, finally, he pronounced an interlocutor upon the state of the accounting betwixt Boyd and Hill's estate, and decreed

2d Division.
Fullerton.
T.

No. 120. against Cochrane for the price of the horse. Pending the proceedings in this process, two actions were raised against Boyd, the one by Lang, and Jan. 20, 1832. the other by Hill's trustees, both connected with the trust affairs. These were conjoined with the original action, but it is unnecessary particularly to advert to them. After some procedure, an advocation was brought by Boyd, in which no plea was stated as to the incompetency of the decerniture in the first action against him. In this advocation a remit was made to accountants, who returned an elaborate report on the state of accounts between Boyd and Hill's trustees. Of this report the Lord Ordinary approved, and pronounced an interlocutor determining the whole matters in dispute, including that regarding the price of the horse involved in the original action, as to which his Lordship decreed against Boyd, under deduction of a certain sum due to him by the trustees.

Boyd reclaimed. The only point debated was, as to the competency of the decerniture against him in an action to which Cochrane alone was called, as to which Boyd maintained, that although a party might, by appearance, waive objections to mere citation, he could not thereby warrant the Court to pronounce decree against him under an action which contained no conclusions to that effect.¹

To this it was answered, that the objection being now stated for the first time, was too late, Boyd having joined issue in the action against Cochrane.

LORD GLENLEE.—This plea is not well founded. The Sheriff ordained Boyd to sest himself as a party. Now, had he cited him, and then found him liable, I presume there would have been no dispute as to the competent shape of the process. But Boyd professes himself willing to account, and the Sheriff accordingly enters into the accounting, and pronounces decree against him. This conduct just amounts to this, that he virtually waives the form of executing a summons against himself individually. In all pleas of incompetency, the material point is, not the mere want of formality, but absolute injustice. But look at the pleas in law; there is not a word about the incompetency of finding Boyd liable under the action directed against Cochrane. I think that must just be construed as an additional waiver upon his part of the necessity of a citation.

LORD JUSTICE CLERK.—I agree. This process is under the judicature act, and I think the proper footing upon which to repel the objection is, that there is no plea in law upon the subject. The objection has been made too late.

LORD MEADOWBANK.—Certainly. What Boyd ought to have done was this,—he should at once have stated his objection to the Sheriff, who might have reserved it. Not only does he not do that, but he has no plea on the record here. The true question is not as to there being a sufficient conclusion in the action under which he has been found liable. There is certainly a sufficient conclusion against Cochrane, and he just puts himself in Cochrane's place.

LORD CRINGLETIE.—All that Boyd can pretend to complain of is the mere

¹ Wedderburn, 4th January, 1740 (M. 11986.)

shape in which the decerniture went out against him. Under all the circumstances, No. 120.
I am of your Lordships' opinion.

THE COURT accordingly adhered.

Jan. 20, 1832.
Boyd v. Lang.

CAMPBELL and MACK, W.S.—WILLIAM DOUGLAS, W.S.—Agents.

M'Fee v. —

M'FEE, Pursuer.—Wilson.
A CREDITOR, Defender.—Stoddart.

No. 121.

Cessio Bonorum.—Where the pursuer of a cessio imprisoned for payment of the aliment of a natural child has been alimented by the mother under the Act of Grace, the general rule for refusing the cessio, where such is the nature of the debt, will not be enforced.

THE pursuer, M'Fee, had been incarcerated at the instance of the def. Jan. 20, 1832.
fender, for payment of the aliment of her natural child, of which he was 2D DIVISION.
the father. He had obtained the benefit of the Act of Grace, and was thereafter alimented in prison by the mother; and after having lain there five months, he brought a process of cessio. This was opposed by the mother on the general ground, that a party was not entitled to the benefit of cessio, where the debt for which he was imprisoned was for the aliment of a natural child; but the Court, in conformity with an exception which had been admitted in cases where the pursuer was alimented in prison under the Act of Grace, by the mother of the child,¹ granted the cessio.

JOHN KNOX, Pursuer.—Skene—Wilson.
JAMES MALCOLM, Defender.

No. 122.

Res Judicata—Circumstances in which an interlocutor of a Lord Ordinary was held to have repelled a plea not specially therein referred to.

MALCOLM, writer in Edinburgh, obtained decree in absence against Jan. 20, 1832.
Knox, for payment of an account of business incurred to him on the 2D DIVISION.
employment of one Mercer, who was Knox's country agent, in regard Lord Medwyn.
to the business. Of this decree, Knox brought a reduction, on the F.
grounds that at the date of the action the account was prescribed, and that he had paid the amount to Mercer, the immediate employer of Malcolm.
A diligence was granted by the Lord Ordinary for the recovery of all writings tending to instruct payment to Mercer, in the course of which an objection was taken to the production of certain documents. On the

¹ Houston, Dec. 13, 1828 (*ante*, VII. 193

No. 122. diligence being reported, his Lordship appointed parties to debate, reserving consideration of the objection; the documents being in the mean time sealed up. The Lord Ordinary pronounced this interlocutor:—

Jan. 20, 1832. Knox v. Mal-
colm.

Alex. Drum-
moud.

“ Approves of the deliverance of the commissioner on the objection stated by the defender in the examination of the haver; and having advised the process as it now stands, finds that no sufficient grounds have yet been established for reducing and setting aside the decree obtained by the defender for payment of his account of business incurred on behalf of the pursuer; but allows the pursuer to prove the application of part of the sum of £64, which was retained by Mr Mercer at handing over to the pursuer the amount of the loan of £600, raised upon the credit of his heritable subjects, to the discharge of the defender's account; and for that purpose grants diligence against witnesses and havers.”

Knox did not reclaim, and the proof was taken. Thereafter, the Lord Ordinary, satisfied that there was no sufficient evidence of payment to Mercer, sustained the defences, and assailed. Knox now reclaimed, and was proceeding to argue his plea of prescription, when it was objected that he was precluded from founding on it by the interlocutor of the Lord Ordinary, which he had acquiesced in, and allowed to become final. On the other hand, Knox contended, that, on a fair construction of that interlocutor, it must be considered as limited to the effect of the proof of payment contained in the report of the diligence then under the Lord Ordinary's consideration, and could not be held to have decided the plea of prescription, which was not specially referred to in the interlocutor, and did not appear to have been in view of his Lordship. The Court, however, thought that Knox's acquiescence in that interlocutor was an abandonment of the plea of prescription, and refused to allow him to go into it, and concurring with the Lord Ordinary as to the import of the proof in regard to the allegation of payment, they adhered to his Lordship's interlocutor.

J. PATISON, Jun. W.S.—W. MILLER, S.S.C.—Agents.

ALEXANDER DRUMMOND, Petitioner.—Rutherford.

No. 123.

Curator Bonis—Lease.—Circumstances in which the Court granted warrant to the curator bonis of a fatuous person, aged eighty years, to let a farm for a period not exceeding seven years, by public roup, or private bargain, on sealed offers, the tenant finding sufficient security.

Jan. 21, 1832. **DRUMMOND**, curator bonis on the estate of Stewart, a man of eighty years, and fatuous, craved warrant to let the farm of Myreside, belonging to Stewart, for a term of years, from and after Whitsunday 1832, when a previous lease would expire. He produced a report from men of skill, who

1st DIVISION.
S.

stated, that, according to the most approved method of farming in the district, a seven-shift rotation of crops should be imposed upon the tenant; and that if the farm were let from year to year, no such rotation could be obtained, and "the consequence is, that the ground will be greatly deteriorated, the rent which the farm ought to bring cannot be expected, and Shireffs, &c. the loss to the proprietor will, in our opinion, be serious." The reporters considered that the lease ought not to be for a shorter period than nineteen years.

Rutherford, for petitioner, stated, that in the case of *Colt*,¹ the Court had granted authority to the tutor of a pupil to let a coal-mine for twenty-five years; which was a term necessarily exceeding the period of the whole minority, but justified by the circumstances of the case. The interest of the estate under curatary, in this instance, required a similar extension of authority.

LORD PRESIDENT.—The term of nineteen years for the lease seems longer than is justified by necessity; and there is a circumstance in this case which renders the interference of the Court a matter of peculiar delicacy. Mr Stewart is a person of eighty years of age; with the apparent probability of a termination of the curatary at no remote date, I am decidedly against authorizing a lease for nineteen years. It must be a much shorter term.

LORD GILLIES.—I take precisely the same view.

Rutherford.—In the late case of *McLean*,² authority was granted for a period of seven years.

LORD PRESIDENT.—I would not propose a longer term than seven, or perhaps five years; but as a seven-shift rotation is stated to be best adapted for this farm, I incline to grant authority to let for a term of seven years.

The other Judges assented.

THE COURT "authorized the petitioner to let the farm of Myreside, for seven years, either by public roup, or by private bargain, on sealed offers, as shall appear to the curator to be most beneficial to the estate, the tenant finding sufficient security for the rent, and for implementing the conditions of lease for seven or fewer number of years, as shall appear to the curator to be most prudent."

MACINTOSH and DUCAT, W.S.—Agents.

JOHN M'LEAN, Petitioner.—*J. Gordon—Stoddart.*
J. L. SHIREFFS (Wilson's Trustee), Respondent.—*Murray—Dauney.*

No. 124.

Bankrupt—Master and Servant.—Circumstances in which the Court sustained a claim for the balance of a year's wages and board wages by a servant, who was hired chiefly as a gardener, as preferable on the sequestrated estate of his master.

¹ March 6, 1800 (16887.)

² June 25, 1828. *Ante*, VL 1018.

No. 124. IN November 1829, Wilson of Glasgowego hired M'Lean, a gardener, to take charge of his garden, at £25 of yearly wages, and 6s. per week of board wages, and stipulated that M'Lean should assist in sowing and reaping such part of a field of five and a half acres, as might be put under crop. A cow was grazed on part of the field; and M'Lean assisted in sowing, reaping, and stacking the crop, which grew on the rest of it. He also occasionally drove a cart to Aberdeen with vegetables, for the use of Wilson's family, or with shrubs, to be planted on another piece of ground belonging to Wilson. A plantation of 20 acres of young wood, was under M'Lean's care. In November 1830, Wilson's estates were sequestered under the Bankrupt Act. At this time a sum of £29, 8s. of wages and board wages was due to M'Lean, who claimed a preference for the amount. The trustee disallowed the preference, conceiving that a gardener was neither a domestic, nor a farm-servant, and that the privilege extended no farther than to these classes.

M'Lean presented a petition and complaint to the Court, setting forth that his occupation was chiefly that of a gardener, but not exclusively so, as he occasionally did some farm-work, &c.

On advising answers in the Bill-Chamber, the Lord Ordinary, "in respect that the situation of gardener is, by the old and accustomed practice of Scotland, considered to be a domestic servant, and, as such, acknowledged by the public law relative to the imposition of taxes; and as the present application involves a general question—(the facts not being disputed, but candidly acknowledged and stated)—appointed the parties to lodge mutual Cases."

LORD PRESIDENT.—This is a case which must be decided on its own circumstances, without involving any general principle. Looking to the fact that MacLean was hired on board wages, along with the other specialties in the nature of his service, I think he cannot be cut off from the privilege which he claims. But I by no means incline to decide at present that a gardener must always be placed on the footing of a domestic servant. On the contrary, I think a gardener may in some cases be clearly ranked with that class of servants, and in others as clearly excluded.

LORD GILLIES.—I am also for sustaining the preference claimed by M'Lean, and I would rest the judgment generally on the circumstances of the case. At the same time, I may observe, that there is a strong analogy between the right of a gardener to a preference for his wages, wherever the fruits of the garden go to the benefit of the sequestered estate, and the right of preference which has been recognised as belonging to the servants who reap a farm, and whose wages are preferable to the landlord's hypothec over the crop.

LORD CRAIGIE.—I am of a different opinion, and consider that M'Lean has no preferable claim. Privileges are not to be extended, but to be strictly construed; the gardener is not a domestic, neither is he a farm servant; and beyond these classes the privilege has not yet been carried. But if we admit the preferable claim of a gardener, there is a large class of other servants,—grooms, gamekeepers,

Jan. 21, 1832.
1st DIVISION.
Lord Balgray.

M'Lean v.
Shireffs, &c.

foresters, &c., who will insist that they are as well entitled to be preferred. It is No. 124. true, that those who reap a farm have a claim for wages preferable to the land-
lord's hypothec, and consequently to the other creditors of the farmer, because the Jan. 21, 1832
landlord cannot take the crop without being liable for the expense of rearing and Shireffs, &c.
gathering it. But although such a preferable claim has been recognised, we must Craig v. Hill,
limit it to the precise case to which it applies, and I cannot see that it reaches to &c.
the wages of a gardener. I therefore would approve of the trustee's judgment,
and refuse the petition of M'Lean.

LORD BALGRAY.—I admit it to be a general principle of the law, that privileges are not to be extended by Courts, but I conceive M'Lean to be well founded, in the circumstances of this case, in claiming a preference. It seems a question of difficulty, whether a gardener, generally speaking, belongs to the class of domestic servants or menials, that is, servants *intra mœnia*, as Bankton says. But it is unnecessary to decide it on the present occasion.

THE COURT, "in the circumstances of this case, remitted to the trustee to sustain the petitioner's claim as preferable, &c.; found the petitioner entitled to his expenses," &c.

Petitioner's Authorities.—M'Glashan, June 29, 1819, F. C.; Lockhart, Nov. 14, 1804 (11853); Marshall, Feb. 12, 1828 (*ante*, VI. 515); Ridley, Feb. 3, 1789. 2 Hailes, 1061; White, Jan. 31, 1781 (11853); 2 Bell, 157.

Respondent's Authorities.—Crawford, Nov. 25, 1680 (11832); Melville, Jan. 22, 1779 (11853); A. S. Jan. 29, 1779; Lockhart, Nov. 14, 1804; Dict. v. Privileged Debt, App. No. 2; Ridley, Feb. 3, 1789 (11854), and 2 Hailes, 1061; 1 Bankt. 11. 54.

J. WATSON, W.S.—J. Ross, S.S.C.—Agents.

ALEXANDER CRAIG, Advocator.—*Skene.*

No. 125.

JAMES HILL and ALEXANDER SINCLAIR, Respondents.—D. F. HOPE.—

J. W. DICKSON.

Proof.—A verbal bargain to commute certain ladle-dues for a sum of £5, held proved, and defender assuited from a larger claim accordingly.

THIS was a special case. Hill and Sinclair, tacksmen of the ladle-dues Jan. 21, 1832. of Glasgow, pursued Craig before the Burgh Court there, for £23, 15s. 1st Division. 3½d. of dues. Craig offered to prove a verbal bargain, by which the dues Ld. Corehouse. had been commuted for a sum of £5. In leading the proof, objections were stated and sustained to the examination of two of Craig's witnesses, and the magistrates decerned against him. He brought an advocation, under which the Court remitted to the magistrates to recall their decree, and to allow the proposed examination.¹ The proof being then completed, the magistrates found that Craig had failed to prove the bargain as alleged,

¹ May 28, 1830, *Ante*, VIII. 833.

No. 125. and of new decerned against him. He brought an advocation, under
Jan. 21, 1832. which the Lord Ordinary altered the judgment of the magistrates, found
Craig v. Hill, that the bargain was sufficiently proved by parole testimony and real evi-
&c. dence, and assoilzied him with expenses.

M'Millan v. The Court adhered, without calling on Craig's counsel to support the
Campbell. note.

J. BENNET, W.S.—C. FISHER,—Agents.

No. 126. NEIL M' MILLAN, Appellant.—D. F. HOPE—NAPIER.
 ALLAN CAMPBELL, Respondent.—A. M' NEIL.

Process—Circuit Court—Service of Appeal—20 Geo. II. c. 43.

1. A notice of intention to appeal from the Sheriff Court to the Circuit, given verbally by the agent of the party in open Court, immediately after judgment, and entered by the clerk in the minute-book of Court; but without any bond of caution being given in at the time, though lodged within ten days thereafter,—held not to be an appeal taken in open Court in terms of the statute 20 Geo. II. c. 43.

2. Service of appeal upon the opposite party in terms of the statute, does not imply the *actus legitimus* of an officer of Court or king's messenger, for whom there is no warrant in such cases: but,

3. There must be a probative attestation of the fact, by delivery before witnesses, or a notarial instrument to satisfy the Judge; and neither a certificate of the appellant's agent that he delivered the copy, nor the admission of the respondent's agent that he received it, is sufficient for that purpose.

Jan. 21, 1832. M' MILLAN pursued an action before the Sheriff of Renfrewshire against
2d Division. Campbell, in which the Sheriff assoilzied the latter. On the 24th April,
Circuit Court. 1829, when that judgment was pronounced, the agent for M' Millan im-
Ld. Moncreiff mediately thereafter stated in open Court that he meant to appeal, which
F. notification the clerk of Court entered in the minute-book. At this time,
 however, no bond of caution was lodged for M' Millan, nor any writing whatever. On the 4th of May, being within ten days after the judgment, M' Millan's appeal, in the usual form of Reasons, and with caution, was lodged, in writing, concluding as follows:—" This appeal I lodge in the hands of the clerk of court, lodging caution, and serving the opposite party with a duplicate hereof in terms of law, this 4th day of May, 1829. (Signed) Neil M' Millan." Of the same date the agent for M' Millan put a copy of the appeal into the hands of Campbell's agent, who accepted the same, and the fact was not denied. On the back of this copy there was a writing holograph of the agent, but without witnesses, in these words:—" I, David Glassford, procurator for the appellant, did this day serve an exact double of the within on Mr Archibald M' Kinnon, writer in Greenock, procurator for the defender, personally apprehended.—(Signed) David Glassford. Greenock, 4th May, 1829."

When the appeal was called at the ensuing Circuit Court held at

Glasgow, the counsel for Campbell objected in limine that the requisites No. 126. of the jurisdiction act, 20 Geo. II. c. 43, had not been complied with. ^{Jan. 21, 1832.} On the subject of appeals to the Circuit Court, the 34th section of that ^{M'Millian v. Campbell.} statute provides, *inter alia*, " And such appeal, it shall be lawful for the party conceiving himself aggrieved, to take and enter in open Court, at the time of pronouncing such decree, judgment, or sentence, or at any time thereafter within ten days, by lodging the same in the hands of the clerk of Court, and serving the adverse party with a duplicate thereof, personally, or at his dwelling-house, or his procurator or agent in the cause, and serving in like manner the inferior Judge himself, in case the appeal shall contain any conclusions against him, by way of censure or reparation for damages, for alleged wilful injustice, oppression, or other malversation ; and such service shall be sufficient summons to oblige the respondents to attend and answer at the next Circuit Court which shall happen to be held within fifteen days at least thereafter." The 36th section farther enacts, " That where such appeal shall be brought, such complainant, at the same time he enters such appeal, as aforesaid, shall lodge in the hands of the clerk of Court from which the appeal is taken, a bond, with sufficient cautioner, for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded ; and the clerk of Court shall be answerable for the sufficiency of such cautioner." The act of sederunt on the subject is a reprint of the statute. Campbell maintained, upon the terms of this statute, that the appeal ought to be dismissed, as there was no execution produced in process to prove that he had been served with a copy of the appeal by a messenger or officer of Court, and a decision of Lord Pitmilly at a former circuit was alluded to, where, it was said, the same objection had been sustained.

Lord Moncreiff pronounced the following interlocutor :—" In respect it appears very doubtful whether a mere certificate by the agent of the appellant can be received as sufficient evidence that the copy of the appeal was regularly served on the opposite agent, and that it is stated to have been previously decided at the Glasgow Circuit by Lord Pitmilly in the case of Taylor, and several other cases, that this is not sufficient ; and in respect that it is farther stated that there is a variety of practice in this matter, and as it is of importance that this matter of form should be definitively settled, certifies this case to the Second Division of the Court of Session, and appoints parties to state the question in mutual minutes, to be seen and interchanged."

Pleaded for Campbell.

There are two modes of taking an appeal contemplated by the statute : 1st, the appeal may be taken in open Court by a minute or writing to that effect, immediately after judgment, accompanied at the same time with a bond of caution, in terms of the statute and relative act of sederunt ; or, 2d, by lodging the appeal in the hands of the clerk of Court within

No. 126. ten days after the date of the judgment, and also within the same period serving his adversary with a copy of the appeal. But the service meant by the statute is not the simple unattested act of the party's procurator. It contemplates the *actus legitimus* of service by an officer of law, of which an execution returned by him in due form is the evidence. As there is no such execution in process in this case, and as the improbatative writing on the back of the copy delivered, cannot supply its place, the statute has not been complied with in respect of service. Nor was the appeal taken in open Court in the sense of the legislature; there was merely a verbal notice that an appeal would be taken, which notice was not accompanied by any bond of caution, and could not constitute a taking of appeal in open Court, although the clerk had taken a memorandum of the notice in the minutes.

Pledged for M'Millan.

The appeal was taken in open Court the moment the judgment was pronounced, by public notice to that effect given by the appellant's agent. The clerk of Court immediately minuted this notice in the minute-book of Court containing the interlocutors in causa; and has now transmitted a certificate of the fact in these terms:—"I, Peter Jackson, depute sheriff-clerk at Greenock, do hereby certify, that the procurator for the pursuer, in the cause which depended at the instance of Neil M'Millan against Allan Campbell, did, at pronouncing final judgment, on the 24th April, 1829, intimate, in open Court, an appeal of said cause to the then next Circuit Court of Justiciary to be held at Glasgow, in common form; and a marking to that effect is entered in the minute-book of Court, of that date. Given under my hand, at Greenock, this 8th day of April, 1830. (Signed) P. Jackson."—A bond of caution was not lodged at the time, but this was done within the ten days, which is all that the act requires.

2. Not only was the appeal taken in open Court, but the party was served with a copy of an appeal duly lodged in terms of the statute. It is admitted that, in point of fact, a copy, with an attestation written upon it by the agent who delivered it, was received by the respondent's agent containing full information. The statute enjoins no stricter mode of service, nor would it have been competent for an officer to have returned an execution in the mode contended for, as there is no warrant in such a case upon which he could proceed, and both the Court of Session and the House of Lords afford analogies in support of the doctrine, that the terms "serve" and "service" do not necessarily imply the official act of messenger-at-arms, or officer of law. The object of the legislature was not to complicate process, but that the opposite party should be sufficiently apprised of the appeal which might be served or delivered by the agent and proved habili modo. In this case no written attestation was necessary, as the fact of delivery is not denied.

On advising the minutes, the Court appointed them to be laid before the other Judges for their opinions.

Jan. 21, 1832.
M'Millan v.
Campbell.

The following opinions were returned.

No. 126.

LORDS PRESIDENT, BALGRAY, CRAIGIE, and GILLIES.—This case relates to ^{Jan. 21, 1832.} **M'Millan v. Campbell.** an appeal attempted to be taken from a judgment of the Sheriff of Renfrew, to the Circuit Court at Glasgow.

The act 20 Geo. II. c. 43, allows such appeals to be taken,

1st, In open court, at the time of pronouncing decree by the inferior Judge; or,

2dly, Within ten days thereafter, by lodging an appeal in the hands of the clerk of Court, “and serving the adverse party with a duplicate thereof, personally, or at his dwelling-place, or his procurator, or agent in the cause, and serving, in like manner, the inferior Judge himself,” &c. &c.; “and such service shall be sufficient summons to oblige the respondent to attend and answer,” &c. &c.

It does not appear that a copy, or duplicate, of the appeal lodged with the clerk, was served on the respondent, by any officer of the law, as no execution by any such officer is produced.

Further, it appears that what was substituted for such service, was merely a certificate by the procurator for the appellant, that he had served an exact double on the procurator for the respondent, personally apprehended; which certificate is signed by the procurator for the appellant, but without any witnesses to such service.

We are clearly of opinion that this is not in compliance with the statute.

1st, When an Act of Parliament, in regard to any legal proceedings, requires the service of any process or legal notice on a party, we are clear that the act must be held to require the *actus legitimus*, known in law by the term service, particularly when we consider the consequences which may follow upon the appeal, not only to the parties, but to the inferior Judge; and, of course, that the process, or notice, shall be solemnly intimated to the party by an officer of the law, of which the regular evidence is an execution of service by the messenger, or other officer, before at least two witnesses, to the act of service.

2d, Even if we could hold that notification, or service, by the private agent of one party, could be held to be sufficient, yet in this case, as such certificate of service does not bear that it was made before witnesses, we cannot hold that it is sufficient; for, it would be absurd to give greater weight to the certificate of an interested and partial individual, (as the agent of a party must be,) than to the execution of a regular and impartial officer of the law, whose execution of service would be null without witnesses.

Therefore, we are clearly of opinion, that the appeal in this case was not served in terms of the statute.

But we doubt if it be necessary to determine this point, in respect that it is now stated, that a bond of caution to abide by the judgment of the Circuit Court, and for payment of the costs, if any shall by that Court be awarded, was not lodged in due time, in terms of the 36th section of 20th Geo. II. c. 43, which provides, “That where such appeal shall be brought, such complainer, at the same time he enters his appeal, as aforesaid, shall lodge in the hands of the clerk of Court from which the appeal is taken, a bond, with sufficient cautioner, for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded; and the clerk of Court shall be answerable for the sufficiency of such cautioner.”

The condition under which the appeal is allowed by the above clause, is, that the

No. 126. party, at the time he lodges his appeal, must lodge his bond of caution, which in this case was not done.

Jan. 21, 1832.
Macmillan v.
Campbell.

LORD MONCREIFF.—I concur in this opinion, except that I do not think that the appeal was effectually taken in open court, because it appears to me that the terms of the statute necessarily import, that, in order to do so, some writing must be "lodged" with the clerk of court; and that a mere note by the clerk, in the Minute, or Diet-Book, is not what the act contemplated.

LORDS MACKENZIE, MEDWYN, and NEWTON.—One object of the Legislature in enacting the Jurisdiction Act, was to introduce a simpler form of obtaining a review of the sentences of inferior courts in criminal causes, and in civil causes within the value of £12, than the ordinary forms by advocation and suspension. Instead of a petition termed a bill, presented to the Bill-Chamber, which may be refused, but which, if passed, allows the appeal, and is a warrant for letters of advocation or suspension, issuing under the King's Signet, which authorize messengers-at-law to summon the respondent to appear in Court, the party is at once authorized to appeal; and this appeal he may take and enter in open Court, at the time the Judge pronounces decree, or within ten days, by lodging the same in the hands of the clerk of Court, and serving the adverse party, or his procurator, with a duplicate of it; and such service, it is declared, shall be sufficient summons to oblige the respondent to attend and answer.

"The facilities thus afforded for such appeals were, that the party had full power to appeal, without obtaining any warrant from the Judge officiating in the Bill-Chamber, or the intervention of the royal authority to bring the respondent into Court by the execution of letters under the Signet, which requires the intervention of an officer of the law.

"The form seems obviously adopted from the mode of appeals to the House of Lords, where the petition of appeal does not require to be served on the respondent by a messenger, or other officer of the law; and to require this in an appeal to the Circuit Court, would be again resorting to some of the troublesome and expensive machinery, which it was intended to abolish.

"Besides, a messenger or sheriff-officer must hold some warrant in the king's name, or the sheriff's, for serving a notice calling upon any person to appear in Court. Of his own authority, no messenger can do this, and the Jurisdiction Act does not authorize him; on the contrary, it says, that, taking appeal in open Court, or lodging the appeal with the clerk within ten days, and serving a duplicate on the party or his procurator, shall be sufficient summons. And it appears, that the very circumstance that service on the procurator is sufficient, shows that the intervention of a messenger or other officer is not required. The authority of the messenger might be necessary to summon a party to appear in Court; but if notice of the appeal to his agent be sufficient, it is clear that the parties are still held to be in Court; that the appeal removes them into the Court of Appeal, and that all that is necessary is entering the appeal, and giving due notice of it to the adversary, which may be given any-how, if the appeal be not in open Court—it not being said that it must be done by a messenger, and being contrary to the evident intention of the statute to require such a formality.

"If it had been intended that a messenger or other officer should summon the respondent to appear, instead of saying that the appeal shall be sufficient summons we think the act would have provided, that entering appeal should be sufficient warrant to authorize a messenger to summon, or to authorize the Inferior Court to

grant warrant to its officers to serve it on the party. But no application is ever made to the inferior Judge, on entering or lodging the appeal, to grant warrant to an officer to serve the appeal on the opposite party, and to ordain him to attend and answer. To ordain a party to appear before a Court, whether of appeal or original, belongs to the jurisdiction of that Court; but the act has also dispensed with this, as the appeal is of itself declared to be sufficient summons for this purpose.

Jan. 21, 1832.
M'Millan v. Campbell.

"The practice, though not uniform, and where it would be so natural to adopt the mode of service by a messenger, or other officer, as in the case of first calling a party into Court, confirms this view of the law; and we see no risk in dispensing with a regular citation by a messenger. The party who had been successful, whether he has occasion or not to extract his decree, can always easily learn if an appeal has been taken in open Court, or lodged with the clerk within the ten days; besides, if service of the appeal upon himself or his agent be disputed, it must be established, like any other fact, by the testimony of two witnesses; but we think that service by a messenger, and a return upon the execution by him, is not requisite, as a solemnity like the execution of a summons, which is expressly introduced and regulated by statute. It appears, therefore, that where the appeal is not made in open Court, it is sufficient that it is not disputed that the appeal was intimated, (as is the case here,) or that an acknowledgment is produced from the party, or his procurator, that it has been served upon them, by sending them a copy of it; or if this has been declined, the party, or any one for him, may deliver it before two witnesses, who must be ready to prove this in Court; and, by way of assisting their memory, it would be proper that there should be a certificate upon the process copy, of the fact of delivery, subscribed by the two witnesses, as well as by the party serving it.

"Entertaining this opinion, it is perhaps unnecessary to notice the certificate by the Depute Sheriff-clerk, that at pronouncing judgment in this case, an appeal was taken in open Court, and that a marking to that effect is entered in the minute-book of Court. We entertain very great doubt whether we can admit this certificate to prove further than that such a marking appears in the minute-book. It seems to us, that the only evidence which can be admitted of an appeal in open Court, is an entry to that effect in the minutes of Court, which contain the procedure in each cause, and that a mere entry in the diet book of Court will not supply the want of this or a written minute of appeal. All proceedings in such Courts are in writing, and we doubt if the Jurisdiction Act meant to introduce a *viva voce* announcement of the intention to appeal, as equivalent to the act of appealing without a written minute to that effect.

"Where an appeal is duly taken in open Court, all persons interested in the appeal being present in Court, the adverse party and the Judge require no other notice or service of the appeal on them, and it is only if the appeal is entered at a subsequent period, and out of the presence of the parties, that intimation by service of the appeal is required: What seems to have been done here, on reading out the interlocutor deciding the case, was merely a statement by the procurator, that he would appeal, and we are the more confirmed in this, as it does not appear that a bond of caution was then lodged, or in the course of that day, as it ought to have been, if this was intended as the entering of the appeal in open Court authorized by the statute, for caution was not lodged till the tenth day after the interlocutor was pronounced."

No. 126.

Jan. 21, 1832.
M'Millan v.
Campbell.

LORD COREHOUSE:—I concur in this opinion; only, I am inclined to think, that written evidence of service, by the certificates of two witnesses, is necessary, and that the mere acknowledgment of the party, or his procurator, that a copy was received, is not enough.

LORD FULLERTON:—I do not think that the appeal in this case can be held to have been entered in open Court. Independently of any inference from the practice in other cases of appeal, the terms of the statute seem to be conclusive on this point. It provides, that “such appeal it shall be lawful for the party conceiving himself aggrieved, to take and enter in open Court, at the time of pronouncing such decree, &c.,” “or at any time thereafter, within ten days, by lodging the same in the hands of the clerk of Court, and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent.” It further directs the “serving in like manner the inferior Judge himself, in case the appeal shall contain any conclusions against him by way of censure or reparation, for damages for alleged wilful injustice, oppression, or other malversation.” These expressions necessarily imply that “the appeal” must consist of some minute or writing, containing the appellant’s demands, and admitting of being lodged with the clerk of Court, and of being served in duplicate on the respondent. Although, therefore, the appellant did, as appears from the clerk’s certificate, intimate an appeal, i. e. intimate his intention to appeal, at the time of pronouncing judgment on the 24th of April, I do not think that an appeal can be said to have been taken and entered in the sense of the statute until the 4th of May, when the paper purporting to be an appeal was lodged with the clerk. Accordingly, the paper so lodged removes all doubt upon this point. From the quotation made in the respondent’s minute, pages six and seven, of which the accuracy does not seem to be disputed, that paper did not contain merely reasons of appeal, but bears to be the appeal itself, which “appeal the appellant lodges in the hands of the clerk of Court; lodging caution, and serving the other party with a duplicate hereof, in terms of law,” &c. Indeed this circumstance of the lodging of caution is decisive of the date of the appeal, as the statute requires, sect. 36, that the appellant shall lodge caution “at the same time he enters his appeal.”

The appellant’s case, therefore, must stand on the second or alternative mode of entering an appeal authorized by the statute, which requires the lodging of it with the clerk of Court, and the service of a duplicate on the opposite party, or his procurator, within ten days. Now, upon this point I should have great difficulty in adopting the argument of the respondent to the full extent, and in holding that the term “service” denotes an *actus legitimus* to be performed exclusively by an officer of the law, and attested in due form by an execution. No authority is referred to in support of this proposition, and it rather appears to me, from the construction put on the term in other cases, that it is not confined to the act of an officer of the law, but may include any formal and sufficiently attested intimation or delivery of the document to be served. But this less rigorous construction of the term appears to be sufficient on the present occasion to support the case of the respondent.

The object and effect of serving the adverse party with a duplicate of the appeal, is to oblige the respondent to appear at the Circuit Court under the usual sanction, that, if he does not, judgment may be legitimately pronounced against him. Accordingly, it is enacted, that “such service shall be sufficient summons to oblige the respondent to attend and answer at the next Circuit Court,” &c. And this provision seems to apply not only to the case of an appeal praying merely for an altera-

tion of the judgment, but to that of its containing any conclusion against the inferior Judge himself, "by way of censure, or reparation of damages for alleged injustice, oppression, or other malversation." But procedure of this kind, and capable of producing such consequences, seems necessarily to require, according to every analogy, not only a formal intimation to the party against whom the demand is directed, but intimation made in such a way as to admit of being the subject of an accompanying attestation, sufficient, until redargued, to satisfy the judge of the court of appeal that such intimation has been made.

Jan. 31, 1838.
M'Millan v.
Campbell.

In the present case, however, all that appears is a certificate of the agent for the appellant, stating, "that, on the 4th of May, 1829, he served an exact double of the appeal on the agent for the other party." Now, whatever latitude may be allowed in construing the term service, I cannot hold this to be sufficient. Considering the object and effect of the service of the appeal, and considering that the service, as well as the lodging of the appeal with the clerk, must take place within ten days after the decree appealed from is pronounced, I should think that an intimation or delivery of the duplicate before witnesses, and consequently, capable of being made the subject of an accompanying attestation, proving, until challenged, its own date, was indispensable to support the appeal; unless some other and less rigorous form of service had been sanctioned by invariable usage. And, as I do not understand this to be the case, I am inclined, on the grounds above stated, to sustain the respondent's objection to the appeal.

LORD JUSTICE-CLERK.—We have now the opinions of the other Judges, and I must say that mine coincides precisely with that of Lord Fullerton. I am clearly of opinion, that we cannot consider this appeal to have been taken in open Court in the sense of the statute, and that it does not fall under the case of Hart, decided upon that specialty in the Court of Justiciary. But neither do I think that the term service implies, in this case, the necessity of the *actus legitimus* of an officer. In short, I agree with Lord Fullerton.

LORD CRINGLETIE.—So do I. The return of an execution of service by an officer of law, I do not think requisite; but there is here no sufficient evidence in the bare attestation of the agent, and I do not think the appeal was taken in open Court.

LORD MEADOWBANK.—I am quite clear we cannot hold that this appeal was taken in open Court, but I differ from your Lordships on the point of service. By the statute, there is no particular mode of service enjoined, and as for the interference of an officer, there is no warrant given upon which he could act. Service by an officer without a warrant, I care not whether a King's messenger or officer of Court, would be utterly worthless; therefore the service is just of a nature that may be proved *habili modo*. I perfectly agree with Lord Corehouse, that a certificate with two witnesses would be quite sufficient; but I have yet to learn, that where a matter of this kind may be proved by witnesses, it may not also be proved by the admission of party. Here there is no necessity for a certificate, or the evidence of witnesses, for the fact is admitted, and by the law of Scotland that is competent proof.

LORD GLENLEE.—I am not inclined to hold that the interference of an officer is necessary here; but the matter ought at least to be certified by the writing which will bear faith in a court of justice. A notarial instrument for instance; the mere certificate of an agent or clerk, will not do.

No. 126. **LORD JUSTICE-CLERK.**—As to the expenses, I am afraid we have no discretion. The appeal must be dismissed as incompetently served, and expenses must necessarily be granted.

Jan. 21, 1832. **M'Millan v. Campbell.** THE COURT accordingly dismissed the appeal, with expenses.

Turnbull v. Forsyth.

JAMES STUART, S.S.C.—M'LEAN and GIFFEN, W.S.—Agents.

No. 127.

ALEXANDER TURNBULL, Pursuer.—Cuninghame.

JOHN FORSYTH, Defender.—More—Napier.

Process.—The Lord Ordinary, on a closed record, having allowed production of books, previously within the power of the party; the Court, of consent, allowed the record to be opened up, that the opposite party might amend his statement, to meet the new production.

Jan. 21, 1832. **TURNBULL**, cashier of the Edinburgh and Leith Glass Company, raised an action in their name against **Forsyth**, as an alleged partner of that **2d Division. Ld. Fullerton.** Company, for certain instalments claimed in terms of the contract of R. copartnery. **Forsyth** did not admit that the calls upon the stock were made in terms of the contract; and in reply to the pursuer's condescendence, containing a general averment that the directors had acted agreeably to the powers vested in them by the contract, he answered, "not admitted, as the defender has no means of ascertaining the truth of it." The books of the Company were not produced by the pursuer to instruct the fact, nor any certified extracts, although they were in possession of the Company; and by a clause in the contract, none but the directors had access to them, without the authority of a general meeting. The record was closed upon re-revised condescendence and answers, without an offer to produce the books until the case was debated before the Lord Ordinary, when the pursuer proposed production, but was opposed by the defender, who maintained, in terms of the 55th section of the Act of Sederunt, that it was incompetent to produce writings, previously within the power of the party, after the record was closed.

The Lord Ordinary having appointed the minute-book to be produced, that excerpts as to the calls might be made by the clerk, **Forsyth** reclaimed, and argued, that the interlocutor was an evasion of the provisions for regulating the forms of process; and that, if they were to be relaxed in favour of the pursuer's productions, the defender was entitled to a corresponding benefit, and to have the record opened up to amend his answers to the condescendence.

LORD JUSTICE-CLERK.—I have great doubts as to this interlocutor; but, Mr Cuninghame, you had much better allow the defender to have the record opened up, as he proposes; and to amend his answers to meet the new productions.

Cuninghame.—We have no objections to that.

THE COURT accordingly remitted to the Lord Ordinary to open up the No. 127.
record.

WILLIAM ALEXANDER, W.S.—J. W. MACKENZIE, W.S.—Agents.

Jan. 21, 1832.
Turnbull v.
Forsyth.

ALEXANDER CAMPBELL and Others, Suspenders.—A. M'Neill.
ALEXANDER PAUL, Charger.—Monteith.

Campbell, &c.
v. Paul.
No. 128.

Sale—Bill of Exchange.—A party having granted a bill at six months as the price of the materials of a house, of which he immediately took delivery, and, not having objected during the currency that he had not received every thing truly included in his bargain, but having asked farther indulgence—a bill of suspension on the ground that certain parts of materials not delivered were included in his purchase, refused.

Mrs DOUGLAS, of Douglas Park, having acquired right to part of the lands of Orbiston in Lanarkshire, whereon there had been erected certain buildings for an establishment on the principles of Mr Owen, which, after a very short trial, had utterly failed, proposed to have the buildings taken down, and the materials sold. The suspender, Campbell, became the purchaser of the eighth lot, or division, which was described in the missive letter accepting his offer, as “the eighth division from the south end of the Orbiston buildings, including the whole materials in said division, except stones and brick.” The price agreed on was £105, and for this Campbell, before taking delivery of the materials, granted to the charger Paul, for behoof of Mrs Douglas, a bill at six months, accepted by himself and by William Johnstone and Co. as cautioners. Thereafter he took possession of the materials of his lot, Mrs Douglas retaining the lead, and the bricks and stones, with the lime of the walls. No hint was then, or during the currency of the bill, given by Campbell, that he considered he had not got every thing really understood to be purchased by him, and the day before the bill became due he wrote to Mrs Douglas soliciting farther delay in these terms: “As the work for which the materials were purchased has only been finished within these few weeks, I could only procure the Company's bill for the balance due me by bill at four months, which I enclose, endorsed by me and William Johnstone and Co. for £123 sterling, which I hope you will have the kindness to accept for the one due to-morrow for £105, and give me the balance, deducting discount.” Mrs Douglas having refused to take the new bill, and a charge having been given on that for £105, Campbell, and Johnstone and Co. presented a bill of suspension, founded on the allegation that he had not obtained delivery of all the materials purchased by him, and that the lead and lime retained were of very considerable value. To this it was answered, that it was the bona fide understanding of the parties, that the lead which had been separately removed and sold was not included in the suspender's lot, that the lime was also understood to be excepted, with the

2d Division.
Bill-Chamber.
Ld. Moncreiff.
R.

No. 128. brick and stone with which it was built up, and in fact that it was only the materials within the walls which had been purchased ; and the suspender's conduct in making no complaint during the currency of the bill, and then proposing to renew it, was referred to as conclusive evidence of the accuracy of this statement.

Jan. 21, 1832. —
Campbell, &c.
v. Paul.

Mitchell v.
Morrison, &c.

The Lord Ordinary refused the bill, and the Court adhered.

C. FISHER,—GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—Agents.

No. 129.

JAMES MITCHELL, Advocator.—*Robertson.*

JOHN MORRISON and Others, Respondents.—*Russell.*

Statute—Jurisdiction—Process.—Penalties being imposed by a road act for evasion of tolls on conviction “ before one or more Justices of the Peace,” with leave to parties considering themselves aggrieved to apply by summary complaint to the Court of Session for redress—Held, 1. that an advocation was a competent form of complaint; 2. that the Court had no jurisdiction to convict and find offenders liable in the penalties; and, 3. that there must be a conviction by the Justices.

Jan. 21, 1832. By a private road act for the Kerse district in the county of Stirling, (34 Geo. III. c. 138,) it was enacted, that all persons evading the tolls in manner specified, “ and being thereof convicted, on the oath or other legal testimony of one or more credible witness or witnesses, before any one or more Justices of the Peace for the said county of Stirling, shall, for every such offence, forfeit and pay to the said trustees, or to their treasurer for the time being, the sum of 20s. sterling,” &c. And by the 70th section, it was further enacted, “ That if any person or persons shall think him, her, or themselves aggrieved by any order or other proceedings of the said trustees, or by the order of one or more Justice or Justices of the Peace, it shall and may be lawful for the said person or persons to appeal for redress to the next General Quarter-Sessions of the said county, at which not fewer than three Justices shall be present, and such appeal shall be lodged within six days after the sentence complained of; and if any person or persons shall think himself, or herself, or themselves, aggrieved by the judgment of the Quarter-Sessions, it shall be lawful to such person or persons to apply for redress by summary complaint to the Court of Session ; provided always, that, before such application, the party making the same shall find caution to pay the sum of 40s. sterling, besides full costs of suit, in case such party shall not prevail.”

Under this statute the advocator Mitchell, who was tacksman of the Kerse toll-bar, brought an action before the Justices of the Peace of the county of Stirling, against the respondents Morrison, &c., to have them found liable in the penalties for alleged acts of evasion, by driving their

coaches along a road of the Forth and Clyde Canal Company, on the No. 129.
 banks of the canal, and thereby avoiding the toll-bar. The respondents
 rested their defence on certain clauses of exemption contained in the road act,
 and in respect of these, without allowing any proof, the Justices assailed them, and the quarter-sessions adhered on appeal. Mitchell
 then presented a bill of advocation, on advising which Lord Eldin pronounced this interlocutor :—“ Having considered this bill, answers, and inferior Court process, remits to the Justices of Stirlingshire with instructions to recall their interlocutors against the complainers ; to find that all persons who use coaches or other carriages for the purpose of travelling upon the tracking-paths or roads upon the banks of the canal, must be considered as evading the tolls in the true meaning of the statute, and liable to the penalties therein contained ; to allow the complainers a proof of their allegations, and thereafter to decide according to the rules of justice ; and further, to find the respondents liable in all the expenses hitherto incurred by the complainant : Finds the respondents liable for all the expenses incurred by the complainants in this Court, and remits to the auditor to tax and report thereon.”

The respondents having reclaimed, the Court recalled and remitted to the Lord Ordinary to pass the bill. Thereafter a great deal of procedure was had, to which the Canal Company became parties, and which issued in a judgment by the Court, finding the respondents “ guilty of evading the Kerse toll-bar, by driving their coaches and carts along the banks of the canal, and therefore liable to the advocator in the forfeitures and penalties imposed by the statute libelled on,” and remitting to the Lord Ordinary “ to ascertain the amount thereof, and decern for the same.”¹

The respondents appealed to the House of Lords, and maintained a plea not raised in this Court, that the Court of Session had no power, under the Act, to convict offenders. The House of Lords thereupon pronounced this order :—“ Inasmuch as a question has been raised at the bar of this House respecting the jurisdiction exercised by the Court of Session in this matter, which does not appear to have been discussed or considered by the said Court, it is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, that the cause be remitted back to the Second Division of the Court of Session, to consider and state their opinion, Whether that Court has, by the law of Scotland, any jurisdiction, upon a bill of advocation, to find a defender liable in penalties under the act in the pleadings in the said cause mentioned, such defender not being convicted before a Justice, or Justices of the Peace ? And the said Second Division of the Court is hereby required to take the opinion of the Judges of the other Division of the Court, and of the Permanent Lords Ordinary, upon this question.”

Jan. 21, 1832.
 Mitchell v.
 Morrison, &c.

¹ See Ante, V. 909.

No. 129. Cases were accordingly given in arguing this question, and a plea maintained by the respondents, that advocation was not a form of complaint competent under the statute. The pleadings having been laid before the Judges of the First Division, and the Lords Ordinary, the following unanimous opinion was returned by their Lordships:—

“ This question has arisen in the course of certain procedure instituted by the pursuer and advocator, for recovering from the respondents and defenders the penalties imposed by the Stirlingshire Road Act, 34 Geo. III. cap. 138, confirmed by the 50 Geo. III. cap. 16, on persons guilty of evading the payment of toll-duties. The application was made, in terms of the statute, to the Justices of the Peace of the Falkirk district; and after various steps of procedure, on the 18th November, 1823, the Justices, upon a particular construction of the clauses of exemption in the statute, and of the averments of the pursuer, found that the defenders had been guilty of no evasion of the toll-duties, and assailed them, with expenses. The pursuer then, agreeably to the provisions of the statute, brought this judgment under the review of the Quarter-Sessions; and on the 2d of March, 1824, the Justices there assembled, in respect of the view they took of the legal effect of the admissions made by the parties, dismissed the appeal, and adhered to the interlocutors of the Justices. A bill of advocation was then presented; upon considering which, Lord Eldin, ordinary in the Bill-Chamber, remitted to the Justices to recall their interlocutor; to find, in terms of certain instructions regarding the legal import of the provisions in the statute; and ‘ to allow the complainers a proof of their allegations; and, thereafter, to decide according to the rules of justice.’

“ Upon a petition by the defenders and respondents to the Second Division of the Court, their Lordships remitted to the Lord Ordinary to pass the bill. The discussion then proceeded in ordinary form; and the cause having been reported to the Second Division of the Court, upon cases, the court pronounced the judgment of the 7th July, 1827, by which they, *inter alia*, ‘ find the respondents guilty of evading the Kerse toll-bar, by driving their coaches and carts along the banks of the canal, and, therefore, liable to the advocator in the forfeitures and penalties imposed by the statute libelled on; and remit to the Lord Ordinary to ascertain the amount thereof, and decern for the same,’ &c.

“ That judgment having been brought under review of the House of Lords, the case has been remitted for the purpose of obtaining the opinion of the whole Judges on the question, ‘ Whether the Court of Session has, by the law of Scotland, any jurisdiction upon a bill of advocation, to find a defender liable in penalties, under the acts in the pleadings in the said cause mentioned, or either of them; such defender not being convicted before a Justice or Justices of the Peace?’

“ In answering this question, we are not disposed to adopt the argument of the defenders, on the absolute incompetency, under any circumstances, of advocation from the judgments pronounced by the Quarter-Sessions. The statute merely provides, ‘ That if any person or persons shall think himself, herself, or themselves, aggrieved by the judgment of the Quarter-Sessions, it shall be lawful to such person or persons to apply for redress by summary complaint to the Court of Session; and considering that the right of review by advocation is one which might, at common law, have been competently exercised, we do not think that the pointing out in the statute, of a summary mode of redress by complaint, can, in sound con-

Jan. 21, 1832.
Mitchell v.
Morrison, &c.

struction, be held to exclude that right. But then, of course, no judgment or finding can be competently pronounced by the Court in such advocation, which is inconsistent with the provisions of the statute. The express provision of the statute, in regard to penalties for the evasion of toll-bars, is, ‘ That any person being thereof convicted on the oath, or other legal testimony, of one or more credible witness or witnesses, before any one or more Justices of the Peace for the said county of Stirling, shall, for every such offence, forfeit and pay to the said trustees, or to their treasurer for the time being, the sum of £20 sterling.’ In the present case, there was no conviction before one or more Justices; on the contrary, the Justices, adopting a particular view of the legal effect or relevancy of the pursuer’s averments, found it unnecessary to proceed to proof, and at once assailed the defenders. Now, in these circumstances, we do not consider an advocation to be incompetent; and, on the supposition of the judgment of the Justices being erroneous, we think that it would have been competent in such advocation to remit the case to the Justices, with instructions correcting their error, and directing them to allow the pursuer a proof, and to proceed to determine the case in terms of the statute.

“ But by the interlocutor appealed from, the defenders are found guilty of evading the toll-bar; and a remit is made to the Lord Ordinary to ascertain the amount of the penalties. It appears to us, that this mode of procedure is not only unauthorized by, but is contrary to, the provision of the statute, which requires a conviction of every such offence, ‘ on the oath or legal testimony of one or more credible witnesses, before any one or more Justices of Peace of the county of Stirling.’ And, therefore, in answer to the question now put to us, we submit, under the above explanation, that in our opinion, ‘ the Court of Session has not, by the law of Scotland, any jurisdiction, upon a bill of advocation, to find a defender liable in penalties, under the acts in the pleadings in the said cause mentioned, or either of them; such defender not being convicted before a Justice or Justices of the Peace.’ ”

The Judges of the Second Division having concurred in the above opinion,

THE COURT therefore found, that “ the Court of Session has not, by the law of Scotland, any jurisdiction, upon a bill of advocation, to find a defender liable in penalties, under the acts in the pleadings in the said cause mentioned, or either of them; such defender not being convicted before a Justice or Justices of the Peace.”

A. WISHART, W.S.—HORKIRK AND IMLACH, W.S. Agents.

THOMAS MEGGET, Pursuer.—*Cuninghame—J. W. Dickson.*

JOHN SCOUAR, Defender.—*D. F. Hope—Pyper.*

No. 129.

Jan. 21, 1832.
Mitchell v.
Morrison, &c.

Megget v.
Scouar.

No. 130.

Title to Pursue—Expenses—Process.—A discharged bankrupt is entitled to sue without finding caution for expenses, although he has conveyed his estates to a private trustee, such trustee having authorized him to sue in his own name for the recovery of the sum in question, and to apply the same when recovered to his own use, and having renounced all right to sue for the debt in his favour, and all claims upon the fund to be realized therefrom.

No. 130. IN 1826, the estates of Megget, W.S., were sequestrated—he was discharged under a composition-contract—and at the same time, he executed a disposition and assignation, in favour of Christie, as trustee for his cautioners, with the view of relieving them of the composition, and thereafter conveying the residue in fee to his children, in terms of a marriage-contract, and in liferent to himself.

Jan. 24, 1832.
1st Division.
Ld. Corehouse.

Megget v.
Scoular.

Christie then addressed the following letter to Megget:—“As you have explained to me your intention to raise an action at your instance against Mr John Scoular, leather-merchant in Edinburgh, for payment of a sum due by him, arising out of certain transactions which he had with the late copartnery concern of Aitken Megget and Company, and you, and as objections might be taken to your instance in that action, seeing that I hold from you a trust-disposition and assignation to certain property and funds, the residue of your late sequestrated estate, and also stand assignee to the outstanding debts due to the late firm of Aitken Megget and Company, I hereby, in both the above characters, authorize and empower you to sue in your own name, for the recovery of the sum or sums due by the said John Scoular, and to apply the same, when recovered, to your own use, and I hereby renounce all right to sue for the said debt in your favour, and all claims upon the fund to be realized therefrom.”

Megget thereupon raised an action against Scoular, who pleaded inter alia that Megget must find caution for expenses, before being allowed to insist.¹

Megget answered, that on being discharged under the sequestration, he was entitled to pursue any action without being obliged to find caution, and was in a different condition from a party who had executed a disposition omnium bonorum under a cessio, because every future acquisition was his own property, and free from the diligence of the creditors under the sequestration.

The Lord Ordinary repelled the plea, and Scoular having reclaimed, the Court adhered.

LORD BALGRAY.—I incline to concur in the opinion of the Lord Ordinary.

LORD GILLIES.—I conceive that a party who receives a discharge under a sequestration, becomes thenceforth as free to pursue any action, as any of the other lieges.

LORD PRESIDENT.—Suppose a man to execute a private trust-deed in favour of his creditors, in consequence of which they discharge him. It would be too much to hold him barred afterwards from pursuing any competent claim in a court of law, unless he found caution for expenses in the first instance. But such party's situation is not better than that of this pursuer.

LORD CRAIGIE concurred.

MEGGET and ROY, W.S.—R. MACFARLANE, W.S.—Agents.

¹ Jan. 21, 1826, Manuel and Co., Ante, IV. 381.

DUNCAN M'DONALD, Suspender.—*Rutherford.*
AFFLECK FRASER, Charger.—*D. F. Hope.*

No. 131.

Jan. 24, 1832.
M'Donald v.
Affleck.

Diligence Legal.—Bill of suspension and liberation passed, on juratory caution, in respect of a blunder in the charge.

MACDONALD, prisoner in the jail of Edinburgh, presented a bill of suspension and liberation against the incarcerator Fraser, setting forth that the charge of horning bore to have been given “upon the 10th day of February, one thousand eight hundred and thirty years,” while the letters of horning were declared to be “dated and signeted the 6th day of December current.” The charge was therefore without a warrant, and the caption was illegal, as following on an irregular denunciation.

Fraser answered, that “the date of the charge (as corrected by the messenger) must obviously have been ‘the tenth day of February, one thousand eight hundred and thirty-one years,’ but the word ‘one’ has been subsequently erased, by whom, the respondent will not pretend to say.” He contended, therefore, that the real date of the charge was the 10th of February, 1831, that the date of the letters of horning must be taken as 6th December last, instead of 6th December current; and that neither from the erasure of the word ‘one,’ to which he was no party, nor from the palpable clerical error of writing December current, instead of December last, was there any good ground of suspension.

The Lord Ordinary “passed the bill.” *

Fraser reclaimed; but the Court, without observation, adhered.

W. KYLE.—H. FRASER, W.S.—Agents.

BUCHANAN and GRAY, Advocators.—*Brown.*
ZUILLES, Respondents.—*Crawfurd.*

No. 132.

Process—Sheriff Court A. S.—Held by the Lord Ordinary, on a verbal report to the Court, that where a pursuer’s procurator in a Sheriff Court has failed to mark his name on the copy of the summons left for the defender, in terms of the Sheriff Court A. S., this does not entitle the defender to plead no process, but merely subjects the pursuer in an amand.

* “*Note.*—It is perfectly manifest, that there is a gross blunder in the charge. The date has plainly been originally different (probably December), and has been altered to February on the margin, while the person who did it, has forgot to remove the word current. But it is rather too much for the charger to expect that the Lord Ordinary is to take from him the scandalous insinuation, that the alteration has been made by the complainer, when he sees plainly, that the word current is of the same ink and hand-writing with the rest of the paper. There may be no doubt of the true date of the horning; but there is a manifest error in the charge, which vitiates the diligence.”

- No. 132. By the Sheriff Court Act of Sederunt, c. i. § 2, it is provided that "all defendants shall be cited upon a summons, signed by the clerk, fully libelled, and having the name of the pursuer's procurator marked on the back, &c.; and the clerk is discharged from calling any summons that is not fully libelled, marked, and signed, as directed." By c. 3, § 6, it is farther provided, that "the name of the pursuer's procurator shall be marked on the back of the copy of the libel, or of the citation left for the defender."
- Jan. 24, 1832. 1st DIVISION. Ld. Corehouse.
- Buchanan, &c. v. Zuilles.
- Macdonald, v. Farquharson, &c.

Buchanan and Gray raised a summons of removing before the Sheriff of Stirlingshire against Zuilles. Their procurator marked his name on the back of the principal summons, but failed to do so on the back of the copy left with Zuilles, who objected that there was no regular citation or calling, in reference to the provisions of the Act of Sederunt, and that there was no process. To this it was answered, that the partial failure to comply with these provisions, might subject an agent in a small amand for the irregularity, but could not be fatal to the citation, as it was not essential, and the Act of Sederunt had not affixed such a penalty.

The Sheriff sustained the objection, and dismissed the action. Buchanan and Gray brought an advocation, which the Lord Ordinary verbally reported, observing that his reason for doing so, was, the necessity of despatch in settling a question regarding the forms in daily use in the inferior courts. Being asked to state his opinion on the case, his Lordship stated that he did not consider there was any foundation for a plea of no process, and that the irregularity should merely subject the party to a small fine to be fixed by the Sheriff, for the purpose of enforcing the regulations of the Act of Sederunt.

The Court unanimously assented, and the Lord Ordinary pronounced this interlocutor:—"Having formerly heard counsel for the parties, and this day verbally reported, &c., remits to the Sheriff with instructions to alter his interlocutor, and to allow the case to proceed, and to impose a fine of five shillings upon the pursuer for neglecting to put the name of his agent on the back of the copy of citation; finds expenses due in this Court," &c.

MOWBRAY AND HOWDEN, W.S.—R. HAMILTON, W.S.—Agents.

- No. 133. **WILLIAM MACDONALD**, Pursuer.—*Shene—Smythe.*
Mrs FARQUHARSON and Others. —*Sol.-Gen. Cockburn—G. G. Bell.*

Road—Servitude—1. Circumstances in which the Court intimated an opinion that a party was entitled to shut up one of two short roads, leading from a highway to a ford, and leaving the highway about 180 yards distant from each other; and, 2. A remit made before answer to a surveyor to report on the line of communication most convenient for all concerned.

- Jan. 24, 1832. PART of the lands belonging to Mrs Farquharson in the parish of Kirk-michael, Perthshire, are thirled to the mill of Inveredderie, belonging to 1st DIVISION. Lord Newton. Macdonald, who is proprietor of the lands of Inveredderie and others, in H.

the same parish. The military road, or king's highway, from Spittal of No. 133. Glenshee to Bridge of Callie, passes near these lands, and not far from the river Shee, which is crossed by a ford in going from the highway to the mill of Inveredderie. There were lately two roads open, leading from the highway towards the ford. They left the highway at two points, distant from each other only 187 yards; and after running, each about 170 yards towards the ford, they met in a point a little way short of it, and became one road as they reached the ford. Both of these roads passed over the grounds of Macdonald, and one of them intersected diagonally an arable field recently enclosed. This road, in 1826, he shut up with a stone dike. Afterwards Watson, one of the tenants of Mrs Farquharson, who was thirled to the mill of Inveredderie, pulled down part of the dike, and refused to carry his corn to the mill unless he were allowed to use the diagonal road, which he alleged was the most convenient for him. These proceedings became the subject of a process before the Sheriff of Perthshire, and Macdonald also raised a declarator in this Court against Mrs Farquharson and her tenants. He concluded to have it declared that the single road, still left open, "was the proper and only road to the mill of Inveredderie, and all that he was bound to furnish as a road thereto;" that the defenders had no right to use the other road as a mill-road, or for any other purpose; and that he had a right to the enclosed field, in property, free of the diagonal road, or of any other servitude, or of any servitude of road through it. He also concluded, inter alia, that the defenders were still liable to the thirl, in the same manner as before one of the two roads was shut up.

The defenders pleaded, 1. That they had a prescriptive right to the road shut up, both as a public road, and a private servitude road; that they possessed, not merely an indefinite right of passage to the mill, at the place in question, but a right to the individual road shut up, as it had been used without interruption by their predecessors, and the public, as a road to kirk, kirk-yard, market, mill, and moss, for upwards of forty years. 2. That the road left open would oblige them to go 183 yards round, on their way to the mill; and that it was a great deal steeper than the one shut up, and otherwise inconvenient. And, 3. That the question, whether they could be compelled to take the road as left by the pursuer, was competent, in the first instance, only before the Justices of the Peace, or other local Judges; and in the meantime they were not bound to go to the pursuer's mill.

A proof was allowed to the defenders, under which several witnesses concurred in deponing, that, for above forty years, the road had been used as leading "to the miln, kiln, church, and market, and as a peat road, not only by people walking on foot, but also by horses and carts;" that it led not to the parish church, but to a chapel, where service was performed during summer, once in three weeks; that they had seen funerals pass along the road; and that, once a year, before the tenants began to drive

Jan. 24, 1832.
Macdonald v.
Farquharson,
&c.

No. 133. their peats, a man from each farm assisted in repairing the road, "so as to make it passable for carts."

Jan. 24, 1832. Macdonald adduced two witnesses, who stated that they considered the field, through which the diagonal road passed, could be of little use to him unless he could shut up that road; and that they considered the road now left open, to be a good serviceable road. A report as to the state of the two roads was obtained from a surveyor, bearing, inter alia, that on the line left open by Macdonald there was a length of about twenty-four yards, on which there was a rise of one foot in seven and a half feet.

The Lord Ordinary "sustained the defences, &c., reserving to the pursuer to apply to the Justices of the Peace for power to shut up the road in question; found the pursuer liable in expenses," &c.

Macdonald reclaimed, and the defenders inter alia insisted, that the Lord Ordinary had expressly found the diagonal road to be a public road, and that the Court could not alter the judgment, unless they found it not to be a public road.

LORD PRESIDENT.—The Lord Ordinary has not found this to be a public road. He has merely found that Macdonald had no right to shut it up as he did, reserving to him to make any application to the Justices of the Peace which he may deem advisable. I differ from his Lordship as to the right of Macdonald. I do not think him liable to have two branches of this road to the ford, kept simultaneously open, upon his grounds, so near each other. But it appears that, on the route left open, there are twenty-four yards so steep that there is a rise of nearly one foot in seven; so as to be nearly impracticable. I would propose to find that Macdonald's land was liable only to a single road, and to remit to a surveyor to point out by what track it is that this road may be best carried, so as neither to impair the servitude of the defenders, nor to injure the servient tenement unnecessarily.

LORD GILLIES.—There is much difficulty in defining what a public road is; at least, in drawing any abstract line which shall separate all private from all public roads, according to the law of this country. I do not think we are called upon to pronounce a finding on this subject. The pursuer admits the right of the defenders to a road, but he denies that he is bound to leave two roads in the situation of these. I think he is liable to leave one, and no more, and I concur in the suggestion that a remit should be made to a surveyor.

LORDS CRAIGIE and BALGRAY assented.

THE COURT then, "before answer, remitted to Joseph Mitchell, land-surveyor or civil engineer in Inverness, to examine the field and roads referred to in the proceedings before the Court, and to report, quam primum, what line of communication with the ford on the water of Shee will be most convenient for all the parties interested."

Pursuer's Authority.—2 St. 7. 10.

Defenders' Authorities.—1661, c. 41; 1685, c. 39; Forbes, Feb. 20, 1829 (*ante*, VII. 441.)

D. WATSON, S.S.C.—TOD and ROMANES, W.S.—Agents.

LIEUT-COLONEL ROBERT HENRY, Petitioner.—*Skene—A. Wood.*
ROBERT GREIG and Others, Respondents.—*D. F. Hope—Cowan.*

No. 134.
Henry v.
Greig, &c.

Bankrupt—Sequestration.—A party having lodged an affidavit and claim for a debt of £1472, at the meeting for electing an interim factor; and being debtor to the bankrupt estate (unless he succeeded in reducing a decree arbitral under a process which was then in dependence), and, not being present at the meeting for electing a trustee, when a resolution was passed disallowing his claim and vote—the Court recalled the resolution.

By a decree arbitral, dated in June 1831, Lieut.-Colonel Henry was found to be indebted to Burns in the sum of £529, as the result of a mutual accounting. Henry raised a reduction of the decree, and, inter alia, contended that he was the creditor, not the debtor, of Burns, under the accounting. The estates of Burns were sequestrated in November, while the reduction was pending, and Greig was chosen trustee. Henry lodged a claim and affidavit, to the amount of £1427, at the meeting for electing an interim factor. This claim embraced various sums, amounting to £411, not covered by the decree arbitral. One of the creditors minuted an objection to the claim, in respect of the submission and decree arbitral, alleging Henry to be debtor, and not creditor, of Burns. At the meeting for choosing a trustee, Henry was not present. The following minute and resolution were then agreed to:—"It was objected to the claim of Colonel Henry, for the reasons stated in the minutes of last meeting; and it was protested by Mr M'Intyre that his claim should not be allowed to be ranked at this or any other meeting of Mr Burns's creditors, and that the trustee should be instructed not to take it into account in making up any state or states of the affairs, he, Colonel Henry, having no interest in the funds, being indebted to Mr Burns in nearly £600 sterling, by a regular and valid decree arbitral, and having therefore no right to control the creditors in any question regarding the affairs, or say in the composition; for if he had, he might defeat the wishes, and materially affect the interest, of the other bona fide creditors, in a matter in which he ultimately can have no concern." To this a Mr Martin objected, "that it is the trustee's duty to reject such claims, after due enquiry, as he may see proper; and as the creditors are at present totally uninformed as to the nature of Colonel Henry's claim, time should be given for enquiry, and if the trustee should feel any difficulty in disposing thereof, a general meeting of the creditors ought to be called, in order to instruct him regarding the same,—upon these grounds, the objector submits that it is improper at the present meeting to give the trustee any directions regarding the disposal of this claim; and protested that his constituent should not be liable in any part of the expenses." The meeting, however, "agreed that Colonel Henry's vote should not be received, and instruct the trustee accordingly to keep it out of his states and calculations

Jan. 24, 1832.
1st Division.

No. 134. in the after stages of the sequestration, in the same manner as if it had never been produced, and that it shall not be counted in estimating the value and number of votes ranked upon the estate."

Jan. 24, 1832.
Henry v.
Greig, &c.

Henry complained to the Court, under § 41 of the bankrupt statute, alleging that the resolution was premature and incompetent. It had disposed of his claim in his absence, and at the meeting for choosing a trustee, which was a time when he could not expect that it would be discussed, as it was the proper duty of the trustee, in the first instance, to decide on the claims of the creditors. But, on the merits, the resolution was ill founded, since the claim embraced sums which did not fall under the decree arbitral, and the decree itself was under reduction. In the mean time, therefore, the whole claim, having been duly lodged, should at least have remained ranked to the effect of there being a dividend, corresponding to its amount, set aside, to await the issue of the reduction of the decree arbitral. He prayed the Court to recall the resolution; to order his whole claim to be ranked, and his vote to be received by the creditors, at least until it was competently objected to and found inadmissible; and to order a dividend to be set aside to abide the legal issue of his claim, or at least to leave the trustee to dispose of this in the ordinary form.

Greig, the trustee, answered, that it was within the power of a general meeting of the creditors to instruct the trustee how to act in disposing of any claim, and a trustee frequently called meetings for the purpose of receiving such instructions. The resolution was therefore competent. On the merits it was well founded, so long as the decree arbitral stood unreduced; and that decree found Henry to be indebted to Burns in a larger sum than £411, being the amount of the claim rested by him on grounds not disposed of under the decree. Henry therefore had no right to present a claim to be ranked on the estate as a creditor, and the resolution excluding it was well founded. Greig alleged farther, in support of the resolution, that Henry had failed to value and deduct certain collateral security possessed by him, and therefore his claim could not be received. Greig opposed the whole prayer of the petition, but especially that portion of it which craved right to vote in respect of the claim.

The Court, without hearing counsel in support of the petition, unanimously recalled the resolution of the creditors. The Lord President suggested that only modified expenses should be allowed to the petitioner, because he should have craved nothing more than a recall of the resolution, and to be reinstated in the situation in which he stood prior to its being passed. The other Judges assented, and the Court "recalled the resolution of the creditors complained of, and found the petitioner entitled to expenses, subject to modification," &c.

NINIAN SCOUILLER, Advocate.—*D. F. Hope.—Wood.*
JAMES POLLOCK, Respondent.—*Cunninghame.*

No. 135.

Jan. 24, 1832.
Scouller v. Pollock.

Property—Servitude.—Circumstances in which a right of eavesdrop was found not to prevent a conterminous proprietor building on the space on which the drop fell.

POLLOCK, the proprietor of certain subjects in the Gorbals of Glasgow, presented a petition to the Magistrates of that district, to protect his property from alleged infringement by the building operations of the respondent Scouller. He set forth, "that in consequence of certain alterations being made on the north, by which a part of the petitioner's property was laid open and exposed, it became necessary to rebuild the wall upon that side which had been removed; and with a view to the rebuilding of the said wall, as well as other objects, the petitioner was desirous of having his property lined on the north by the birleymen of the barony, in common form: that on the 7th day of April 1829, an application was accordingly presented to your Honours, craving a remit to the birleymen for that purpose, which was accordingly made; and they having visited the subjects, heard parties and their agents, made a report thereon to the Court, on considering which report your Honours, on the 13th instant, lined the petitioner's property on the south of the close mentioned in the petition, according to the site of the present walls, the petitioner having no eavesdrop where the property projects beyond the line of the slate-covered tenement at the east end of the close: that although the petitioner is found to have no eavesdrop where the wall of his property projects beyond the line of the slate-covered tenement above referred to, yet he has right to an eavesdrop, so far as the slate tenement itself extends. Notwithstanding whereof, the said Ninian Scouller, since the date of the said visit and report, without any lining on his part, or other authority whatever, commenced building a brick wall close to the north side wall of the said slated tenement, by which the petitioner will be deprived of the eavesdrop belonging to him along the north side of the said slated tenement: that although the petitioner has again and again required the said Ninian Scouller, and the workmen employed by him, to desist from the erection of the said wall, yet they persist in doing so, in consequence of which, the present application is necessary." He therefore prayed the Magistrates, "not only to interdict, prohibit, and discharge the said Ninian Scouller from erecting the wall complained of, but decern and ordain him forthwith to take down and remove the said wall, in so far as the same has been already erected; to find the said Ninian Scouller liable in the expense of this petition and subsequent procedure, and decern, and in the meantime to interdict, prohibit, and discharge the said Ninian Scouller, and all others employed by him, or having his authority, from proceeding farther with the erection of the said wall, till the farther orders of Court."

Jan. 24, 1832.
2d DIVISION.
Ld. Fullerton.
T.

No. 135. Scouller denied that he had encroached on, or deprived Pollock of any servitude of eavesdrop attaching to the property claimed by him. After various steps of procedure, this interlocutor was pronounced : "Having resumed consideration of this case, and having visited the property, finds that the pursuer is entitled to a slate-drop along the slate-covered tenement referred to in process—ordains the defender to remove the wall begun to be erected by him so far as within the space allowed as a slate-drop—and prohibits and discharges him from again erecting the said wall, until it shall have been lined off by the birleymen, on an application for that purpose, according to the purstier's right, as now defined, and decerns: finds the pursuer entitled to expenses."—" Note. A slate-drop is not merely a servitude, it is a right of property in the space left out, or held to be left out, when the tenement having it was built, and which the owner of the tenement is entitled to include, when he rebuilds his tenement, he carrying off the water of his roof within his own premises. No such practice, therefore, either exists, or could be allowed, as that alleged by the defender, of the adjoining proprietor building on the space for the drop, and carrying off the water."

Scouler having advocated, the Lord Ordinary "found, that the respondent's petition rests on the special grounds, that his property is bounded by the present walls of his house ; that beyond that he has merely a right of eavesdrop, and that the right of eavesdrop will be injured or destroyed by the proposed wall ; that the judgment of the Inferior Court, as explained by the Note, grants the interdict, on the principle that the ground on which an eavesdrop falls, must be held to be the property of the party having the right of eavesdrop ; that this judgment is erroneous, and is besides unwarranted by, and at variance with, the grounds of the petition ; therefore remitted the cause, with instructions to recall the interlocutors complained of, and to allow the respondent (Pollock) a proof of his averment, that the right of eavesdrop will be injured or destroyed by the wall built, or proposed to be built, by the advocator ; found the advocator entitled to the expenses incurred in this Court."

Pollock reclaimed.

LORD CRINGLETIE.—I am satisfied that the judgment of the Inferior Court is right. The doctrine there laid down is supported by all our authorities. In particular, it is supported by that of Mr Erskine. I think the Lord Ordinary mistakes the import of the petition. What is claimed is the eavesdrop—not the servitude of the eavesdrop merely. Now, is there any thing here to show that this space was not Pollock's property ? I hold the presumption of law to be, that where there is a right of eavesdrop, the space is in property ; and it is for the other party to show that there was no right of property. I think the Inferior Judge was quite right.

LORD GLENLEE.—I cannot agree with Lord Cringletie. No doubt when a man has a right of eavesdrop, there is a strong presumption of property. Had property been alleged here, that presumption would have had its due effect ; but the

Jan. 24, 1832.
Scouller v.
Pollock.

allegation under the present application is, that it was a drop on another man's property. Now the doctrine in the note to the judgment in the Inferior Court is, that the mere circumstance of having an eavesdrop implies property; but where such a right is coupled with property, the property must rest on other grounds. I agree Pollock. No. 135.
Jan. 24, 1832.
Scouller v.
Lockhart v.
Lockhart, &c.

LORD MEADOWBANK.—I am entirely of Lord Glenlee's opinion. I think Lord Cringletie has misapplied the law; had the question of property occurred, the right of eavesdrop might have been conclusive from the strength of the presumption. But the petitioner expressly states, that he has had his property defined, and he claims the right of eavesdrop over and above.

LORD JUSTICE-CLERK.—The objectionable doctrine is only in the note to the Bedie's interlocutor, and as to that, I agree with what has fallen from most of your Lordships; but I would not disturb the interlocutor on any other footing. The party is entitled to have his right of eavesdrop protected from what has every appearance of a proceeding in *seculacionem vicini*; and I agree with the Lord Ordinary's finding, upon the understanding that this party's interest will be thoroughly guarded during the investigation that is to be gone into.

THE COURT accordingly adhered.

Advocator's Authorities.—*Stirling, June 11, 1752 (M. 14596); Robertson, March 8, 1908.*
(not reported.)

Respondent's Authorities.—*2 Erik. 9. 9; Garioch, March 7, 1769 (M. 13178).*

R. and A. KENNEDY, W.S.—JAMES STUART, S.S.C.—Agents.

NORMAN LOCKHART and Others, Pursuers.—*D. F. Hope—Miller.*

No. 136.

MRS CAMILA LOCKHART and Others, Defendants.—*Stene.*

MAGISTRATES of LANARK, Defendants.—*Keay—Maitland.*

Manee—Burgh—Parish.—1. In a parish partly landward, and partly burgh, the Magistrates, as representing the community of the burgh, are primarily liable, along with the heritors of the proper landward district, in the expense of maintaining a manse, and the burden cannot be laid directly on the individual proprietors within the burgh territory. 2. Right of the Magistrates to try the question of relief against such proprietors, or the inhabitants of the burgh, reserved.

THE parish of Lanark includes the royal burgh of that name, of which Jan. 24, 1832.
2d Division.
Lord Medwyn. a considerable rural territory forms part, and a proper landward district, valued in the cess rolls of the county. The whole burgh territory is held by one charter for burgage services, but almost all of it has been granted by the Magistrates to individuals in feu or burgage, and is possessed by them as private property. The proprietors of lands within the burgh territory are termed in-town heritors, and the proper landward proprietors out-town heritors. The valuation of the landward district is £4219, 12s. 6d. Scots, and the amount of cess £63, 6s., while the cess paid by the burgh is £23, 7s. 8*½*. In the division of the area of the church, no portion is assigned to the individual in-town heritors, but the whole is divided

No. 196. among the out-town heritors and the burgh as a community,—the share
 Jan. 24, 1832. effeiring to the burgh being assigned to the Magistrates, who are in use
 Lockhart v. to grant temporary or permanent rights to the in-town heritors or others,
 Lockhart, &c. inhabitants of the burgh. The minister of Lanark has always enjoyed
 a manse, and, in 1795, the existing manse requiring to be repaired, it was
 agreed “that the sums necessary for the repairs be laid upon the out
 and in parish, both shire and burgage lands, in proportion to the cess
 paid by said lands;” and as the amount of cess paid by the burgh was
 little more than one-third of that paid by the landward district, the sum
 required, to avoid minute calculation, was levied in the proportions of
 one-third and two-thirds respectively; and the same rule was followed as
 to certain further repairs in 1803. In 1820, it was resolved by a meet-
 ing, at which the provost of the burgh was present, to make a consider-
 able addition to the manse, for the expense of which, a subsequent meet-
 ing of heritors (which none of the Town Council attended) appointed
 the collector “to collect the sum of £600 sterling, two-thirds to be paid
 by the heritors of the out-parish, and one-third by the town, or heritors of
 the in-parish, agreeably to the proportions at last repairs of the manse and
 offices.” The £200 allocated on the burgh not having been paid, was
 advanced by the out-town heritors, who thereafter instituted an action of
 relief, to which they called as parties the Magistrates and Town Council,
 as representing the community of the burgh, and also the in-town heritors
 or proprietors of lands in the burgh territory, concluding alternatively
 against the latter in the event that the Magistrates and Town Council
 should not be found liable. The parties made very contradictory averments
 as to the usage of the parish in contributing to assessments of this descrip-
 tion; but as there seemed to be no very express usage any way, and as
 the Court left the allegations on this head entirely out of view in pronoun-
 cing judgment, it is unnecessary to advert to them.

No objection was made by either set of defenders to the share of the
 expense (if they were liable) being fixed at one-third, but it was main-
 tained in defence against any liability—

By the Magistrates.—That the proper landward heritors were alone
 liable in the burden, or, at all events, that the community as such were liable
 in no part of the burden, except in so far as might effeir to the lands,
 whereof the dominium utile was still held by the burgh.

By the In-town Heritors.—That the heritors of the proper landward
 parish, and the Magistrates as representing the community of the burgh,
 were the parties on whom the burden fell by law.

The Lord Ordinary reported the case, and the Court thereafter ordered
 a hearing in presence.

Pleaded for the Out-town Heritors.—

By the act 1663, “the heritors” of parishes are appointed to build and
 maintain manses for their ministers. It has now been finally determined
 that ministers of burghs with a landward district attached, though almost

exclusively held burgage, are, under this statute, entitled to manses;¹ No. 136. and consequently the act has reference to such parishes, as well as to those which are exclusively landward. The territory of the burgh, however, is as much heritage as any other part of the parish; there appears no intention to relieve it of a share of the burdens imposed generally on the parish; the holders of it must be considered heritors, just as the holders of any other heritage in the parish, and the only question which can be seriously agitated is, whether the Magistrates as representing the community of the burgh, or the individual proprietors therein, are to be considered the heritors, in the sense of the statute. On this point it must be observed, that it is the community of the burgh which is the proper vassal in the burgh territory. The Magistrates represent that community, but in granting portions of the burgh territory to individuals, they do not thereby interpose themselves as superiors between the Crown and the burgesses; however the territory may be divided, it is the community which remains the sole vassal of the Crown, the heritor of the whole burgh territory. Nor can it make the slightest difference whether the territory be built upon or not; it is all equally burgal, and forms part of that general heritage of which the community is proprietor. This being the case, it is clear that the Magistrates, as representing the community, must bear the burden in a question with the landward heritors, whatever mode they may be entitled to adopt to allocate it on the burgesses, or individual proprietors within burgh. In divisions of churches, they have assigned to them the whole area; in all respects they represent the community; and accordingly it was very recently decided that they alone are the proper parties to call in an action at the instance of the landward heritors, for determining the mode of imposing the burden of supporting the poor.² This construction of the statute 1663, as to the Magistrates of burghs in a parish partly burgal and partly landward being included in the term "heritors," is strongly confirmed by the terms of the act 1690, c. 28, regarding patronages, in which it is impossible to dispute that the Magistrates of burghs situated in landward parishes are included in the term "heritors." Then as to decisions, although the question seems never to have been specifically raised, it appears always to have been assumed that the burden of building and repairing manses lay on the landward heritors and the burgh as a community,³ while the case of Rutherglen, cited to the contrary, did not raise any question on the point, the only matter there determined being, that parties merely holding seats in the church by temporary

¹ Auld v. Magistrates of Ayr, in House of Lords, June 13, 1827 (2 W. and S. 600); and in Court of Session, July 5, 1828, ante, VI. 1087.

² Dunbar, June 2, 1831, ante, IX. 669.

³ Williamson (Kirkaldy), March 26, 1685 (5121); Heritors of Kinghorn, Feb. 16, 1761 (7913); Ure, &c. (Forfar), May 16, 1793 (7929); Campbelton, July 1, 1775 (7924).

No. 136. rights, were not liable as heritors to contribute to the repair of the manse ;
 Jan. 24, 1832. but still it was there assumed that the burden lay on the community re-
 presented by the Magistrates, along with the landward heritors.¹
 Lockhart v.
 Lockhart, &c.

Pleaded for the In-town Heritors—

The individual proprietors of the burgal territory have no independent rights as heritors, but merely form constituent members of the community, which subsists as an *unum quid*; they have no seats allotted to them in the parish church in respect of their properties—the whole area effering to the burgh, being assigned to the Magistrates, who dispense of it to the inhabitants or proprietors on their own terms, nor do they enjoy any of the other privileges of heritors; and as a counterpart, they are necessarily free from having burdens imposed on them, to which they could only be directly liable in the character of heritors.

Pleaded for the Magistrates—

By the act 1663, the ministers of burghs are excluded from the right to a manse ; and although it has been held that the ministers of landward parishes having a burgh included therein, are entitled to a manse, still it is in respect of the landward part of the parish alone, and the burgh therefore ought to be kept entirely free of part of the burden. But even if a proportion of the expense might be allocated on the burgal part of the parish, it can, under the act, be imposed on the heritors only. Now, heritors are clearly proprietors of the *dominium utile* of land. The Magistrates of a burgh, however, are not proprietors of the burgal territory, except in regard to such part of it as may not have been granted out to individuals ; and with respect to all the rest, the actual proprietors fail to be considered as heritors in the sense of the statute ; for as to this, the Magistrates are truly in a situation analogous to that of superiors, who, it has been determined, are not liable in any part of such burdens.² The decisions quoted for the out-town heritors relate chiefly to the case of churches, the obligation for the support of which rests on a different principle, viz. that the party obtaining a share of the area should bear a proportionate share of the expense ; but besides, the question seems not to have been specifically raised, while in the case of Rutherglen, sanction was given to the plea that the Magistrates of a burgh could not be burdened with the expense of maintaining a manse, except in so far as they might be liable in the proper character of heritors.

LORD JUSTICE-CLERK.—I am clearly of opinion, in the first place, that there is no proof of any such usage or practice in this parish as can warrant us to decide on that ground ; and therefore we must consider the principles and analogies of law on which the case falls to be determined. Keeping in view that there is a landward district paying cess to the amount of £63, 6s., and burbage territory, for which there is paid of cess £23, 7s. 8d., the question is, how the expense of repairing the manse is to be defrayed. The action is at the instance of the heri-

tors of the landward part for £200, being one-third of the whole expense. At first No. 136.
 I had a difficulty to discover how the proportion of one-third is that claimed against
 the burgh; and if a question as to the proportion had been put in issue by the par- Jan. 24, 1832.
 ties, there might have been great difficulty; but they do not dispute that it is a Lockhart v.
 reasonable proportion, and then the only question is on whom the burden lies.
 On a fair consideration of the statutes referred to, I think the action as laid
 against the Magistrates representing the burgh, is well founded. The act 1663,
 now settled as applicable to burghs with landward parishes, provides, that the heri-
 tors of parishes are to provide manses. Then how am I entitled, in regard to the
 term heritors, to exclude those representing burgh property? But it cannot extend
 to every proprietor within the burgh; and this is clear, because the individual pro-
 prietors are not entitled to the privileges of heritors. They are not entitled to insist
 for a share of the area like a landward heritor; on the contrary, the Magis-
 trates, as representing the community, have a share assigned to them, and it is a
 thing unknown for burgh proprietors to have a share allotted to them. Magistrates
 are therefore to be held heritors for the burgh property, in terms of the act 1663.
 But the act 1690, as to patronage, affords a most important confirmation of this.
 Where there is no landward district, the Magistrates are the parties to call the
 minister, and not the proprietors; while, if there be a landward part, the heritors
 are to call with the Magistrates of the burgh, and I hold this a legislative decla-
 ration that Magistrates are to be deemed heritors, in respect of the burgh ter-
 ritory. On the statutes, therefore, the argument is invincible. Then, has there been
 any decision in which a contrary principle was adopted, or from which such may
 be inferred? I have gone through all the cases referred to, and have discovered
 none. In the case of Dunbar, we decided with reference to an action regarding the
 poor, that it was enough to call the Magistrates and Council, as representing the
 community. In the case of Kirkaldy, the Magistrates and Council were held
 liable; and in the same way in that of Kinghorn, it is the burgh which is held
 liable. Then comes the case of Campbelton, and when we look into the circum-
 stances of the case, it is a very strong authority. As to the Linlithgow case, we
 have no information as to the compromise interfering with these principles; and as
 to the case of Rutherglen, it is quite wild to say that it is an authority on the other
 side. It was merely an attempt to subject seat-holders who had bought their seats
 from the Magistrates. It was found that they were not liable, and that was all
 that was decided by the Court; and no question raised with the Magistrates and
 community. There is nothing therefore to interfere with the principle that, I think,
 should regulate the decision that the Magistrates are properly called, as represent-
 ing the community, and are primarily liable—I say *primarily*—for the question of
 relief is not raised, and I would not wish to decide it.

The other Judges concurring,

THE COURT pronounced this interlocutor:—“ Find that in parishes con-
 sisting partly of landward, and partly of a royal burgh, the Magistrates and
 Town Council, as representing the community thereof, are heritors in the
 sense of the statute 1663, c. 21, and liable in that character, along with
 the landward heritors, for a proportion of the expense of building and re-
 pairing the minister’s manse; and in respect that the parish of Lanark is a
 parish of this description; and in respect farther, that the fairness of the
 proportion, viz. one-third part of the expense of repairing the manse of

No. 136.

Jan. 24, 1832.
Harper v. Balfour.

Young v. Cleg-horn.

Lanark on the occasion libelled, claimed by the pursuers as representing the landward heritors, by whom the whole of the said expense was originally defrayed, has not been disputed by the Magistrates of Lanark; find the said Magistrates and Council, as representing the community of the burgh of Lanark, liable to the pursuers for the said proportion of the said expense, and decern accordingly against the said Magistrates, in terms of the libel, for payment to the pursuers of the sum of £200, with the legal interest thereof, from and since the term of Whitsunday 1811, till payment; assailed the other defenders from the conclusions of the present action, reserving to the said Magistrates all claims of relief competent to them against the proprietors or in-town heritors of the burgh, and to the said proprietors or in-town heritors their defences against such claim of relief, as accords; find no expenses due to any party, and decern."

LOOKHART and SWAN, W.S.—J. and A. SMITH, W.S.—J. ANNAN—Agents.

No. 137.

JAMES HARPER, Suspender.—Neaves.
THOMAS BALFOUR, Charger.—A. Wood.

Process—Bill-Chamber.—Circumstances in which a bond of caution was allowed to be received in the Bill-Chamber after the fourteen days from the interlocutor passing the bill, and after certificate of no caution had been granted.

Jan. 26, 1832. HARPER having been incarcerated by Balfour, presented a bill of suspension and liberation, which was passed on caution on the 28th December last. On the same day a bond of caution was lodged; but being objected to, it was transmitted to Ross-shire to be attested. It was accordingly attested, and put into the Post-office at Tain; but by some irregularity, a post was allowed to elapse without despatching it, in consequence of which, it was not received in Edinburgh till the morning of the 12th of January, the fourteen days having expired the evening before. On the morning of the 12th, Balfour's agent obtained a certificate of no caution, and the clerk refused to receive the attested bond, with which, however, he was satisfied. Harper now applied to the Court for authority to the clerk to receive the bond, as no execution had followed. This was opposed, on the ground that he should have given in a note craving a prorogation.

LORD JUSTICE CLERK.—It would be a great deal too sharp practice in circumstances like the present, to compel this party to present a second bill, by refusing to receive the bond with which the clerk is now satisfied.

The other Judges agreeing,

THE COURT granted warrant to the Clerk of the Bills to receive the bond.

JOHN JAMESON—JAMES KENNY—Agents.

No. 138.

YOUNG, Pursuer.—Skene.
CLEGHORN, Defender.—Cochburn.

Expenses—Jury Court.—Circumstances in which a verdict of 1s. damages being returned in favour of a pursuer, the Court found him entitled to his expenses.

YOUNG raised an action of damages against Cleghorn, for having mentioned in a public stage-coach a report that he was bankrupt. The jury found a verdict for the pursuer, and gave 1s. of damages. Under this verdict, each party moved the Court for expenses. It was stated at the bar, that the smallness of the damage arose from the fact, that truly no damage was done, because nobody had believed the report.

No. 188.

Jan. 27, 1832.
1st Division.
Jury Cause.

Young v. Cleghorn.

LORD PRESIDENT.—The action was not one of that numerous class for verbal defamation, in which a pursuer craves a solatium to his wounded feelings, and reparation of his character. It was an action for a real injury, in reporting a man bankrupt, a proceeding by which his credit might have been injured, and his ruin accomplished. I remember that, at the trial, I was surprised at the small amount of the damages which was awarded. Perhaps the jury were influenced by the consideration that the report was so utterly groundless, as not to have hurt the credit of Young. But the groundlessness of the falsehood, if it has produced this effect with the jury, makes it only the more imperative on the Court to allow expenses to Young. I am clearly of opinion that they ought to be allowed.

LORD GILLIES.—The awarding of expenses, where the damages are small, as in this instance, is a matter of discretion. But where the Judge who presided at the trial has formed a decided opinion on the subject, it would require some strong and substantial ground to be stated, before I should feel inclined to take an opposite view.

LORDS CRAIGIE and BALGRAY agreed that, in the circumstances, Young should be allowed his expenses.

The motion for Young was therefore granted, and Cleghorn's counter-motion refused.

WILLIAM EWING.—*Jameson.*

ALEXANDER MACARTNEY, for Commercial Bank.—*Clephane.*

No. 139.

Expenses—Multiplepoinding.—The actual raiser of a multiplepoinding, whose claim was repelled, and whose objections to the nominal raiser's condescendence of funds were overruled, held liable to the nominal raiser in expenses.

EWING, a creditor of the late Mr Buchan, W.S., was confirmed exec. Jan. 27, 1832. under an agreement at a meeting of creditors, that the funds to be received should be divided among such creditors as lodged claims within the legal period. At this meeting an agent attended on behalf of the Commercial Bank, but no claim was lodged for the Bank. After several years, Macartney, the manager, raised a process of multiplepoinding in Ewing's name. Ewing gave in a condescendence of funds, showing very considerable disbursements, and leaving a comparatively small balance, still liable for further expenses, and in which the Commercial Bank, it was contended, were not entitled to participate. Macartney lodged objections to this condescendence, and also a claim for an amount beyond the whole balance. His objections were overruled, and his claim repelled by the Lord Ordinary, who, however, found no expenses due to Ewing.

2d Division.
Ld. Mackenzie.
R.

No. 139. On this point Ewing reclaims.

Jan. 27, 1832. Ewing v. Mac- LORD MEADOWBANK.—The Commercial Bank were the actual raisers, and the whole proceedings originated with them. I can see no grounds for exempting them from expenses.

Bruce v. Ha- LORD JUSTICE-CLERK.—I confess I am of the same opinion. The raiser lodged his accounts, and the bank, with this before their eyes, choose to go on, and give in objections. Macartney is in fact the real pursuer; he is not called into the field by Ewing; that would have been a different matter. I cannot get over this claim for expenses. I think the bank must pay them, subsequent to lodging the account.

The other Judges concurring,

THE COURT altered, and found Macartney liable in the expenses incurred subsequent to the lodging of Ewing's condescension of funds.

WOTHERSTOON and MACK, W.S.—J. A. CAMPBELL, W.S.—Agents.

No. 140. ARCHIBALD BRUCE (RENNIE'S TRUSTEE), Pursuer.—*Forsyth.*
JOHN HAMILTON, Defender.—*Jameson—Cullen.*

Bankrupt—1696, c. 5.—A purchase by a creditor at a sale by public roup in the ordinary course of business by his debtor, who becomes bankrupt within sixty days, is not reducible under the act 1696, c. 5.

Jan. 27, 1832. JOHN RENNIE of Phantassie, an extensive agriculturist in East Lothian, was in the use to have sales of farm stock, on a great scale. At one of these, which took place on the 28th July, 1829, and was carried on as usual, by public roup, the defender, Hamilton, horse-dealer in Edinburgh, purchased two horses. Within a month thereafter, Rennie became bankrupt, and his estates were sequestrated on the 28th of August. Bruce having been appointed trustee on his estates, demanded payment of the price of the horses from Hamilton. Hamilton claimed deduction to the extent of a previous debt due him by Rennie, but offered to pay the balance. Bruce, however, contended, that the sale having taken place within sixty days of bankruptcy, was reducible under the act 1696, c. 5, as an alienation made in satisfaction of a prior debt; and he accordingly raised a summons for setting aside the sale, and recovering the horses, or their value, leaving Hamilton to rank on the estate for his debt. In defence, Hamilton pleaded, that the act 1696 did not touch a public sale like this, in the ordinary course of the bankrupt's dealings, no concert or contrivance being pretended. The Lord Ordinary sustained the defences, and assizized, adding the subjoined note.*

* " The grounds of judgment are very simple: The Lord Ordinary is of opinion that the act 1696 has no application to a case like this. It is certainly not necessary, in a reduction on that statute, to aver or to prove fraud. The statute gives a presumption of fraud, where the facts which it points out are plainly involved in the transaction. But the Lord Ordinary conceives, that it is necessary, by the very

2d Division.
Ld. Moncreiff.

F.

Bruce reclaimed, but the Court, without hearing the defender's counsel, No. 140. adhered.

Jan. 27, 1832.
Bruce v. Ha-
milton.

words, and by the plain spirit and meaning of the act, that 'the disposition, assignation, or other deed' challenged should appear to have been 'made or granted' by the debtor 'in favour of his creditor, either for his satisfaction or further security, in preference to other creditors,' and, though it is undoubted law that the statute is of sufficient efficacy to reach indirect as well as direct transactions of the description contemplated, and that it cannot be evaded by any covert proceeding where the truth is disclosed; it is nevertheless equally true, and has always been held, as very distinctly expressed by Mr Bell (ii. 217), that this rule only applies the statute to all conveyances to a creditor, 'if directly or indirectly intended to confer on him a preference over other creditors.' Before, therefore, there can be any room even for reasoning on a case as within the statute, it must at the least appear that the conveyance was made with the intention of giving to the particular creditor satisfaction or security of the prior debt; for if this intention did not exist, there could be no intention to give it as a preference. Hence all the cases which have been decided as to transactions in the ordinary course of business, where a preference may be actually obtained by the indirect effect of the dealings of the parties, although there was no intention to give either payment or security. Now, in the present case, there is no averment in the record, either that the sale of the two horses was made to the defender 'for,' or as intended either directly or indirectly to operate in payment or security of the prior debt; and on the face of the transaction it may be assumed that no such thing could be averred. The purchase was made at a public auction, at which Mr Rennie sold stock to a large amount, about £12,000, as averred by the defender. It is no doubt a very possible thing, that even under such a sale, a preference under the act 1696 might be covered, if a preconcert or design to give and take it were averred; but there is no such averment here; the sale was open to all the world, and it is not even stated that the price offered publicly for the horses was beyond their fair value. The pursuer, indeed, is even at pains to state that it was not by any special agreement with Mr Rennie that the defender got possession of the horses without granting his bill. The disputed fact as to this appears to the Lord Ordinary to be of no importance; the averment is at least probable, that other persons who were not prior creditors, but known to be of good credit, got delivery of articles purchased in the same manner. But the Lord Ordinary thinks that the question would have been exactly the same as it is, if the defender had granted a bill for the price. It would still have remained to be decided whether he had not a right of compensation or retention; and if the act 1696 does not reach the transaction as it now stands, it would as little have applied to it in the other form, while without it the claim of retention would have been clear. But the Lord Ordinary apprehends, that on the face of such a transaction as a sale and purchase of a single article in an extensive public auction, there can be no presumption of any intention as to a particular creditor. A sale in open market may fall under the act 1696, if a previous contrivance be proved; but if no such contrivance be averred, 'a sale in market for a fair price is not challengeable,' Bell (ii. 219); and yet that is not so strong a case as a sale by auction, because the bankrupt does specially transact with the particular creditor, even where he sells in market.

^a The case of Hepburn v. Bell, July 11, 1816, as shortly reported by Mr Bell (vol. ii. p. 214), is undoubtedly very much in point, and applies a fortiori. But even though it were to be doubted whether the judgment pronounced in that case may not have gone too far, the only ground of hesitation would be in a point not at all applicable to the present case.

No. 140. **LORD JUSTICE-CLERK.**—The interlocutor is perfectly right. This was a transaction in the ordinary way this bankrupt carried on his business, and is just one of the cases excepted from the statute, which does not cut down any incidental preference arising from such transaction.

Jan. 27, 1832.
Bruce v. Ha-
milton.
Palmer, &c. v.
Stewart.

The other Judges concurred.

ALLAN and BRUCE, W.S.—WALKER, RICHARDSON, and MELVILLE, W.S.—Agents.

No. 141. **PALMER and Co., Petitioners.**—Jameson—Christison.
C. C. STEWART, Respondent.—D. F. Hope—D. M'Neil.

Process.—Circumstances in which the Court authorized a Lord Ordinary to score but part of an interlocutor pronounced by them, remitting a cause to him to prepare, and granting diligence,—as having been written per incuriam.

Jan. 28, 1832.
1st DIVISION.
ON 24th December 1831, the Court pronounced this interlocutor:—“Appoint the petitioners to put in a condescendence of the facts and circumstances they offer to prove in support of their petition, and remit to the junior Lord Ordinary to prepare the cause, and grant diligence at either party's instance against havers, and commission to the Judge Ordinary to be reported the .”

Lord Moncreiff now reported the cause for instructions, whether the petitioners were entitled instantly to extract diligence, or whether they were bound in the first instance to condescend.

LORD GILLIES conceived the interlocutor of 24th December to have been so inaccurately framed, that it could not be literally explicated. It began by remitting the cause to the Lord Ordinary for preparation, and afterwards proceeded in the immediate preparation of it to grant diligence, as if still unremitted. His Lordship understood that the interlocutor which the Court had designed to pronounce, was simply a remit to the Lord Ordinary, to prepare the cause. After that had been arranged, a motion had been made for a diligence, which was irregularly, and per incuriam, granted by the Court. That part of the interlocutor ought to be still scored, as it arose from mere oversight that it was originally written.

LORD BALGRAY approved of deleting that part of the interlocutor relative to the diligence, leaving it to the Lord Ordinary to grant diligence or not, as he should see cause. His Lordship felt assured that after the interlocutor of remit had been prepared, as the appropriate interlocutor of the Court, one of the parties had asked a diligence, after the other party was gone, and the Court had assented to the motion per incuriam.

“The Lord Ordinary might not perhaps have thought it necessary to state the grounds of his judgment so particularly, if it had not been represented to him that this is a leading case, and that there are a number of other cases under the same sequestration, which will be regulated by the decision of it.”

LORD CRAIGIE thought the objection to the terms of the interlocutor to be rather critical, its object clearly being to grant a diligence, and, at the same time, to remit the cause to the Lord Ordinary for preparation. His Lordship was understood to oppose the alteration of the interlocutor without consent of parties.

LORD PRESIDENT concurred with Lords Balgray and Gillies.

No. 141.

Jan. 28, 1832.
Palmer, &c v.
Stewart.

Scott v. Scott.

THE COURT, "upon report of the Lord Ordinary, requiring explanation of the interlocutor of 24th December 1831, in so far as it 'grants diligence at either party's instance against havers, and commission to the Judge Ordinary to be reported the _____,' and considering this as inconsistent with the first part of the interlocutor, they order the words to be delete."

W. RENNY, W.S.—

—Agents.

ROBERT SCOTT, Petitioner.—*More—A. Murray, junior.*

No. 142.

J. R. SCOTT, Respondent.—*Marshall.*

Adjudication.—Circumstances in which the Court dispensed with the inducise of a summons of adjudication, allowed it to be enrolled in the calling lists of the Outer House, limited the term for seeing it to eight days, authorized the Lord Ordinary to dispense with the reading in the minute-book of the decree of adjudication, and granted warrant to the clerks of Court to give out an immediate extract, reserving all objections contra executionem.

SCOTT presented a petition, setting forth that a first effectual adjudication had been led against James Robert Scott's estate, on 22d February 1831; that on 22d and 23d December 1831, he had obtained decree against him for the sum of £15,000, "to the effect of adjudication, reserving all objections contra executionem;" and a warrant dispensing with the minute-book, and authorizing immediate extract; that he had executed a general special charge against James Robert Scott, personally at Chisholm House, where he had for two years resided with a brother; that on the expiry of the days of charge, a summons of adjudication was executed against James Robert Scott, by leaving a copy at Chisholm House, with a servant, because he could not personally be found; that as Chisholm House was within three hours' journey of the border, the petitioner had now become apprehensive that Scott might be residing in England, colluding with the prior creditor, to defeat the petitioner's pari passu ranking, and that his first summons of adjudication having contained no warrant for citing him as forth of the kingdom, a supplementary summons had been raised and executed on 26th January, with such warrant, but in other respects the same with the first. In these circumstances, he prayed the Court "to dispense with the running of the inducise of both the said principal summons and supplementary summons of adjudication at the petitioner's instance, herewith produ-

Jan. 28, 1832.
1st Division.
R.

No. 142. ced, and to authorize the clerks to receive the same forthwith, to be then entered in their calling lists. Further, to dispense with the running of Jan. 28, 1832.
Scott v. Scott. the whole term allowed for seeing the summonses when called, and to limit the same to eight days; and to grant warrant to the clerks to enrol the said summonses in the printed rolls to be taken up thereafter. Further, to authorize the Lord Ordinary, before whom the said summonses may come, to dispense with the reading in the minute-book the decree of adjudication to be pronounced by him in said actions; and to grant warrant to the clerks to give immediate extract of the said decree so to be pronounced, reserving all objections contra executionem."

Scott opposed the prayer of the petition, and contended, that until the cause was called in Court, there was no dependence, and until there was a dependence, the Court could not pronounce an interlocutor abridging the forms of procedure. In old cases, where *inducia* had been dispensed with, there were two diets; and after the first diet, the cause having been called, there was held to be a dependence to the effect of entitling the Court to interfere. But now there was only one diet, and before the *inducia* were expired, the Court could do nothing.

LORD PRESIDENT.—The summons has been served and executed on the defendant. I conceive the Court are entitled to grant the prayer of the petition.

LORD BALGRAY assented, and was understood to observe that he had frequently seen similar instances of dispensing with *inducia*, while in practice at the bar.

LORDS CRAIGIE and **GILLIES** concurred.

THE COURT then pronounced this interlocutor:—" Dispense with the running of the *inducia* of the principal and supplementary summons of adjudication therein referred to, and authorize the clerks of Court to enrol the same in the calling lists of the Outer House, and dispense with the running of the usual term for seeing the summons, and limit the same to eight days; authorize the Lord Ordinary before whom the said summons may come, to dispense with the reading in the minute-book of the decree of adjudication to be pronounced in the said actions; grant warrant to the clerks of Court to give out an immediate extract of the decree of adjudication, reserving all objections contra executionem."

Petitioner's Authorities.—1 Bell, 725: 2 Beveridge's Form of Proc. 187 and 519.

J. CHALMERS, W. S.—THOMSONS and ELTON, W. S.—Agents.

ROBERT BENNIE, Pursuer.—*Cunninghame.*
GILLIES MACK, Defender.—*Jameson.*

No. 143.

Jan. 28, 1832.
Bennie v.
Mack.

Process—Landlord and Tenant—Proof—Stamp.—1. Where a landlord petitioned for sequestration for arrears of rent, public burdens, "and other stipulations to be afterwards specially condescended on and proved in the course of this process, all in terms of the foresaid missive of lease," held competent, on lodging replies, to restrict the petition to the money-rent, and that it then remained unobjectionable in form. 2. Where a party makes a reference to oath, and an interlocutor sustaining it is pronounced, it is competent to retract the reference, on paying expenses incurred since the date of the interlocutor. 3. An unstamped missive, acknowledging receipt of "bills and cash to the amount of £55, 4s. 6d., which shall be placed to account of your rent," and the amount being afterwards stated to be erroneous as to the cash, but the bills being admitted to have been received of the date of the missive, and the missive being ultimately stamped with a £1 agreement stamp—held good evidence that the bills were to be specially imputed to the rent.

COLT let the farm of Lochwood to Bennie for a year, from Whitsunday Jan. 28, 1832. 1824. Bennie bound himself to pay a rent of £100, and a proportional share of the public and parochial burdens attending to the estate, of which Lochwood was a part, and also to take the dung and grass seeds left by the last tenant, at a valuation to be made by one Waddell. The rent was to be paid at Martinmas 1824. On 1st December 1824, Bennie paid £55 to Mack, writer in Glasgow, as agent for Colt, who granted an acknowledgment that the sum was paid to account of the rent. On 16th February 1825, Bennie left in the hands of Mack two bills, amounting together to £26, 4s. 6d., and he also made a payment in cash. On this occasion a clerk of Mack wrote the following missive, which Mack signed, and gave to Bennie: "I have this day got bills and cash from you to the amount of £55, 4s. 6d., which shall be placed to account of your rent due to Mr Brown." Brown was now the trustee of Colt. On 14th April 1825, Mack wrote to Bennie, "As Mr Brown will not take the bills you deposited with me to account of your rent, you will now make a point of settling the balance of your arrears by Wednesday next in cash, otherwise I must sequester your stock, for which you must blame yourself after this intimation." Mack did not send back the bills to Bennie. Brown then presented, on 29th April, a petition to the Sheriff of Lanarkshire, stating, that he had only received payment of £64 to account, and craving sequestration until he was paid "the foresaid arrears, public burdens, and other stipulations (to be afterwards specially condescended on and proved in the course of this process), all in terms of the foresaid missive of lease."

1st Division.
Ld. Moncrieff.
D.

Bennie answered that he had made two payments, each of £55, to account of his rent in the first instance, in terms of the two missives of Mack; that the last payment, on 16th Feb. 1825, consisted of £29 in cash, and £26, 4s. 10d. in two bills; that his whole money-rent (£100) was thus

No. 143. paid, and a sequestration was incompetent as a means of recovering payment of any other stipulations, especially as the claim for grass seeds and dung remained still illiquid.

Jan. 28, 1832.
Bennie v.
Mack.

Brown, in his replies, restricted the petition for sequestration, so as to apply merely to the arrears of money-rent. He alleged, that the missive dated 16th Feb. 1825, contained a clerical error, in stating £55, 4s. 10d. to have been received from Bennie, the true sum being only £35, 4s. 10d., and consisting of £9 in cash, and £26 of bills, which, he farther alleged, were only taken by him subject to the approval of Brown. Brown had refused to approve of the bills, and this left only the sum of £9 in cash, as paid on 16th Feb. 1825. This sum, added to the £55 previously paid on 1st December, made £64 paid to account of rent, for which Bennie received credit in the petition for sequestration; and Brown offered to refer to Bennie's oath that no more than £9 had been paid in cash.

The Sheriff pronounced an interlocutor sustaining the reference, but Brown afterwards reclaimed, and retracted the reference, which the Sheriff allowed him to do, on paying the expenses subsequent to the interlocutor sustaining his offer. Brown then contended, 1. That the missive of 16th February being a receipt, and being unstamped, could not be pleaded to any effect; 2. That there was no evidence of any payment being made on that day, except under the admissions of himself, or his agent Mack, which did not instruct any payment to account of rent on that day, except £9 in cash; and, 3. That although the bills for £26, 10s. had been retired when they fell due, and Bennie was entitled to credit for them, yet he (Brown) was to apply them to any part of the debt; and he imputed them to the price of grass seeds, dung, &c., for which Bennie was liable. In this way, and by computing interest, there was a balance left of £36, 10s. 9d. of money rent, for which he was entitled to follow up the sequestration.

Bennie then got the missive of 16th February impressed with an agreement stamp of £1, and contended, 1. That it was now good evidence of the receipt of the full sum of £55, which could only be redargued by his writ or oath; 2. That as it was admitted by Brown that £26 in bills had been delivered on 16th February, and there was evidence of their having been specifically appropriated to the rent, both from the missive of that date, and Mack's subsequent letter of 14th April, the proceeds of these bills could not be applied to any other debt; 3. That although the missive should not be held good as a money receipt, yet it proved the receipt of the bills, and it afforded evidence of their specific appropriation to the rent; and as the alleged condition of Brown's approval was denied, it could only be proved by the writ or oath of Bennie, and therefore there was no money rent due when the sequestration was applied for; that even if only sustained as evidence of the specific appropriation of the bills, still there remained a balance of less than £10 of money rent due at the time when sequestration was craved for £36.

After the stamp was affixed to the missive, Brown argued that it could give it no force as a receipt, not being a receipt stamp ; nor as an agreement, the missive not being of that nature. Besides, it was improbatative, being neither holograph nor tested.

No. 143.
Jan. 28, 1832.
Bennie v.
Mack.

The Sheriff "sustained the objection raised under the stamp act, 31 Geo. III. cap. 25, § 16, against the validity of the missive or note subscribed by the pursuer's procurator, acknowledging that he had got from the defender, to account of the rent payable by the defender to the pursuer, bills and cash to the amount of £55, 4s. 6d. ; and found, in terms of the act of Parliament aforesaid, that the said missive or note cannot be pleaded or given in evidence, or admitted in any Court to be good, useful, or available in law or equity. But in respect that the pursuer in his pleadings admits the alleged payment aforesaid, to the extent of £9, and that the two bills, amounting to £26, 4s. 6d., deposited by the defender in the hands of the pursuer's procurator, have been retired, found that the defender, under the transaction in question, falls to get credit for the sum of £35, 4s. 6d. in part payment, and towards extinction pro tanto of his rent : found the alleged additional payment of £20 can only be established by legal evidence in writing, under the hands of the pursuer or of his procurator, or by the oaths of these persons : allows the defender to prove the said additional payment accordingly," &c. The Sheriff afterwards, "in respect it appears that the writing cannot be considered as an agreement—in respect it is provided by the 4th section of the act 55 Geo. III. c. 184, that no stamp appropriated to denote the duty charged on any particular instrument, and bearing the name of such instrument, shall be used for denoting any other duty of the same amount, or if so used, the same shall be of no avail—in respect it appears from the description given in the schedule subjoined to the said act, that the writing in question is truly a receipt, acknowledgment, or writing given for or upon payment made by money or bills to the account of the rent owing by the defender to the pursuer, and falls to be charged and impressed with the receipt stamp alone—in respect that said writing is not impressed with such stamp, but with the stamp of one pound, applicable to instruments of agreement, found the said writing, as so stamped, can have no farther effect or avail in law than attached to it before the said agreement-stamp was exhibited thereto : sustained the objections preferred by the pursuer in said minute, and recurred and adhered to the interlocutor thereby re-claimed against; but allows the opinion of the Sheriff-depute on the whole cause," &c.

The Sheriff finally "found the defences not proved; therefore found that there is still a balance of £36, 10s. 9d. due to the pursuer of rent and interest : authorized the clerk of court to pay the pursuer the sum of £12 sterling, consigned in his hands as part payment of, and to account of, said balance, and continued the sequestration to the extent of the

No. 143. balance, being £24, 10s. 9d., reserving to the pursuer to apply for a warrant of sale by minute or petition: found the defendant liable in the expense of process, under deduction of the expenses allowed to him by interlocutor of 18th June 1826," &c.

Jan. 28, 1832.
Bennie v.
Mack.

A sum of £14, 4s. 10d. of expenses was ultimately awarded against Bennie, and he was incarcerated, and lay for some time in prison. He afterwards raised an action against Brown, to reduce the Sheriff's judgments, on the grounds already stated. In this action, Mack sisted himself as defender. The Lord Ordinary " sustained the defences, assoilzied," &c. with expenses.*

Bennie reclaimed.

* "Note.—The Lord Ordinary in general approves of the grounds of judgment set forth in the interlocutors of the Sheriff. But, more particularly, 1st, He is of opinion, that though there was an inaccuracy in the original petition, in so far as it prayed for sequestration generally, till payment of the arrears of rent and public burdens, and other stipulations of the lease, to be afterwards specially condescended on, this inaccuracy was corrected in the replies, by an express restriction of the prayer of the petition. The Lord Ordinary thinks that that restriction was competent, and that it was sufficiently clear to exclude any question as to the competency of sequestration for the value of the grass seeds or dung referred to. 2d, He is clearly of opinion that it was competent to Mr Brown to retract the reference to the present pursuer's oath, with regard to the disputed payment of £55 on the 16th February, 1825. 3d, He is of opinion that the writing bearing the date of 16th February 1825, must be considered as a receipt for money, and that it cannot bear faith in judgment under the stamp laws. 4th, As a consequence of this last point, it must be incumbent on the present pursuer to prove the payment alleged to have been made on that day; and there being no evidence except the admissions of Mr Brown, and the circumstances relative to the two bills, the fact must stand thus, that he paid £9, and delivered a bill for £6, 4s. 6d., and a bill for £20, and that though Mr Brown refused to accept of these bills as payment, and held them only in security, they were afterwards paid, and are to be credited in the accounting. But there is no evidence, and the fact is not admitted, that either these bills or the £9 were received as definite payment for the arrears of the rent and taxes specifically." 5th, If the Sheriff was right in refusing effect to the document bearing date 16th February 1825, the sum for which he ultimately decerned, £36, 10s. 9d., was the true debt at the date of the original petition. See state, No. 15 of process (No. 16 of original process), which ought to be printed if the case is submitted to the Court. The only question, therefore, which remains is, whether the decree given for this sum was warranted under the petition for sequestration as restricted. The receipt for the first payment of £55, bears expressly to be to account of the rent; but there is no evidence, and no admission, that either the £9 or the bills for £26, 4s. 6d., were given or taken as definite payments specially to account of the rent or the taxes. The bills, indeed, he had expressly refused to take on that footing. Mr Brown therefore was entitled to impute these sums to that part of his debt which was the least secured, but comprehended in the obligations of the lease, viz. the value of the grass seeds and dung, and then the result is, that the sum decerned for was truly due as arrears of the rent and taxes exclusively, for which the sequestration was clearly competent."

LORD BALGRAY.—Though a missive may not be pleadable as a receipt for money, from want of a stamp, it may remain good evidence to other effects. If I grant an acknowledgment that I have received ten cows, and £10 sterling from any party, on unstamped paper, it will be no evidence against me that I have received the money, but surely it will instruct delivery of the cattle. The delivery of the bills is not even denied here, and the missive of 16th February both proves the delivery of bills, and that they were to be applied to account of the rent. No. 143.

LORD GILLIES.—The missive expressly bears that the bills “shall be placed to account of your rent.” There is no dispute about the bills having been then delivered; but the Lord Ordinary has found there is no evidence as to their special application to the rent. I conceive, however, that this missive proves the receipt of bills, and their special appropriation to the rent at the same time.

LORD PRESIDENT concurred, and **LORD CRAIGIE** was understood also to assent.

THE COURT “recalled the interlocutor, and found that the pursuer is entitled to deduction of the £9, 16th Feb. 1825, and of the bills for £6, 4s. 6d., and for £20, when paid as payments to account of the rent: And with this finding remitted the cause to the Lord Ordinary, to proceed farther in it as shall be just; reserving entire all claims for expenses, hinc inde.”

Defender's Authorities.—55 Geo. III. c. 184; 31 Geo. III. c. 25, § 16; 33 Geo. III. c. 35.

F. HAMILTON, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

JAMES MORRISON and Others, Petitioners.—Sol.-Gen. Cockburn—
Maitland. No. 144.

JAMES TURNBULL and Others, Respondents.—Jameson.

Bankrupt—Sequestration.—Sequestration recalled on the ground that the concurring creditor's claim was contingent, being as indorsee of a current bill drawn by the bankrupt upon, and accepted by, a solvent third party.

On the 6th December last, sequestration was awarded of the estates of one Torrance, merchant in Glasgow, upon his own application, with concurrence of his law agent, as a creditor to the extent of £100, by two bills of £22 and £78. The latter of these bills was accepted by one Davy to the bankrupt, and by him indorsed to the law agent; it was dated 23rd September, 1831, and was payable at three months, so as to fall due 23–6th December. The respondent, Turnbull, was appointed interim factor; but shortly thereafter Morrison, and certain other creditors, presented a petition for recall, on the ground that as the bill for £78 was current at the date of the petition for sequestration, and the presumption was, that the acceptor would retire it, there was only a contingent claim against the bankrupt. Turnbull attempted to prove that Davy had admitted his insolvency in a correspondence with the bankrupt, and had disposed to him his goods, on condition that he should pay a list of debts, including the

2d Division.
Lord Balgray.
Bill-Chamber.
T.

No. 144. bill. He also maintained, that as, in a question with the holder of a bill,
 Jan. 28, 1832. the whole parties upon it are conjunctly and severally liable, the concur-
 Morrison, &c. v. ring creditor's claim was not contingent.
 Turnbull, &c.

Johnston v.
 Inglis.

LORD GLENLEE.—I think granting this sequestration was ultra vires. This was a contingent debt, and nothing else; and that question was settled by the opinion of the whole Court in the case of Thom,¹ without a dissentient voice. It is plain, that although the legislature means to allow sequestration to pass as easily as possible, it did not intend that we should take the bankrupt's word for the state of his affairs; and I was particularly struck to find that no creditor comes forward to take up and support this petition for sequestration. I think it would be dangerous to allow this as sufficient.

LORD CRINGLETIE.—I agree with Lord Glenlee.

LORD JUSTICE-CLERK.—This is the safe course to take. The debt being a contingent debt, is not a good ground for sequestration, and we must recall it.

LORD MEADOWBANK concurred.

THE COURT accordingly recalled the sequestration.

JOHN CULLEN, W.S.—CAMPBELL AND MACDOWALL, S.S.C.—Agents.

No. 145. **GEORGE JOHNSTON** Junior, Suspender.—Jameson—G. G. Bell.
JOHN INGLIS, Respondent.—D. F. Hope—Anderson.

Landlord and Tenant—Retention and Compensation.—1. Circumstances in which the tenant of a stone quarry was held not entitled to plead retention of rent to compensate an illiquid claim of damage. 2. The amount of rent made up from the tenant's books in a certain proportion to the gross output, in terms of the lease, and not impugned, held to be a liquid claim of rent.

Jan. 28, 1832. INGLIS, the charger, let a freestone quarry on his estate of Redhall, to
 ————— the suspender, Johnston, in the year 1821. The tack contained clauses
 2d Division. Ld. Cringletie. restricting the mode of working, and otherwise defining the tenant's right.
 Bill-Chamber. F. In particular, he was to pay a certain per-centge on the gross output, in name of rent or royalty, to be ascertained by books which he was taken bound to keep; and it was further declared, "that an account made up from the said books, (kept in manner foresaid,) by the said proprietor, and subscribed by him, should be sufficient to liquidate a charge against the tenant, and oblige him to make payment of the same, and on which balance, so to be ascertained, letters of horning on six days charge, and all other diligence, should proceed in the same manner as if the amount of the rent had been fixed by the tack." Johnston entered into possession, and during the lease Inglis endeavoured, with concurrence of Johnston

to carry some operations into effect, by which the relative positions of No. 145. the quarry and the high road might be better and more profitably arranged for them both. This was the subject of two separate agreements ^{Jan. 28, 1832.} Johnston v. Inglis. in 1828 and 1830, betwixt Inglis and Johnston, reduced into writing, which embraced the whole obligations of the lease, but extended the right of working. Under these agreements, Johnston quarried and removed a quantity of rock not included in the original tack. Some disputes occurred betwixt the parties, in the course of which Johnston alleged a claim of damages against Inglis for failure in performance of his part, and he ultimately refused to pay his rent for the additional quarry worked in terms of the above agreements, while he continued in possession by tacit relocation, his lease having expired. Inglis charged in terms of the tack, and Johnston presented a bill of suspension, which Lord Balgray refused. Thereafter a second was presented to Lord Cringletie, in which Johnston admitted the above facts, and did not deny the amount of rent claimed, but maintained—

1. That the sums charged for were illiquid, and could not be enforced by summary diligence.
2. That they did not fall within the terms of the lease, being for rock quarried under the subsequent agreement.
3. A plea of compensation and retention for damage, under the allegation that the landlord had failed to implement.

The Lord Ordinary pronounced this interlocutor:—"Having advised this bill, with the former one refused by Lord Balgray, the answers thereto, and writings produced, sees it admitted by the complainer, that by both the agreements, in 1828 and January 1830, with reference to the lease granted to the complainer, the whole obligations in the lease were held and agreed to be comprehended in these agreements, with the exception of the limitations of the extent of the rock in the lease, which were enlarged by these agreements; and, among others, it was agreed that a statement made out from the books kept for the quarries, to ascertain the amount of rent due, should be a sufficient warrant for letters of horning: In respect that it is admitted on page 32 of this bill, that the whole stone quarried, and for rent of which this charge was given, were quarried from rock which the complainer was allowed to work by the agreement 1830; and as the rent is in no way disputed to be correctly stated, and is therefore a liquidated debt, against which the complainer only opposes a vague claim of damages; and further, that he is still in possession, and will have rents to satisfy any such claim, if it at all exists—refuses this bill; but sists execution till Wednesday next, that the complainer may reclaim to the Court, if he shall be advised so to do."

Johnston reclaimed; but the Court adhered.

LORD JUSTICE-CLERK.—The subsequent agreement was just an enlargement of the bounds within which this tenant was to carry on his operations; and the ques-

No. 145. Jan. 28, 1832. Johnston v. Ingla. tion is, are the whole provisions of the lease to fly off in consequence? I hold that the stone wrought is to be paid for in the proportion as previously fixed, and as for the claim of damages, they are of an extrinsic nature, and wholly illiquid.

Hamilton v. Bridges. LORD GLENLEE.—I think the Lord Ordinary's interlocutor well founded.

The other Judges concurred.

ALEXANDER JOHNSTON, W.S.—DICKSON and STEWART, W.S.—Agents.

No. 146.

DR JAMES HAMILTON, Petitioner.—*Whigham.*
JAMES BRIDGES, Respondent.—*D. F. Hope—Monro.*

Right in Security—Statutes 7 and 8 Geo. IV. c. 76—1 and 2 William IV. c. 45.—
1. Where commissioners take property under the compulsory clauses of a statute, and the whole value is awarded by a Jury to heritable creditors—the commissioners are not entitled to withhold the price till the creditors shall furnish a feudal title; but are bound to pay on receiving a valid discharge disburdening the property.
2. Question raised whether the terms of the statute did not per se afford a sufficient title.

Jan. 28, 1832. By statute 7 and 8 Geo. IV. c. 76, passed in 1827, for carrying into effect certain improvements in the city of Edinburgh, the Commissioners are empowered to purchase the houses and grounds falling within the line of their operations, and to take the rights and conveyances in the name of their clerk for the time being. If the proprietors refuse to sell or transact, there is a provision in the act authorizing the Commissioners to apply to the Sheriff-depute of the county to summon a jury, “who shall enquire of, and give their verdict, for such damage or recompense, price or prices, as they shall judge fit to be awarded to such owners or occupiers, as aforesaid, or any of them, for any such lands, houses, &c., for their respective estates, or interests in the same, or for any damage done thereto; and the said Sheriff-depute, or his substitute, shall and may give judgment for the sum or sums of money specified in the verdict or verdicts of such jury or juries respectively; which verdict or verdicts, and the judgment, decree, or determination thereupon, declared and pronounced by the said Sheriff-depute, or his substitute, and the value or recompense, price or prices, so to be awarded or declared, shall be binding and conclusive, to all intents and purposes whatsoever, against the said Commissioners respectively, and against such person or persons, bodies politic, corporate, or collegiate, and all and every other person or persons whatsoever, having or claiming any right, title, trust, or interest of, in, to, or out of such lands, houses,” &c.

It is also provided, that “upon payment of such sum or sums of money so to be awarded and adjudged to the party or parties concerned, or legal tender made to him, her, or them respectively, either personally, or at his, her, or their usual place or places of abode, or upon payment

thereof into the Bank of Scotland, or the Royal Bank of Scotland, or the Bank of the British Linen Company of Scotland, in manner by this act directed, and notice of such payment left in writing, &c., it shall then, and not before or otherwise, be lawful to and for the said Commissioners to remove, convert, or dispose of such lands or houses, &c.; and the said Commissioners shall be indemnified therein, and shall be invested in the possession of the premises so to be converted and disposed of under the authority of this act."

No. 146.
Jan. 28, 1832.
Hamilton v.
Bridges.

It is further enacted, "that in case any dispute shall arise between the parties claiming or entitled to different interests in the premises to be purchased or acquired for the purposes of this act, or in case any person or persons to whom any sum or sums of money shall be awarded for the purchase thereof, shall refuse to accept the same, or shall not be able to make out a good title to the premises, to the satisfaction of said Commissioners, or in case such person or persons, to whom such sum or sums of money shall be awarded and adjudged as aforesaid, cannot be found, or if the person or persons entitled to such premises shall not be known or discovered, then, and in every such case, it shall and may be lawful to and for the said Commissioners to order the said sum or sums of money, so to be awarded and adjusted as aforesaid, to be paid into the Bank of Scotland, or Royal Bank of Scotland, or Bank of the British Linen Company of Scotland, to the credit of the parties interested in the said lands, houses, tenements, leases, heritages, or other properties (describing them) subject to the order, control, and disposition of the Court of Session; which said Court, on the application of any person or persons making claim to such sum or sums of money, or any part thereof, by petition, shall be, and is hereby empowered, in a summary way of proceeding, to order distribution thereof, or payment of the dividends or interests arising therefrom, according to the respective estates, title, or interest of the person or persons making claim thereunto, or to make such other order in the premises as to the said Court shall seem just and reasonable, pursuant to the directions of this act; and the cashier or cashiers, or other proper officers of the said Bank of Scotland, or Royal Bank of Scotland, or Bank of the British Linen Company of Scotland, with whom such sum or sums of money may be deposited, in terms of this act, is and are hereby required to give a receipt for such sum or sums of money, specifying for what and for whose use the same is or are received."

The late Dr Miller was proprietor of a house, which his widow and family inhabited, within the line of the improvements. Over this property Dr James Hamilton was a prior creditor by an heritable bond and disposition in security for £400, and Nisbet was a postponed creditor in an heritable bond for £300. Dr Miller having died insolvent, and no one having taken up his succession, the Parliamentary Commissioners took benefit of the compulsory clause of the statute, and presented an appli-

No. 146. cation to the Sheriff, in which they called as parties the widow and children of Dr Miller, as his representatives, together with the heritable creditors, Dr Hamilton and Mr Nisbet. The following agreement was entered into in presence of a jury : " We agree, in respect of the verdict in the case of John Stark, returned this day, that the jury empanelled to try this case shall award to the heritable creditors called in this action, in respect of their rights, the sum of £900, payable at Whitsunday 1831 ; and to the said Mrs Marianne Gardner or Miller, in respect of her right as tenant, that she shall give immediate possession of the Merchant Street Green, the sum of £150, payable at Whitsunday 1831."

Jan. 28, 1832.
Hamilton v.
Bridges.

A verdict was returned in terms of this agreement, and the Sheriff interposed his authority thereto. When the heritable creditors claimed the sum awarded, the clerk for the Commissioners refused to pay the money until they not only assigned their interest over the property, but at the same time furnished the Commissioners with a feudal title to the house from Dr Miller's heir-at-law, who had declined to represent. The price having been consigned in terms of the act, Dr Hamilton petitioned the Court for a warrant to uplift the amount of his bond. This the Commissioners opposed, unless the creditors should furnish them with a complete feudal title, and they thereafter gave in a minute, proposing a variety of modes, by which, they alleged, this might be effected. On the other hand, the creditors maintained, 1. That the compulsory clauses of the statute, in virtue of which the Commissioners took the property, afforded *per se* a sufficient title ; and, 2. That the heritable creditors were not bound to do more than grant a full discharge of the burdens to entitle them to receive their money.

The Court seemed to be of opinion that the statute afforded a sufficient title, but they ultimately found specially, " that the respondent is not entitled to demand from the petitioners any other title than a discharge and assignation of his heritable security over the subjects in question, the same to be made wholly at the expense of the Improvement Commissioners, and therefore repel the objections stated for the respondent; and upon the petitioners' executing such discharge and assignation, grant warrant to and ordain the Governor and Company of the Bank of Scotland, and William Cadell, their Treasurer, to pay to the petitioners, out of the sum of £900 sterling, with interest thereof since the term of Whitsunday last, consigned in the said Bank on the 25th instant, to the credit of all having interest, in terms of the Improvement statute, the principal sum of £400 sterling, with interest thereof since Martinmas 1819, in terms of the prayer of the petition, " and found Dr Hamilton entitled to expenses." *

* The Court pronounced a similar order on a petition for the other creditor Nesbitt.

LORD CRINGLETIE.—Every body knows that a purchaser pays for the title which his man of business draws; but look at the terms of the act,—there is a compulsory clause providing for such cases as this; and if the terms of it do not imply a full and perfect right of property, I do not know what could. Now, a complete right of property is not merely the right of using and enjoying, but also the *ius disponendi*. What better title could these Commissioners require? I have not the least doubt that the statute meant to vest a full right in them. Suppose the people who had right to receive the money were out of the country, and could not be found?

LORD GLENLEE.—I do not see how it is possible to burden the heritable creditor with the expense of making up a title; it would be very hard if they were to suffer on account of the interference of these Commissioners.

LORD JUSTICE-CLERK.—I am of the same opinion. No clause in the statute warrants the imposition of such a burden upon the heritable creditors; they are entitled to payment out of the first and readiest of this money, and to have an immediate order of payment; and all that can be required of them is to grant a valid discharge.

A. GOLDIE, W.S.—G. DUNLOP, W.S.—JAMES BRIDGES, W.S.—Agents.

BINNING BELL, Suspender.—*Whigham.*

No. 147.

WILLIAM CADELL, for BANK of SCOTLAND, Charger.—*Skene.*

Auditor—Fees to Counsel.—1. Circumstances in which a taxation by the auditor of the amount of fees to counsel was disallowed. 2. Question raised as to how far the auditor is entitled to cut down the amount of fees.

WHEN the case mentioned ante, p. 100 (which see), was discussed in Jan. 28, 1831. the Outer-House, it was deemed of such importance and difficulty, as to occupy nearly two days in the debate. On Bell's reclaiming note being put out for advising, the Court, on the suggestion of his counsel, ordered Cases without any argument from the bar, the counsel, however, having been prepared to plead it. The Court having, at a second advising, adhered, with expenses, the account for the Bank of Scotland was laid before the auditor. The whole amount was £63, whereof 33 guineas were for fees to counsel. Of these, two, viz. £7, 7s. to the senior, and £5, 5s. to the junior, were for attendance when the reclaiming note was first put out for advising, on which occasion Cases were ordered, without counsel having been called upon to plead. There were also two of £5, 5s. and £3, 3s. for the final advising, besides the ordinary fees to the counsel for preparing the Case. From each of the fees charged for the first advising, the auditor taxed off £2, 2s. This being objected to as beyond his province, and unreasonable in itself, it was answered, that the whole fees to counsel throughout the cause fell to be considered by the auditor; that the labour of preparing for pleading having been once incurred for the debate in the Outer-House, the subsequent trouble in

Jan. 28, 1832.
Hamilton v.
Bridges.

Bell v. Cadell.

2d DIVISION.
F.

No. 147. preparing to repeat the same argument was not great, and that the fees for Jan. 28, 1832. the first and second Inner-House advisings, taken together, were ample Bell v. Cadell. remuneration. On the other hand, while it was maintained that the fees Drummond v. were only reasonable for a cause of difficulty and importance like the Gilmour. present, it was mainly pleaded that it was not the province of the auditor to sit in judgment on the fees given to counsel; but that if the fees had been bona fide paid, and there was no appearance of accumulating them for the purpose of oppressing the opposite party, the auditor was bound to pass them.

LORD JUSTICE-CLERK.—I cannot see any ground for striking any thing off these fees. Counsel were bound to come to the first advising thoroughly prepared to argue the cause, which was an important one, and I cannot say they are at all exorbitant.

LORD MEADOWBANK.—Fees have certainly been enlarged since I was at the bar; but this has been rendered necessary by the alteration in the mode of conducting a cause, and those charged here seem to me perfectly reasonable. I must say, however, on the general principle, that I do not think it ever was in the contemplation of the Court, in appointing an auditor, to subject the Bar to the degradation of their fees being controlled by him; and that if an objection is to be taken, it should be to the Court when the report is advised.

LORD CRINGLETIE.—I cannot go that length, though I agree that the taxation here should be disallowed.

LORD JUSTICE-CLERK.—There is no need, in order to decide this matter, to lay down that broad rule positively.

THE COURT disallowed the taxation, and granted the expense of the present discussion.

BRODIES and KENNEDY, W.S.—HENRY DAVIDSON, W.S.—Agents.

No. 148

J. B. DRUMMOND, Suspender.—Neaves.
GEORGE GILMOUR, Charger.—Outram.

Process—Expenses.—A defender, who had failed to obtemper an order in an inferior court for deponing on a reference to his oath, having been reponed, and, after considerable delay, having failed again, and decree held in consequence pronounced, entitled in a suspension to be reponed, on paying the whole previous expenses in the Inferior Court and Court of Session.

Jan. 28, 1832. In an action before the Magistrates of Edinburgh, at the instance of the charger Gilmour, against the suspender Drummond, for payment of 2ⁿ Division. Bill-Chamber. an account, the Magistrates sustained a defence of prescription proposed Ld. Cringletie. by the latter, and allowed a reference to his oath. Having failed to appear and depone at the appointed diet, the Magistrates decreed against

him, but thereafter reponed him on payment of 10s. Six months were allowed to elapse, but he still failed to appear and depone, whereupon the Magistrates again decerned against him, with expenses, and Gilmour having extracted the decree, charged thereon. Drummond presented a bill of suspension, which the Lord Ordinary refused, “in respect it is admitted that he failed to appear on the day appointed to depone, on which account decree was given against him; and in respect that he does not in this bill even propose to appear and depone, provided the action were remitted to the Inferior Court.” Drummond now reclaimed, and stated that he had meant in his bill to offer to depone, and considered he had done so, but he now offered to appear and depone, if he were reponed against the decree.

The Court remitted to repone him, but only on payment of all the expenses in this and the Inferior Court.

D. CHRISTIE, W.S.—J. RUTHERFORD, W.S.—Agents.

HUGH COGAN, Pursuer.—Greenshields—Maitland.
GEORGE LYON and Others, Defenders—A. M'Neill.

No. 149.

Title to Pursue—Death-bed.—A party who held heritance under a disposition to herself and her disponees, and (failing her disponing) to certain substitutes, having executed a conveyance, alleged to be on death-bed—Found that her titles were not exclusive of the substitute heir of provision's title to pursue reduction of it ex capite lecti.

THE husband of the late Ann Cumming disponed certain heritable subjects by a deed of settlement to her, “in case she should survive me, and to her disponees whomsoever; and failing the said Ann Cumming by decease before me, or failing her disponing or conveying the subjects hereby disponed, in case she shall survive me,” to certain substitutes. Ann Cumming having survived her husband, and having died leaving a disposition in favour of the defenders, Lyon and others, an action of reduction of it, as executed on death-bed, was raised by the pursuer Cogan, who was heir of provision under Hunter's settlement. In defence, an objection was taken to his title to pursue, that the property having been conveyed to Ann Cumming “and her disponees,” and only destined to the substitutes conditionally in the event of her not disponing, the condition had not been purified which opened the succession to them. To this it was answered, that the destination to Ann Cumming's “disponees,” could imply no more than would have been included in a destination without mention of disponees, and that there being no power to dispone on death-bed, she could no more than any other proprietor in fee-simple exclude the heir alioqui successurus, by a death-bed deed, and therefore he had good title to set aside a deed avoiding the destination to him.

Jan. 28, 1832.
Drummond v.
Gilmour.

Cogan v. Lyon,
&c.

No. 149.

Jan. 28, 1832.
2d Division.
Ld. Moncreiff.
T.

No. 149. The Lord Ordinary repelled the defence, adding the subjoined note.*
 The Court adhered.

Jan. 28, 1832.
 Cogan v. Lyon,
 &c.

CAMPBELL and MACK, W.S.—CARNEGIE and SHEPHERD, W.S.—Agents.

Whitson and
 Crone.

No. 150. Rev. G. WHITSON and W. CRONE, Petitioners.—*Carlyle.*

Clergyman—Factor Loco Tutoris.—The Court declined to appoint a clergyman to be factor loco tutoris.

Jan. 31, 1832. THE Reverend George Whitson, and the Reverend William Crone, parish ministers, presented a petition to the Court, stating that John Clyne and others were in pupilarity; that the late Mrs Waugh had, by settlement, left them certain property, and that, though she did not name any guardian in her settlement, yet, on her death-bed, she had verbally requested the petitioner, Mr Whitson, to take charge of the property left to the children. They also stated, that the party entitled from relationship to the office of tutor at law, was so poor as to be unable to find caution for his intromissions. In these circumstances they craved the Court to appoint them joint factors loco tutoris, or at least to name Mr Whitson as factor loco tutoris to the children.

LORD PRESIDENT.—The Court mean to observe it as a general rule, to refrain from nominating a clergyman of the Established Church to the office of factor loco tutoris. Some other nominee must be suggested.

THE COURT then “ refused the desire of this petition, in so far as it prays for the appointment of two factors, both of the persons suggested being clergymen; but without prejudice to amend the prayer of the petition and intimate it anew; or to put in a new petition.”

J. WATSON, W.S. Agent.

* “ The Lord Ordinary is clearly of opinion, that the circumstance of the property being conveyed to Ann Cumming, ‘and her donees whosoever,’ and only failing by her decease, or failing her disposing, to the heirs substituted, cannot have the effect of excluding reduction on the head of death-bed, at the instance of the heir so substituted: That heir is undoubtedly the heir *alioqui successurus*, the heir of provision under the title by which Ann Cumming held the property; and as it was given to her in fee-simple, the disposition to her and her donees was no more than what would have been implied in the conveyance to herself. But though she had full power to dispose of the property by deed, it by no means follows that she, any more than any other proprietor in fee-simple, could exclude the heir of the destination by a deed executed in *lecto*. This is altogether different from a conveyance with a reserved power to the grantor to alter or dispose, *etiam in lecto segregitudinis*. As the cases mentioned in the debate do not appear to the Lord Ordinary to apply to this case, it is unnecessary to advert to them.”

JOHN SHAND, Pursuer.—*W. Bell.*

HUGH ROBERT DUFF, Defender.—*A. Murray.*

No. 151.

Jan. 31, 1832.
Shand v. Duff.

Agent and Client—SHAND, W.S. having been employed by Duff, raised an action against him for his business account. Duff pleaded defences, resting on specialties, which the Lord Ordinary repelled with expenses, and the Court adhered.

1st DIVISION.
Ld. Corehouse.
D.

Dundee Rail-
way Co. v.
Miller, &c.

J. S. ROBERTSON, W.S.—**J. LAWSON**, W.S.—Agents.

DUNDEE and NEWTYLE RAILWAY COMPANY, Pursuers.—*Skene—Alison* No. 152.
—*Brown.*

JAMES MILLER and MESSRS SOOTS, Defendants.—*Jameson—Cowan.*

JOHN HALDANE and TRUSTEE, Defendants.—*W. Bell.*

Title to Pursue—Partnership—Statute 7 Geo. IV. c. 101.

1. An Act of Parliament incorporating a Joint Stock Company, with a conditional provision, that it should not come into force until a subscription contract to a certain amount was entered into and signed; and this having been done to the precise amount, and no more; and a party having signed as mandatory, but without authority—Held that the signature, though it did not bind the alleged mandant, afforded, from the terms of the contract, sufficient *ex facie* evidence of liability against the subscriber to put the act in operation, and the Company in titulo.

2. Circumstances held not to infer mandate.

3. Liability as partners of a Company held to be constituted *rebus ipsius et factis*, although the parties had signed no contract.

IN 1825, the Magistrates of Dundee, and certain proprietors in that part of the country, issued a prospectus of a joint stock company for forming a railroad from Dundee to Newtyle, &c. A good many subscriptions having been obtained to the prospectus, application was made to Parliament for an act to carry the proposed measure into execution. While steps were taking to obtain the sanction of Parliament, a contract was also circulated for signature among the proprietors, whereby “the subscribers agree to become members of said Company, and oblige ourselves, and our said constituents, and their respective heirs, executors, and administrators, to hold the number of shares, and pay the several sums affeiring thereto, annexed to our respective names, at such times as shall be appointed by the committee of management, &c., according to the calls to be made from time to time on the subscribers by or under the authority of the said committee of management,” &c. Copies of subscription papers to the amount of four-fifths of the estimated expense of the operations having been produced, an act (7 Geo. IV. c. 101) was passed,

2^d DIVISION.
Ld. Fullerton.
T.

No. 152. incorporating the Magistrates and Town Council of Dundee, and certain other individuals, into a Company, under the designation of the Dundee and Newstyle Railway Company. The 30th section of the statute contained a conditional provision in these terms :—" Whereas the probable expense of making the said railway will, according to an estimate made thereof, amount to the sum of twenty-seven thousand six hundred pounds, and four-fifths of this sum, and upwards, have been already subscribed for defraying such expenses, under a contract binding the subscribers, their heirs, executors, and administrators, for payment of the several sums of money so subscribed by them respectively, be it enacted, that the whole of the said sum of twenty-seven thousand six hundred pounds shall be subscribed in like manner before any of the powers given by this act shall be put in force."

Jan. 31, 1832.
Dundee Rail-
way Co., v.
Miller, &c.

Subscriptions to a certain amount, signed in some instances by the parties themselves, and in others by mandatories for them, were obtained to a contract, which bore, " we whose names, &c., oblige ourselves, and our said constituents, &c.;" but up to the 16th June, 1826, the day fixed by the act for the first meeting of the Company, the requisite amount had not been obtained. The meeting was therefore adjourned. This was succeeded by other adjourned meetings, in the course of which it was determined, that although the sum required by the act had not been subscribed, the operations should be forwarded in the meantime. This resolution, however, was not unanimous, and Miller, one of the defenders, in his own name and that of others, protested that no steps should be taken until the subscriptions were filled up. The railway was commenced, and partly constructed in the course of the years 1826 and 1827, following out surveys taken upon the plan of being terminated at Newstyle, as expressed in the act, but deviating slightly from the line therein contemplated. Calls to defray the expense were then made by the committee of management upon the partners of the Company. Payment of these being resisted by certain of the partners, the Company raised an action against them, which was dismissed by the Lord Ordinary, on the ground that the contract required by the act had not been completed.

The Company acquiesced, and abandoned their action; but proceeded to perfect their title by means of a second and supplementary contract, executed for the whole sum specified in the act, the last signature to which was dated 6th February, 1828. Of that date, the Company, by means of the two contracts, were in possession of the precise amount of subscriptions required by the act to put them in *titulo*, and no more. Many of the signatures were by mandatories, and the mandates, though not produced, were offered to be proved; and with the exception of the signature of Dr M'Donald, to be afterwards noticed, were sanctioned by subsequent acts of the mandants. There were besides certain

other parties, who were said to have become partners by their actings and No. 152. admissions. In particular, the defenders, Messrs J. and D. Soot, and John Haldane, had not signed any contract; but the two former signed the prospectus, and attended the meetings; and the latter styled himself a partner in the proxy which he gave to one Laird to act for him. On the other hand, some of those who had signed the prospectus and contract, among whom was the defender Miller, alleged that they had subscribed upon the faith that the railway was to be carried into the valley of Strathmore; whereas the committee had obtained a clause in the act limiting the operations at the point of Newtyle, contrary to the circulated prospectus, and had even deviated from the statutory line. Among the subscriptions both to the prospectus and the contract, was included the name of the late William M'Donald, (whom the defender Dr M'Donald now represented,) which was obtained under the following circumstances. This gentleman, who was not a proprietor in the district, but lived at some distance, had expressed an inclination to join the scheme, and to subscribe for defraying the expense of surveys. A friend of M'Donald communicated this intention by letter to a Mr Bisset of Dundee, who made no immediate reply, and the object was effected through other agency. Bisset, however, about ten months after the application to him, wrote to M'Donald, mentioning a meeting of subscribers, and requesting to know what number of shares he wished to hold. M'Donald replied by a letter dated 28th October, 1825, in these terms:—"Allow me to say, I feel particularly obliged to you for your kindness in attending to my interest in the Dundee and Strathmore Railway. It was my intention, up till late last night, to attend the meeting at Dundee to-day, and to name the number of shares I meant to subscribe for, but as ill luck would have it, I was called, after the post hour, to a severe and alarming case, &c., and on no account can I leave town. This has disappointed me, and I must leave it to your kindness still to act for me. I shall be satisfied with five shares, even at the reduced rate, as many more immediately connected with the country will be desirous to come forward and support the thing, while I shall have no difficulty in laying out any funds I may have to advantage. I wish you would inform me how many subscribers there are, and who takes the lead in the matter, because, if they are merely speculators, I would rather have nothing to do with it. I am hopeful, however, they must be men of a different stamp, and that the thing is gone circumspectly about, and will prove a good concern for the country and Company. I wish much that the secretary would give us at a distance more timely notice of meetings, if possible, and also of the proceedings. May I trust to your kindness to let me know what is done at to-day's meeting, and oblige yours," &c.

It was not proved that Bisset attended the meeting to which the correspondence referred, and no contract was prepared for several months after-

Jan. 31, 1832.
Dundee Rail-
way Co. v.
Miller, &c.

No. 152. wards; but on the 14th of April, 1826, he signed as mandatory for M'Donald in this form : " For Wm. C. M'Donald, Edinburgh, William Bisset per mandate five shares, two hundred and fifty pounds." M'Donald, on receiving certain circulars respecting calls, wrote to a Dr Johnston, (Dec. 25, 1826,) stating that he was anxious " now not to enter into any transaction in this country that may require advances," and adding, " I shall therefore feel obliged to you and the secretary, whoever he is, if, under the painful circumstances in which I am placed, you get my name, if so be it is there, removed from the list of subscribers to the above useful and meritorious undertaking." What steps were taken on this did not appear, but Bisset's subscription for M'Donald continued at the contract. When the Company had amended their title, by means of the supplementary contract, they again issued calls in terms of the act, commencing in March 1828; and these being resisted, the present action was raised to enforce them. A variety of defences, general and special, were put in for the opposing parties. With reference to all the defenders, it was pleaded,

1. That the Company were not in *titulo* to enforce calls, as many of the subscriptions to both contracts were by mandatory, and no mandates were produced; and that, at any rate, the subscriptions not having been obtained at the date of the first meeting appointed by the act of Parliament, the subsequent proceedings under the adjourned meetings were not authorized; and, 2. That the subscription of M'Donald at least could not be taken into account, as his mandate was not instructed; and that the title was incomplete without it, seeing his subscription was absolutely necessary to make up the full sum required by the act.

In regard to the defenders individually—

1. Dr M'Donald pleaded specially, that his brother was not bound by Bisset's signature without authority.
2. The Messrs Soot rested their special defence upon the fact of having only signed the prospectus, and not the contract.
3. John Haldane argued, that as he had not even signed the prospectus, no calls were competent against him.
4. Miller maintained, that the plan and operations carried into effect, having been different from the prospectus, and even from the line pointed out by the *act*, the fact of signing the prospectus and contract could afford no ground for calls, neither authorized, under those circumstances, by the prospectus nor the *act*.

The Lord Ordinary reported the cause on Cases, and issued the note below.*

* " NOTE.—The pleadings embrace various points on the title as well as the merits, and, with one exception, the Lord Ordinary is rather inclined to an opinion in favour of the pursuers : 1st, It is set forth, by way of recital, in the 30th section of

LORD GLENLEE.—As to the objection to Dr M'Donald's liability, the Lord Ordinary's difficulty seems to be, that by the act of Parliament there must be par-

Jan. 31, 1832.
Dundee Rail-
way Co. v.
Miller, &c.

the statute, that a certain sum has been subscribed under a contract, binding the subscribers, their heirs, &c.; and although he cannot adopt the argument of the pursuers, that this is equivalent to an enactment that the contract produced to the legislature was actually blinding on those who were apparently parties to it, he thinks that the production of such contract to the legislature, for the purpose of being made the ground of a statute, was such an homologation of, or rei inter-vetus on, the contract so produced, as to bar all merely formal objections to its execution.

"2dly, He thinks that the objection to the signatures by mandatory is effectually taken off by the averment and offer of proof that mandates did exist, and that, at all events, the parties have sanctioned the acts of the mandatories, by admitting their liability, and paying their calls as members of the copartnery.

"3dly, Considering that the 30th section clearly contemplated the passing of the act before the whole sum of £26,000 should be subscribed, and that the 40th section provided specially, that the first 'General Meeting of the said Company, for putting this act into execution, shall be held at Dundee on the third Friday next after the passing of this act,' he does not think that the whole act necessarily fell, from the circumstance of the full amount not being subscribed before the day appointed, for the first general meeting, held that day, was totally unauthorized. Considerable difficulty, on this point, certainly arises from the mode in which the different clauses are expressed; but, upon the whole, he thinks that in sound construction, that meeting and subsequent meetings were authorized, although the powers of the Company for actually commencing operations, and carrying the measure into execution, were suspended until the full sum was subscribed.

"4thly, There seems no ground for the defence, on the merits, that the defenders are free because a clause was inserted in the statute contrary to the circulated prospectus, and to the bill as originally proposed, by which clause, it is said, the railway was necessarily prevented from ever being carried further than Newtyle. It is clear, in the first place, that the parties, subscribers, were bound to attend to their own interest, in regard to the terms of the statute actually adopted by the legislature. But, besides, the bill circulated and approved of, bore to be a bill for making a railway only to Newtyle, and, consequently, the insertion of a clause preventing it from being carried further, cannot be viewed as any change in the essentials of the measure proposed.

"5thly, Although the irregularities alleged to be committed by those who took an active charge, by commencing operations before the statute was in force, and by deviating in some particulars from the line pointed out in the statute, may raise very important questions regarding the application of the Company funds, and the personal liabilities of those by whom such irregularities were committed, it does not appear that they afford a good defence against the present action. This is an action for calls, and it is expressly provided by the statute, that in any action brought 'by reason of any call or calls, made by virtue of the act, it shall be sufficient to declare and allege that the defendant or defendants are proprietor or proprietors of so many shares in the said undertaking, is or are indebted to the said Company in such sum or sums of money as the call or calls,' &c.; and that it should only be necessary to prove that 'the defendant or defendants, at the time of making such call or calls, was or were a proprietor or proprietors of such share or shares in the said undertaking, and that such call or calls was or were in fact made, and that such notice thereof was given as is directed by this act.' Indeed, independently of such express

No. 152. ties bound by the contract, before any thing can be done. Very true, this Company must have the subscriptions, and claims against individuals, who, on the other hand, may have their defences; but the question before us is just whether the requisite sum was subscribed in terms of the act. The first thing, therefore, for our consideration, is the title to pursue. I doubt if, as a general rule of law, it would be a good answer to the objection to M'Donald's liability, that, when a mandatory signs a deed without any obligation against himself, he must be held to take the obligation on himself if he does not insist that the mandate accompany the deed. No doubt he might be responsible, but that would be on special grounds; not on the contract. But when I look at the terms of the subscriptions to both the first and second contracts,—“we whose names,” &c. “oblige ourselves and our said constituents,” &c.,—I can have no doubt that Bisset bound himself and his heirs. There may be special questions, but this is one merely of competency,—merely as to their being in *titulo* to pursue; and if it be necessary to include Bisset's subscription for that purpose, I have no doubt he is bound. I speak only to the question whether the Company are entitled to act as such; for there may be special

provision, the irrelevancy of such a defence was lately determined by the Court in the case of Caledonian Iron Company v. Clyne.

There is, however, one point upon which the Lord Ordinary feels great difficulty indeed; and that is, the objection to the title, founded on the signature of the contract by mandate, for the late Mr M'Donald. The signature is objected to by the representative of Mr M'Donald, on the ground that the mandatory had no authority; and as it is res judicata of the judgment formerly pronounced by Lord Cringletie, now final, that to support the title of the pursuera, as a corporate body, the act of Parliament requires that the specified sum shall be subscribed ‘by a contract, binding the subscribers, their heirs, executors, and administrators,’ and as it is admitted that the subscription by Mr M'Donald to the contract, is necessary to complete the statutory sum, which has as yet been subscribed by formal contract, the title of the pursuers truly comes to depend on the validity of that subscription.

Now, the mandate founded on is a letter of the 28th of October 1825, addressed by Mr M'Donald to Mr Bisset, which certainly seems to authorize Mr Bisset to attend and act for him at a meeting at Dundee, giving as the reason, that he was prevented from attending that meeting himself; and it may be fairly construed as authorizing Mr Bisset to subscribe for five shares at that meeting. It does not seem yet to be ascertained whether Mr Bisset did attend and subscribe at that meeting or not. But the fact is undoubted that there was no contract subscribed at that meeting; that the contract was not prepared for several months afterwards; and that it was not signed by Mr Bisset, as mandatory for Mr M'Donald, till the 14th of April 1826, M'Donald being at home, and no application being made to him personally for his signature. Now, the impression of the Lord Ordinary is, that this signature was unauthorized, as he does not consider that an authority to attend a meeting and subscribe a certain number of shares, given on the ground that the party is prevented from attending that meeting, does form a mandate to subscribe a regular contract of copartnery six months afterwards, the party himself being on the spot, and neither the terms, nor even the existence, of such a contract ever having been communicated to him.

The Lord Ordinary has thought it right, however, to order cases, and to afford the pursuers an opportunity of obtaining the opinion of the Court, before any interlocutor be pronounced on a point so deeply and so extensively affecting their rights.

Jan. 31, 1832.
Dundee Rail-
way Co. v.
Miller, &c.

defences, such as that Bisset as well as M'Donald ought to have been called; but No. 152. that is a very different matter from dismissing the action on the ground that the requisite sum was not subscribed.

LORD CRINGLETIE.—I had written on my papers an opinion precisely to the ^{Jan. 31, 1832.} Dundee Rail-
way Co. v. Miller, &c.

LORD MEADOWBANK.—My opinion is also the same. I shall only add, that the terms of the act of Parliament do not appear to me to be very express. But on the point of title, I agree with Lord Glansee.

LORD JUSTICE-CLERK.—My opinion is, that as to this subscription of Bisset, there is a sufficient answer made to the objection taken for M'Donald.

JAMERON.—There is another point on the title, to which your Lordships have not spoken, and on which we wish the opinion of the Court. We deny that the act of Parliament has ever come into operation. If the first meeting was not held under the act, (and it is admitted that the full sum was not then subscribed,) there could be no other meeting, because all the meetings are adjourned meetings; so if there was no legal meeting at first, there could be none after.

LORD JUSTICE-CLERK.—I am quite clear that that objection is not well founded. The act appoints a certain day for proceeding to put it into execution. It would have been an objection, and we would never have heard the last of it from the defenders, if that day had been passed over. But they meet on the day enjoined, and take certain steps—Is there any thing in the act which says, that if the whole sum was not subscribed by that day, the act was to fall to the ground? If that had been meant, Parliament would have expressed it. Until the sum was subscribed, they could not enter into any operations for acquiring property, or make calls, but it would be trifling with the legislature to say that the act was thereby to fall altogether.

THE other Judges agreed.

LORD JUSTICE-CLERK.—As to the other objections, I pay no regard to them. With respect to the allegation that there was any deception practised on the subscribers as to the extent of the railway, look at their own statements:—It is stated that there was only a probability of its being extended to Strathmore and Cupar-Angus; but there must have been funds, and applicants to have it carried so far. Then as to the alteration made, it is only that it should not come within 100 yards of the public roads; there is nothing here making it impossible to extend it. They may go to Parliament, and get a supplementary act for the prolongation of the road. But the proposal is for a railway to Newtyle, and four parishes are mentioned, to none of which is this objection applicable; and there are some other objections equally ridiculous, as that to M'Donald's liability, where the question is, whether he is liable as a partner of this Company, for it is just a declarator of copartnery, as, if the calls are properly made, he would be liable as a partner. When I look at his letter, I am not satisfied that it authorized Bisset to subscribe for him. If he had attended the meeting himself, would that have made him a partner? The letter merely authorizes Bisset to attend the meeting; but is there any thing saying, and to subscribe for him? I can find no such word. But what is done afterwards? Bisset did not attend the meeting. Six months afterwards, when M'Donald was in Edinburgh, and Bisset in Dundee, is there any thing which authorized this most extraordinary act, which might have led to a demand for five-and-twenty times the amount of the present sum? I have not been able to discover in the letter any such

No. 152. authority. Then what remains? The letter of a posterior date. There is no evidence that M'Donald was aware of the proceedings after that meeting. All he says is, "If so be" that his name is there, to get it removed. If he had stated that he was afraid Bisset had acted as mandatory for him, we might have been bound to put that construction on the letter that he wished now to get off, and that they were entitled to prevent him. I can find no legal grounds for making him or his representatives liable and responsible for this Company.

LORD MEADOWBANK.—On the whole, my opinion coincides with that now delivered, and principally on the terms of the letter by M'Donald, particularly the latter paragraph, where he wishes to know who are the subscribers, because, if they are merely speculators, he would rather avoid the undertaking. If he had attended the meeting himself, he would have learned this, but he does not say that he would have subscribed; before doing so, he wished to know the subscribers. On the whole words of the letter, I do not think it imports authority to subscribe an obligation for him.

LORD GLENLEE.—I am of the same opinion. Not calling Bisset was a blunder; but I do not see any such evidence of the mandate as to authorize us to hold M'Donald liable.

LORD CRINGLETIE.—I am of the same opinion.

LORD JUSTICE-CLERK.—My only difficulty as to Haldane is, the shape of the action. This is an action for calls from the partners. Does his acting by proxy go further than to compel him to become a partner?

Shene, for the pursuers, read the proxy by him, in which he called himself a partner.

LORD GLENLEE.—That is sufficient.

THE COURT accordingly "repelled the several objections pleaded by the defenders against the title of the pursuers to maintain the present action: sustained the special defences pleaded by Dr John Caddell M'Donald, and assolved him from the conclusions of the libel; but found no expenses due, reserving to him his claim for such against Mr Bisset, referred to in the pleadings, and to Mr Bisset his defences, as accords: repelled the defences pleaded for all the other defenders, decerned against them respectively, in terms of the conclusions of the libel; and found them liable in expenses of process, subject to modification."

PATRICK TENNENT, W.S.—J. R. STODDART, W.S.—JOHN DONALDSON, W.S.—WILLIAM WADDELL, W.S.—Agents.

No. 153.

ALEXANDER and ROBERT MURRAY, Pursuers.—*Brown.*

JOHN MURRAY, Defender.—*Cunninghame—Cowan.*

Rev. JAMES STRACHAN, Defender.—*G. G. Bell.*

JOHN STEVENSON'S REPRESENTATIVES, Defendants.—*D. F. Hope.*

JOHN HALLIDAY, Defender.

Tutor and Curator—Statute 1672, c. 2.—Tutors appointed under a deed which declared each liable only for his actual intromissions, having failed to give up inventories, in terms of 1672, c. 2,—Held liable for omissions, as well as intromissions, and singuli in solidum.

THE late Robert Murray appointed the Rev. William Strachan, John Murray, John Stevenson, and John Halliday, to be tutors and curators to his two infant children, Alexander and Robert Murray. The deed declared "that they shall not be liable for omissions, but each for his own actual intromissions only." Robert Murray died in 1807, when his youngest child was a few months old. The whole estate of the pupils was committed with by the tutors. In particular, John Murray subscribed the renunciation of a lease in December 1808. He also subscribed several discharges, by which considerable sums of the pupils' money were uplifted. John Stevenson died in 1809, after having had intromissions with a large part of the estate. In 1816, the Rev. W. Strachan, and John Halliday (a quorum of the surviving trustees), raised a summons of constitution against Stevenson's representatives, to account for his intromissions. A submission was entered into by these parties, under which a balance of £195, 3s. 6d. was found due by Stevenson's representatives, and on receiving payment, the tutors, including John Murray, signed a discharge in their favour.

No inventories had been made up by the tutors. In 1828, Robert Murray, the youngest son, became major, and in 1829, he and his brother Alexander raised an action of count and reckoning against the Rev. James Strachan, as representing the Rev. William Strachan, now deceased, John Murray, John Halliday, and the representatives of Stevenson, concluding, inter alia, "that the defenders, by their neglect to give up judicial inventories, &c. are liable to the pursuers both for intromissions and omissions, and shall have no allowance or defalcation of the charges and expenses or losses laid out and sustained by them in the affairs of the pursuers." They did not raise a reduction of the discharge which had been granted to Stevenson's representatives by the surviving tutors.

John Murray pleaded in defence, 1. That he was a rustic, and had only taken a subordinate share in the management of the pupils' estate; that he had for some time, at first, declined to act at all, and therefore the omission of making up inventories was properly chargeable only against the other tutors, as they had acted from the first, and were bound to give up inventories at entering on their office, so that he was entitled to presume, when he did begin to act as tutor, that inventories were already given up; and, 2. That he was at least protected, by the terms of the deed of nomination, from any liability, except for his own actual intromissions.

The pursuers did not admit these allegations; referred to his actings already noticed; and contended that his allegations were irrelevant.

The representatives of Stevenson pleaded, inter alia, 1. That the discharge under the submission exonerated them; and 2. That the action, so far as penal, could not be maintained against them, as no litiscontestation had taken place with their ancestor.

The pursuers answered, 1. That the discharge granted by the surviving

Feb. 1, 1832.
1st Division.
Ld. Corehouse.
D.
Murray v.
Murray, &c.

No. 153. Feb. 1, 1832. *Murray v. Murray, &c.* tutors could not prevent the pupils from calling Stevenson's representatives to account; and, 2. That in an action of accounting, the latter plea was irrelevant.

The Rev. James Strachan denied that he represented his father; and pleaded other defences. Halliday denied intromission or interference with the pupils' estate.

The Lord Ordinary found, "that the defender John Murray was named one of the tutors of the pursuers by their father, the late Robert Murray; found it proved, that he acted in that capacity repeatedly, and on several important occasions; and in respect that no tutorial inventories were made up, in terms of the statute 1672, cap. 2, found that the said John Murray is liable for omissions as well as intromissions, and likewise in solidum with the other tutors; and, before farther answer, appointed him to give in his tutorial accounts between and next calling. With regard to the defender Thomas Stevenson, in respect of the submission and decree-arbitral mentioned in the pleadings, in terms of which decree he has accounted to the other tutors, and has been exonerated and discharged by them; and in respect the said decree has not been brought under reduction by the pursuers on the head of minority and lesion, assoilzied the said Thomas Stevenson, and found him entitled to expenses of process, in so far as they have been incurred since his defences were given in, and decreed. And with regard to the defenders Strachan and Halliday, sisted process in hoc statu; reserving to John Murray his relief against the other tutors, and their representatives."

John Murray reclaimed.

LORD BALGRAV.—We cannot allow Murray to argue that he was entitled to presume that inventories were given up before his co-tutors entered on their office, because he might have ascertained the truth on this subject by going to the Sheriff Court. If he did not enquire into this, he must take the consequences. I am for adhering.

LORD GILLIES.—It may be a case of hardship against this defender, but the Lord Ordinary's interlocutor as to him is strictly in terms of the act of Parliament, and should be adhered to. But I doubt how far there are *termini babilis* for assoilzieing the representatives of Stevenson, at this stage of the case.

THE OTHER JUDGES concurred in the same doubt, and Lords Balgray and Gillies were understood further to observe, that, though the pursuers' claim against the representatives of a deceased tutor, might be affected because no *litiscontestation* took place before his death, yet, if the pursuers recovered decree against John Murray, the claim of relief by Murray against these representatives would not be exposed to the same limitation.

The case stood over until the representatives of Stevenson should make appearance; which being done, and it appearing that the Lord Ordinary's interlocutor assoilzieing them had not been reclaimed against in that respect, and was now final, their Lordships adhered.

1662 (16268); *Kintore*, June 28, 1665 (1 Supplement, 512); *Cleland*, June 24, 1680 (12451); No. 153.
 Hamilton, Nov. 6, 1750 (16355); *Elohis, Tutor*, No. 19 (5 Supplement, 782.)

Stevenson's Authority.—Lady C. Graham, March 6, 1778 (5599.)

Feb. 1, 1832.
*Murrays v.
 Murray, &c.*

T. PAUL, W.S.—*GRAHAM and ANDERSON, W.S.*—D. BROWN, JUN.—W. A. G. and R.
 ELLIS, W.S.—J. MACLAURIN, W.S.—Agents.

Stephen, &c. v.
Pirie.

JOHN STEPHEN and JAMES DUIS, Advocators.—*Jameson—Pyper.* No. 154.
 JAMES PIRIE, Respondent.—*Rutherford.*

Proof—Donation.—Where a nephew admitted that he had received advances of money from his uncle; and on the uncle's death, an acknowledgment, apparently subscribed by the nephew, for the money, was found in the uncle's repositories, and relative to an adjustment of accounts; and the nephew refused to admit, but did not deny his signature to be genuine, and alleged that the money had been given as a gift—Held that he was liable for the money, with interest.

ON opening the repositories of the late John Pirie, farmer, on 12th June 1829, in presence of his nephew, James Pirie, and others, there was found the following, among other documents, “memorandum of articles due by James Pirie to John Pirie, from Whitsunday 1816, to Whitsunday 1817. To black mare, £22, and 2 draught oxen, £22—£44,” &c. There then followed a list of articles of farm stocking, along with some items of lent cash, which exceeded £300, but were not summed up. This writing was subjoined: “Little Carnbeg, 18th February 1819.—James Pirie, to John Pirie, Dr.—To sundry articles of farm stocking and money, £285, 17s. 7½d.—Little Carnbeg, 19th February 1819.—I acknowledge the above account to you, due by me, for which I shall grant you my bill, or pay when you call for it, and am, &c. James Pirie. To John Pirie, farmer, Little Carnbeg.”

1st Division.
 Lord Newton.
 D.

A minute was made at the meeting when the repositories were opened, stating, *inter alia*, that there was not time to go over the various vouchers of debt, which were therefore re-sealed, for the purpose of being examined and inventoried at an early day. Another meeting was held on 16th June, in terms of the previous minute, for examining “the vouchers and other writings,” &c. A list of vouchers of debt, and deposit receipts, was then drawn up, which contained the following item:—“Acknowledgment by James Pirie, of date 18th February 1819, for £285, 17s. 2½d.” This minute was signed by James Pirie.

Stephen and others, as executors of John Pirie, thereafter raised an action before the Sheriff of Kincardineshire, against James Pirie, setting forth that the deceased had made advances to him, in the shape of farm stocking and cash, especially between Whitsunday 1816 and Whitsunday 1817; that the parties, on 19th February 1819, adjusted their transactions, when James Pirie was found indebted in the sum of £285, 17s. 7½d, conform to fitted account, “which account is attested, and theforesaid

No. 154. sum acknowledged to be due," by the missive of 19th February 1819,
 Feb. 1, 1832. above quoted. This missive was produced, and they concluded for pay-
 Stephen, &c. v. ment of the sum, with interest.
 Pirie.

Along with his defences, James Pirie produced the following document: " Memorandum of articles due by James Pirie to John Pirie, from Whit-sunday 1816 to Whitsunday 1817. To a black mare, and 2 draught oxen, £44," &c. The items in the memorandum found in John Pirie's repositories were differently arranged, but substantially the same with those in this memorandum, in which their sum was stated at £305, 17s. 7½d. On the back of this memorandum there was written, " Little Carnbeg, 19th February 1819. Settled the within account. John Pirie."

James Pirie pleaded in defence, 1. That although he had received farm stocking and money in 1816-17 to the value of £305, 17s. 7½d., from his uncle, and though nothing was expressly said at the time, yet he had always understood them to be a donation; and on 19th February 1819, his uncle told him he had made up a state of his advances, but that he meant to make him a present of the whole of them. On that occasion, the memorandum, with the docquet settling the account, was signed and delivered by his uncle to him. His uncle had lived above ten years afterwards, and never called on him, either for payment, or for any voucher, because the whole was bestowed as a donation, and nothing remained due; and, 2. That he did not admit the adhibition of his subscription to the acknowledgment found in his uncle's repositories; and it was improbatative, as not being in re mercatoria, and as not being stamped. He denied that he had any intention of recognising the acknowledgment as an obligation against him, by signing the list of vouchers, &c. found in the repositories of the deceased.

Stephen and others answered, 1. That, as Pirie admitted the receipt of the articles and cash, and that they never were paid, it lay with him to prove the donation, which he had failed to do. The docquet stating the account to be settled, could not be received as probative, unless the memorandum and signed acknowledgment found in the uncle's repositories were taken as probative also. When these were viewed together, it plainly appeared, that the settlement of accounts between the parties was effected by James Pirie acknowledging himself debtor for £285, 17s. 7½d., and promising to grant a bill for the amount, which voucher lay in the repositories of the uncle until his death. The difference between this sum, and that of £305, stated in one memorandum as the sum of all the advances, probably arose from a partial payment made at the time by James Pirie, or from a partial donation by his uncle. And, 2. That the acknowledgment required no stamp, being a mere docquet at settling accounts; and it required no witnesses, being truly in re mercatoria. But, at any rate, its contents were admitted by the defender, when he acknowledged receipt of the articles, &c., and that he had never paid them. This was farther confirmed by his conduct in signing the list of the defunct's vouchers, inclu-

ding his own acknowledgment, at the meeting when the repositories were opened. No. 154.

The Sheriff found, "that the irregular, unauthenticated, and unstamped writing, No. 2 of process, is no sufficient evidence of a debt due by the defendant to the late John Pirie, and this the more especially, as there is no evidence that John Pirie (although he lived more than ten years after the date of said writing), ever demanded payment of the supposed debt, or a bill for the amount. And if a bill had ever been granted, instead of the writing referred to, such bill would have been prescribed long before this time; therefore, on the whole matter, assailed the defendant, and decerned, but found no expenses due down to this date."

Both parties brought an advocation; Stephen and Dairs on the merits, and Pirie as to expenses.

The Lord Ordinary "repelled the reasons of both advocations, and remitted the cause to the Sheriff simpliciter; found neither party entitled to expenses in this Court," &c.

Stephen and Dairs reclaimed on the merits, and Pirie on the point of expenses. In opposing their note, he rested on the case of Alexander.¹

LORD BALGRAY.—I have formed a decided opinion on this case, and am for altering the judgment. I consider the adjustment and docqueting of accounts between the uncle and nephew to be of the nature of a mercantile transaction, and quite different from the case of Alexander, which was not *in re mercatoria*. We are daily in the practice of sustaining such a document as the acknowledgment of John Pirie, on docqueting an account, where the party does not deny his subscription. In this instance the two documents corroborate each other. The nephew signs the docqueted account, and acknowledges the balance due, and gives this document to the uncle. The uncle signs the counter part, stating that the account was that day settled, and this is delivered to the nephew. And when I observe that the balance struck is so minutely stated as to comprehend, not merely the number of pounds, but the odd money of 17s. 7½d., I cannot but suppose that there was an actually adjusted balance of accounts. Considering the transaction to be *in re mercatoria*, and looking to these documents, I think there is proof of the subsistence of the debt as of their date; it is not extinguished by the lapse of time; and there is no proof of payment or donation.

LORD CRAIGIE was also for altering, but doubted whether the transaction was *in re mercatoria*.

LORD GILLIES.—I also would propose to alter. Pirie says that he understood the farm-stockings and money advanced were meant to be donations at the time, though he admits nothing was expressly said by his uncle to that effect. But on looking to the settlement of accounts as on 19th February 1819, it is clear that there was no donation prior to that date. Where, then, is the evidence of a donation, at that date, when Pirie acknowledges the fitted balance, and promises to grant a

Feb. 2, 1832.
Stephen, &c. v.
Pirie.

No. 154. bill for it when required? And, as I see no proof of donation or payment subsequently, I must hold the debt to remain still due.

Feb. 2, 1832.
Stephen, &c. v. Pirie.
Shields and Others.

LORD PRESIDENT.—My opinion is the same. When the uncle made a docquet, stating the account to be settled, had he added the words "by bill," and had a bill been granted as of that date, it is clear that the mode of settlement would thus have been proved to be by bill. But, instead of a bill, there is a fitted account of that date, with Pirie's acknowledgment of the sum due, and his promise to grant a bill. It was in this way that the account was settled or adjusted. I see no evidence of a donation in this, and payment is not averred.

THE COURT then "altered, advocated, and decerned against the defender for payment of the sum of £285, 17s. 7½d., with the interest thereof from 19th February 1819; found the defender liable in the pursuers' expenses in this Court, and in the Inferior Court," &c.

Pirie's counter note was then refused.

Advocators' Authorities.—MacLurg, Jan. 2, 1678 (16970); Leslie, Jan. 27, 1714 (16978); Stewart, Dec. 17, 1680 (12624); Currier, March 1683 (12625); Tait on Evid. 114.

Respondent's Authorities.—Tait on Evid. 120; Grierson, Jan. 14, 1830, (*ante* VIII. 317); Alexander, Feb. 26, 1830 (*ante*, VIII. 602.)

G HEGGIE, W. S.—DENNISTOUN and CHRISTIAN, W. S.—Agents.

No. 155. ALEXANDER SHIELDS and Others, (SHIELDS' TRUSTEES,) Petitioners.—
A. Dunlop.

Tutor—Process—1672, c. 2.—Dispensation granted in an action for making up tutorial inventories, from citing the next of kin on the mother's side, who lived beyond the jurisdiction of the Court.

Feb. 2, 1832.
1st Division.

SHIELDS and others, trustees of the deceased Alexander Shields, and tutors to his children, raised a summons for making up tutorial inventories under the act 1672, c. 2. The next of kin on the father's side were cited. None of the next of kin (majors) on the mother's side resided within the kingdom. Shields and others therefore presented a petition to the Court, narrating these circumstances, and stating that their summons contained, *inter alia*, a conclusion in terms of the following prayer of their petition, "to dispense with the concurrence or citation of any of the next of kin to the said pupils on the mother's side, and to find and declare that the inventories of the estates of the said pupils which shall now be made up, the before-named nearest of kin to the said pupils on the father's side having been summoned in the said process, with their concurrence, or of a delegate to be appointed by the Lord Ordinary, are and shall be as valid and effectual to all intents and purposes whatsoever, and shall have the same force, strength, and effect in every respect, as if two of the nearest of kin to the said pupils on the mother's side had been cited to the said process, and had concurred in making up the said inven-

tories in terms of the said statute, or if, after being so cited, they had failed to appear, all in terms of the said act of Parliament, and to remit to the Lord Ordinary to proceed accordingly," &c. In support of this, they founded on the case of Hobbs and others, and De Maria's children.¹

The Court "dispensed with the concurrence or citation to the within mentioned process, of any of the next of kin on the mother's side, and remitted to the Lord Ordinary to proceed accordingly."

T. S. ANDERSON, W.S.—Agent.

WILLIAMS, FOSTER, and Co., Pursuers.—*Pensay.*
JOHN M'GEORGE, Defender.—*W. Bell.*

No. 156.

Process.—1. A petition craving a remit to be reponed in the usual terms against a decree pronounced in respect of no defences, allowed to be altered to a reclaiming note.—2. The 18th section of 6th Geo. IV. c. 120, in so far as it orders the delivery of six copies of a note to the agent of the opposite party, does not apply to a reclaiming note against a decree pronounced in respect of no defences.

WILLIAMS, FOSTER, and Co., obtained decree against M'George, on January 19, 1832, "in respect of no defences being lodged." They presented a petition to the Court, praying them "to remit to the Lord Ordinary to receive the defences, and repon the petitioner, &c., on payment of such expenses," &c. The pursuers objected that a petition to this effect could not be received, a reclaiming note being the proper form; and that, as a reclaiming note, it was incompetent, no copies having been left with them, or intimation previously given to them in terms of 6th Geo. IV. c. 120, § 18.

M'George answered that he was ready to alter the title of his paper to a reclaiming note; and that it was only in reclaiming against interlocutors in causa, that intimation was required by the statute.

LORD PRESIDENT.—The first objection is now obviated by the alteration on the form of the paper. In regard to the second, the section of the statute orders copies of the note to be delivered to the opposite party, either where the Lord Ordinary's judgment was pronounced "on cases," or, if without cases, where there was at least a record. That section does not authorize us to dismiss the present note as incompetent. The section clearly implies the interlocutors reclaimed against to have been pronounced in causa, and therefore it does not apply to this note.

THE COURT remitted to the Lord Ordinary to repon on the usual terms.

P. CAMPBELL, S.S.C.—

—Agents.

No. 157.

Feb. 2, 1832.
Scott v. Fisher.PETER SCOTT, Suspender.—Jameson—Moir.
DAVID FISHER, Charger.—Sol.-Gen. Cockburn—More.

Landlord and Tenant—Removing.—A party who is not the settler of the tack, and not infest, is not entitled to decree in an action of removing on the Act of Sederunt 1756, nor is a decree validated by his being infest subsequently thereto.

Feb. 2, 1832. IN 1816, Peter Scott obtained a lease of a mill-house and fall of water,

1st DIVISION. for 14 years, from the late Archibald Fisher, and entered into possession.
Ld. Newton. After the death of Fisher, his nephew and heir David raised, in 1829, a summons of removing against Scott, on the Act of Sederunt 1756, before the Sheriff of Perthshire. Scott, inter alia, objected to the title of David, that he had only a personal right to the lands. The Sheriff decerned in the removing. Scott presented a bill of suspension, which the Lord Ordinary passed on caution.* In the mean time, David Fisher was infest under a precept of clare constat, and charter of confirmation from the superior.

Under the passed bill, the question chiefly discussed was, whether the decree of removing was validated by the subsequent infestment. The Lord Ordinary, “in respect the charger took decree, in the action of removing before being infest, and did not take infestment till after a bill of suspension of the decree had been passed, sustained the objection to his title, suspended the letters simpliciter, and decerned: Found the suspender entitled to expenses, both in this suspension, and in the Inferior Court process, but subject to modification,”† &c.

Fisher reclaimed, but the Court unanimously adhered.

* At passing the bill, the Lord Ordinary observed in a note, that, “though the point attempted to be maintained in the answers, that an apparent heir generally has, by mere appurtenance, a title to pursue a removing, appears to the Lord Ordinary to be contrary to all authority, he is inclined to think, that, in this case, the title was sufficient, on the ground, that, by the entry by precept of clare constat, and the charter of confirmation obtained, the pursuer was in a situation to raise the action completing his title by infestment before decree. But he thinks that the charger has not sufficiently answered the plea on the merits,” &c.

+ “NOTE.—The parties, in the debate before the Lord Ordinary, confined themselves, in great measure, to the question of title, and it is upon this point, solely, that the cause has been decided. The Lord Ordinary is aware, that the strict rules of the ancient law, as to the necessity of infestment, have been of late years relaxed to a certain extent, but he knows of no case, where it has been found competent to support a decree of removing, by taking infestment subsequently. In the two latest cases, 2d March, 1808, Campbell against M'Kellar, and 3d March, 1810, Johnston against Martin, the Court held, that infestment was not necessary at the time of executing a summons of removing, and that it was enough that it was taken before calling the summons. In both cases, as appears from the reports, the Court pro-

LORD BALGRAY.—I think this a clear case. When we look to the nature of the summons of removing, under which Fisher came into the Sheriff Court, we find that he sets himself forth as heritor and proprietor of the lands in question. But during the whole process in that Court he had nothing but a personal title. Now, the tenant was entitled to see that he did not cede possession to any one who did not instruct a lawful title. Had he not done so, he might have become liable in damages. It is true, that the rigour of our old practice has been relaxed, but I have never yet heard of an instance where decree was taken by a party not the setter, and who was not infest. I look on such decree as quite null and inept. It is impossible to sustain it, and the Lord Ordinary's judgment is perfectly well founded.

LORD PRESIDENT.—I concur. Indeed, there is this specialty in the present case, that a bill of suspension of the decree had actually been passed before the infestment was taken.

Sol-Gen. Cockburn for charger.—Upon that subject the Lord Ordinary has fallen into a mistake in point of fact.

LORD CRAIGIE.—I think it quite immaterial. I am clearly of opinion that the interlocutor is well founded, on the general law, independently of any such specialty.

LORD GILLIES.—I am of the same opinion.

Charger's Authorities.—Ross's Lectures, 532; 2. Erak. 6. 52.

WOTHKASROON and MACK, W.S.—ÆNEAS MACLEAN, W.S.—Agents.

ceeded on the ground, that by the Act of Sederunt 1756, the calling of the summons is made equivalent to an execution of warning, and that it is sufficient, therefore, if the pursuer be infest before this step.

“ There is, no doubt, in a note to the report of the former of these cases, mention made of an unreported one, 10th February, 1802, Brown against Lang, where it is said infestment was held sufficient, though taken after the cause had been some time in Court. But the authority of this case, which seems not to have been considered at the time as worth reporting, cannot be great, more especially as it appears inconsistent with the ground assigned as the ratio of the later decisions above noticed. At any rate, it cannot support the present removing, where infestment was taken, not only after the calling of the summons, but after decree was taken, and even after its validity had been brought under consideration of this Court, by the passing of a bill of suspension.

“ The Lord Ordinary has found expenses due, subject to modification, because a great part of the expense has been occasioned by other pleas of the suspender, most of which appear very questionable.”

No. 157.

Feb. 2, 1832.
Scott v. Fisher.

No. 158.

DAVID BEATTON and Spouse, Pursuers.—*More.*
PETER GAUDIE, Defender.—*G. G. Bell.*Feb. 2, 1832.
Beaton, &c. v.
Gaudie.

Service—Sasine.—Sasines proceeding on charters neither granted by the Crown, nor by a subject-superior deriving right from the Crown, are not sufficient to establish that lands in Orkney, once held by udal tenure, were feudalised so as to prevent them passing from father to son without service.

Feb. 2, 1832. IN 1819, the late David Cursatter executed a disposition in favour of the late George Gaudie, who died, leaving a son, Peter Gaudie. The disposition bore that the lands were a two-farthing udal land in Kirbuster, in Orkney; the word two-farthing, being synonymous in that part of the country with two-merk. It appeared from a series of writs between 1693 and 1769, that these lands were constantly described as udal lands, though securities were repeatedly granted over them by disposition and sasine.

1st DIVISION.
Ld. Moncreiff.

S.

After the death of David Cursatter, his two surviving sisters, Elizabeth and Catharine Cursatters, granted a disposition in favour of David Beatton and his spouse of their two-merk land in Kirbuster; and thereafter the sisters were served heirs-portioners to James Cursatter, their grandfather, and who, the jury found, was last vest and seised in three portions of land in Kirbuster, amounting respectively to a one and three-fourth merk land, and to two half-merk lands. From notarial copies of the sasines in favour of James Cursatter, their dates appeared to be 1678, 1679, and 1704. The first proceeded on a precept of clare constat from the Lord Bishop of Orkney as superior, to James Cursatter, "as nearest and lawful oye and heir" to Robert Brown, his maternal grandfather, and the land was described as "all and haill ane merk and thrie part of ane merk udall land in Kirbuster," &c. The narrative of the precept bore Robert Brown to have been infest by his father, conform to "charter of alienation" by the father, and sasine thereon, registered in the register of seisin for the shire of Orkney in 1626; and "that the same lands and pertinents are holden immediately of us in feu-farm for the yearly payment of the feu-farm duties due and payable forth of the same, conform to the rentall." The second sasine was of a "half-merk udal land in Kirbuster," and proceeded upon "certain letters of disposition and alienation, containing precept of seisin therein, made, granted, &c., by Harry Grahame of Breckness." The third seisin was of a half-merk land in Kirbuster, and proceeded upon "certain letters of disposition, containing precept of seisin made, granted, &c., by James Stewart." Stewart's right was stated to rest on letters of disposition and precept of seisin by Harry Graham of Breckness. Under the retour of their service, Elizabeth and Catharine Cursatters obtained a precept from Chancery, and were infest.

David Beatton and spouse then brought a reduction of David Cursatter's disposition to George Gaudie, founding on their right derived from

Elizabeth and Catharine Cursatters, as heir served to James, averring that No. 158.
 the lands described in the sasines were the same with those to which
 David Cursatter's disposition applied ; that the lands had been regularly
 feudalised ; and that, as David Cursatter had never made up a title, the
 property remained in hereditate jacente of James, and they, as donees
 of his heirs-portioners, were entitled to the lands.

Feb. 2, 1692.
 Beatton, &c. v.
 Gaudie.

Gandie, besides objecting to the formality of the disposition in favour
 of Beattons, disputing the evidence of notarial copies, and alleging that
 the lands were not the same, maintained, 1. that, as David Cursatter's two-
 mark lands were proved to be udal, by the writs from 1678 to 1769, and
 no evidence of subsequent feudalisation by charters flowing from the
 Crown existed, it was unnecessary for David Cursatter to make up a title
 by service, and therefore his disposition was sufficient to carry the pro-
 perty ; and 2. that possession constituted a valid title to him, because the
 lands were originally udal and bishop's lands in Orkney, below £20
 Scots of valuation, and were therefore capable of being transmitted and
 acquired as udal lands, (by 1690, c. 32,) though they had once been feu-
 dalised.

He also raised a counter reduction of the disposition in favour of Beat-
 tons, as informal ; and repeated the pleas maintained by him in defence
 against Beatton's action.

The actions were conjoined, and the Lord Ordinary pronounced this
 judgment :—" In the action at the instance of Peter Gaudie, repels the
 objections to the form and regularity of the disposition by Elizabeth and
 Catharine Cursatters : Finds that the question as to the validity of the
 said disposition in other respects, as a title to the same lands which are
 possessed by Peter Gaudie, under the disposition by David Cursatter to
 George Gaudie, his father, must depend on the merits of the reduction by
 Beatton and spouse against the said Peter Gaudie : Finds that the pur-
 suers, Beatton and spouse, suing in the right of the said Elizabeth and
 Catharine Cursatters, as the heirs served to James Cursatter, their grand-
 father, can only establish their title to challenge the disposition by David
 Cursatter to George Gaudie, by showing that the property in question
 was not legally vested in the said David Cursatter, and remained in hære-
 ditate jacente of the said James : Finds, that supposing the instruments of
 sasine produced and founded on by the pursuers, bearing date in 1678,
 1679, and 1704, to relate to the same subjects, or parts of them, which
 are now possessed by the defender Peter Gaudie, such sasines not pro-
 ceeding on charters either from the Crown or from a subject-superior
 deriving right from the Crown, are not sufficient to establish that lands
 in Orkney, which were at one time held by udal tenure, were feudalised,
 so as to prevent them from passing from father to son without service :
 Finds, that the two first of the said sasines bear expressly that the lands
 were udal : Farther finds it clearly instructed by a series of writs produc-

No. 158. ~~Beaton, &c. v.~~ ced between the years 1698 and 1769, that the two-farthing or two-merk lands (which terms are admitted to be synonymous) in Kirkbuster, and sometimes denominated the two-merk or farthing lands of Hutter, which Gaudie.

Feb. 2, 1832.

belonged to the said James Cursatter, and afterwards to his son David, were constantly described as udal lands, notwithstanding that securities were given over them by disposition and sasine: therefore finds that there is no sufficient ground for holding that these lands ever lost their character or privileges as udal lands: *separatim*, finds, that supposing the one and three-quarter-merk lands comprehended in the instrument of sasine of 1678, which bears to have proceeded on a precept of clare constat from the Bishop of Orkney, to be part of the lands in question, and to have been held by charter and sasine, the said deed affords sufficient presumptive evidence that these lands were church lands, under the valuation of £20 Scots, and thereby entitled to retain their udal holding in virtue of the act 1690, cap. 32: therefore, finds that David Cursatter was in *titulo* to convey the said two-merk lands to George Gaudie, and that Elizabeth and Catharine Cursatter had no title, by their service to James Cursatter, to convey the same to the pursuers: finds that the pursuers have not, by virtue of the disposition in their favour, and the said service, as set forth in the summons, any good or valid title to insist in the reduction of the disposition by David Cursatter to George Gaudie. In the action at their instance, sustains the defences, &c.; and in the action at the instance of Gaudie, reduces, decerns, and declares in terms of the libel, so far as the deeds called for and produced may affect the interest of the said Peter Gaudie, or his heirs or assignees, but no farther: finds expenses due," &c.

Beatons reclaimed, and pleaded, that as their authors, Elizabeth and Catharine Cursatters, were set forth in the libel as the sisters of David Cursatter, and as "heirs-portioners served and retoured to the deceased James Cursatter, their grandfather," they were also necessarily the heirs of their brother David; that the service proved that he had left no issue, nor any other collateral relation; and they, therefore, as the disponees of the sisters, were entitled to reduce, on legal grounds, any disposition granted by David Cursatter, whether the subject of the disposition had been vested in him, or remained in the *hereditas jacens* of their grandfather.

LORD GILLIES.—I concur in the finding of the Lord Ordinary, that the lands are udal, but I would recall the rest of the interlocutor. I cannot conceive that lands are brought under the feudal system by such dispositions and infestments as took place here. There can be no proper feudal holding which does not flow at first from the Crown.

LORD PRESIDENT.—I am of the same opinion. Suppose that a superior refuses to enter his vassal, what remedy is there if the vassal cannot recur to the mediate superior, and, finally, to the Crown, to enter him? But if the holding did not originally flow from the Crown, there could be no such remedy. I am satisfied that there is no proper feudalisation, unless the lands hold primarily of the king.

The other Judges having concurred in the suggestion that the Lord Ordinary's No. 158.
interlocutor should be partially recalled,

Feb. 3, 1832.
Beaton, &c. v.

THE COURT found that the lands were udal, quoad ultra recalled the interlo- Glenny.
cutor, and remitted to the Lord Ordinary to proceed accordingly.

Hotchkis, &c.
v. Kirk, &c.

Gentle's Authorities.—1690, c. 32; 2 Ersk. 3, 18.

Thomson v.
Thomson.

R. URQUHART, S.S.C.—A. PERRAKIN—Agents.

Buchanan.

HOTCHKIS and MEIKLEJOHN, Pursuers.—D. F. Hope—Thomson. No. 159.
JOHN KIRK and Others, Defenders.—Forsyth—Skene—Hunter—Moir.

Indefinite Payment.—THIS was a case of circumstances. Hotchkis and Feb. 3, 1832.
Meiklejohn raised action against Kirk and others, for payment of a busi- 1st Division.
ness account, incurred to them as agents in Kirk's sequestration. It was Lord Newton
pleaded in defence, that two sums of £20 and £30 had already been paid D.
by the trustee, definitely to account of these expenses. The pursuers
answered, that the payments were indefinite, and they had a right to im-
pute them to another account due to them. The Lord Ordinary found
that the payments were definite; but the Court altered, repelled the de-
fences, and found expenses due.

HOTCHKIS and MEIKLEJOHN, W.S.—J. SHAND, W.S.—GORDON and BROWN, W.S.—
A. STEVENSON, W.S.—Agents.

ROBERT THOMSON, Pursuer.—D. F. Hope—G. G. Bell. No. 160.
JAMES THOMSON, Defender.—Jameson—Deas.

Community.—QUESTION, whether a party with a clause of parts and Feb. 4, 1832.
pertinents in his titles, had had such possession in a community as to 2d Division.
afford a title to pursue a division. The Lord Ordinary found that he Lord Medwyn.
had, sustained his title, and the Court adhered. F.

JAMES WEMYSS, W.S.—G. GORDON, S.S.C.—Agents.

Single Bills, &c.

MRS BUCHANAN, or FORBES, Petitioner.—Sandford.

No. 161.

Factor loco tutoris.—The mother of three children in pupilarity having made a Feb. 4, 1832.
second marriage, and petitioned the Court to appoint her second husband to be fac- 1st Division.
tor loco tutoris to her children, the Court suggested that it would be proper to
name a different party.

J. KNOX, S.S.C.—Agent.

No. 162.

ROBERT WEIR, Advocate.—*Skene—Jameson—W. Bell.*GAVIN GLENNY and Others, Respondents.—*D. F. Hope—Whigham.*

Feb. 4, 1832.

Weir v.

Glenny, &c.

Property—Servitude.—Where, under a special agreement, a dam-dyke was built, and a run of water thence made through the lands of adjoining proprietors to supply their mills; and each proprietor was to keep the water-course in good repair within his own grounds; and the expense of upholding the dam-dyke was common; and the superior proprietors were prohibited from injuriously interrupting the water-course—held that, though no right of passage was expressly stipulated, a tenant of a mill belonging to one of the inferior proprietors had a right to go along the water-course to the dam-dyke, as often as necessary to examine the condition of, and to repair, the water-course or dam-dyke.

Feb. 4, 1832.

1st DIVISION.
Lord Newton.

IN 1801, Morehead of Herbertshire, who possesses lands on the north and south banks of the Carron, entered into a written agreement with Reid and Napier, proprietors on the south bank, for the purpose of forming a run of water to supply their mills. Reid's lands of Tamaree lay farthest up the stream; Napier's lands were next; and Morehead's lands of Stonywood were the lowest. It was agreed that a dam-dyke should be built across the Carron at Tamaree Linn, to Morehead's property on the north bank; “and that a cut or canal, five feet wide and two feet and a half deep, shall be made from the said dam-dyke through the lands of the said parties, on the south side of the said river Carron, in such a direction as shall be found to be most suitable for all the said parties, to the present mill-dam of the paper-mill at Stonywood, belonging to the said William Morehead, which lands above mentioned are situated in the parish of Denny and shire of Stirling; and that the said parties shall have full power and liberty to erect such mills as they shall think proper upon the sides of the said canal, each of them within his own property; and which dam-dyke and canal shall be made and constructed according to the following terms and conditions: first, the said dam-dyke shall be made and erected by the said John Reid at his own expense, and the cut or canal therefrom to the march between the said Archibald Napier's lands and the lands of the said William Morehead, shall be made, and the expense thereof defrayed, by the said Archibald Napier and John Reid, each of them being obliged to conduct the same through his own lands, and the said William Morehead's tenant shall make the said cut through his own lands to the mill-dam of Stonywood paper-mill, at their own expense; and the said cut or canal shall be so constructed as to deliver at the march between the lands of the said William Morehead and Archibald Napier the whole water contained in the said canal, at a height or with a fall of at least ten feet above the present surface level of the foresaid mill-dam of Stonywood paper-mill; and the expense of maintaining and repairing the said dam-dyke shall be defrayed by the said three parties equally in all time coming. But the said John Reid hereby engages and binds himself to relieve the said William Morehead of his proportion of the said

repairs for the sum of 10s. sterling annually, which sum the said William Morehead binds himself to pay to the said John Reid at the term of Martinmas yearly, beginning at Martinmas 1803; and the said John Reid and Archibald Napier oblige themselves to maintain the said canal in all time coming, each of them so far as it passes through his own lands, and no farther."

Napier and Reid farther bound themselves not to " suffer or allow any ashes, rubbish, or other nuisances to be thrown into the said canal which may be hurtful to the washing of paper, or other operations in the said paper-mill at Stonywood; neither shall the said Archibald Napier nor John Reid, at any time, or for any space, be at liberty to interrupt the course of the water in the said canal, so as to stop or injure the operations in the said paper-mill."

A dam-dyke was constructed, and a canal of the stipulated breadth and depth was made through the lands of Reid, Napier, and Morehead. The upper end of the canal was connected with the dam by a sluice situated on Reid's lands of Tamaree. By means of a key, the sluice was capable of being enlarged or diminished, according to the current in the Carron, so as to regulate the amount of water which was transmitted through the canal.

Prior to 1829, Weir purchased the lands of Tamaree, on which there was a corn-mill. He was also tenant of the paper-mill on Morehead's lands of Stonywood. The two extremes of the canal were thus situated on grounds which he occupied either as proprietor or tenant. Part of the intermediate ground of Napier had been purchased by M'Robbies, who had a paper-mill upon it. This mill and ground were let by them to Glenny. There was a fourth mill built on the side of the canal.

After some irregularity had occurred in the transmission of the water, Weir presented a petition to the Sheriff of Stirlingshire, setting forth the agreement, and alleging that Glenny had repeatedly trespassed on the lands of Tamaree, and asserted a right to go through them along the canal to the sluice at the dam-head, for the purpose of regulating the dam-slusice at his pleasure. He therefore prayed the Sheriff to find that Glenny had no right to enter on the lands of Tamaree, or to interfere with the sluice of the dam, or to raise the flow of water in the canal above $2\frac{1}{2}$ feet, and to interdict him accordingly. Glenny and M'Robbies stated in defence, that the dam-dyke was upheld and repaired at the joint expense of the parties through whose lands the canal was cut, and all these must have a right of access to it to examine its condition, and to repair it when requisite. Besides, the artificial supply of water through the canal being necessary for all the mills along the banks, and made for their use, there was a community of interest and of right thus arising, which entitled the tenant of any of them to pass along the canal, in the event of any interruption of the due supply of water, so as to discover its cause, and see it removed; and they alleged, that the practice of all parties, since the canal was made, supported this right of passage to the dam-head.

Feb. 4, 1832.
Weir v.
Glenny, &c.

No. 162.

Feb. 4, 1832.
Weir v.
Glenay, &c.

Weir answered, that, under the agreement, each proprietor was bound to maintain the canal in good repair, so far as it passed through his own grounds; but he was not bound to give access to any other party through his grounds. As the sluice was placed in his ground, he was also obliged to take care that it admitted the due supply of water, and no more. But his land was not subject to any servitude of road; and if the supply of water to the inferior works was found to be deficient, the remedy was to complain to the Judge Ordinary, and have a judicial inspection. The alleged practice was denied.

The Sheriff, after allowing a proof, assizied; and Weir thereupon brought an advocation, in which the Lord Ordinary pronounced this interlocutor:—"Finds that it was not competent to the Sheriff to determine, from the terms of the contract alone, and without any reference to the possession, that the advicator's property is burdened with the servitude of a road; and that any judgment in the present cause can only be of a possessory nature: finds it not proved that the occupiers of the lower mills had possessed a road or access to the dam-head, or been in use to regulate the sluice there, for seven years previous to the commencement of this action; and that, on the contrary, it is proved that any possession by them does not reach back for nearly so long a period: finds, that as the respondents have no express grant of servitude, or decree of declarator to this effect, and when they have had no possession sufficient to entitle them to a possessory judgment, the advicator, as proprietor of the ground, was justified in applying for an interdict to prevent them or their servants from using the road in dispute, and in so far grants the interdict craved: finds it unnecessary to grant any interdict as to the regulation of the sluice, the advicator's right to the sole regulation following from his exclusive possession of access thereto: finds the advicator entitled to expenses, subject to modification."*

* "NOTE.—The contract is quite silent as to any road or access to the dam-head; and if the present action were the proper one for determining, whether a right to such road can be implied from the provisions of the contract, the Lord Ordinary would have great difficulty in arriving at the conclusion the Sheriff has done. Where servitudes are essential to the enjoyment of an admitted right, they may be inferred from it, as the right of a road to a moss follows necessarily from a servitude of casting peats there; but there seems no necessity in such a case as the present, that the servants at all the mills should interfere in the regulation of the sluice, or that there should be a common road along the whole course of the mill-lead. Take for example the mills on the Water of Leith. The mill-lead proceeding from the dam-head immediately below the village of the Water of Leith, after serving several mills belonging to the corporation of bakers, supplies water for the mills at Stockbridge, Silvermills, and Canonmills, and does not join the river till a great way below. It was never thought of (the Lord Ordinary presumes) that the occupiers of all these mills and their servants had a right to go to the dam-head and alter the sluice at their pleasure, and the lead passes in many places through private property completely enclosed, so as to admit of no road or passage along the banks. The owners of the lower mills in the present case have a sufficient security for the supply of

Glenny and M'Robbies reclaimed.

No. 162.

LORD BALGRAY.—I do not think that this question depends on the possession Feb. 4, 1832.
of the parties, or that Glenny and M'Robbies required any declarator of servitude. Weir v.
The question arises among parties who were members of an association having cer-
tain rights and interests in common. Three parties, in 1801, agreed to contribute
a portion of their respective grounds to make a canal. They united for one gene-
ral end and purpose, in which they had all an interest. Had one of them *then*
expressly stipulated with the others that they should have no right of access along
the canal in so far as it lay within his ground, and that even if it was dried up in
the middle they should remain excluded, and should have nothing left but a claim
of damages, the Court would no doubt have been compelled to give effect to the
contract, however absurd such a stipulation must have been considered. But no
such stipulation was made. The parties agreed to complete a canal of a given
breadth and depth through its whole length. They bound themselves to keep it
in repair as it passed through their respective grounds; and the expense of main-
taining the dam-dyke was made common. In these circumstances, every lower
proprietor has a right to see that both the dam-dyke and the canal are kept in
sufficient repair, and that the due supply of water is delivered to him through the
canal. It is not enough to refer him to his claim of damages, and to his applica-
tion to the Sheriff in the event of the supply being deficient. The parties who
agreed that the cut should be made through their grounds, in order to supply mills
along the line, must be held to have agreed at the same time to what was essential
to the canal being used for that purpose. The right of passage along the side of
the canal follows necessarily from the common interest of parties. The legitimate
exercise of that right must be protected; as any nimious use of it will certainly be
restrained by the law.

LORD PRESIDENT.—I concur. Even on the supposition of the Lord Ordinary,
that damages would be due if the water was obstructed, Glenny and others would
have a right of passage along the canal, in order to discover whence the damage
arose. If the water fails to come down to Glenny's mill, has he not a right to go
and see why it is stopped? The canal was made for the purpose of affording a
regular supply to the whole mills. At the same time it is clear, that any nimious
or excessive use of this right of passage would be restrained by the law; but it
would have been equally so restrained, if the right of passage had been expressly
stipulated in the original agreement, instead of actually arising out of it, as being
necessary to the explication of the contract of parties. For the same reason that
Glenny has a right of passage upwards, Weir must have a right of passage down-

water in the obligation to furnish it, under which the advocator lies by the contract;
for if he shall, either by neglecting the dam-head, to which, from his situation, he is
primarily bound to attend, by improper management of the sluice, or allowing the
lead within his ground to get into disrepair, so that the proper supply is not sent
down, he may be liable in the whole damage sustained.

"As to the possession," &c.

"On the whole, the Lord Ordinary is satisfied that there was no possession by
the occupiers of the lower mills, or interference by them with the sluice, which was
not precarious, and depending on the will of the owner of the upper one, beyond
four years from the commencement of the action, and that that of the respondents
does not reach back nearly so far."

No. 162.

Feb. 4, 1832.
Weir v.
Glenny, &c.

wards, in the event of any obstruction to the water-course occurring in the grounds occupied by Glenny, so as to make the water regorge on Weir's lands, or otherwise to affect his use of the canal.

LORD CRAIGIE concurred in the judgment and views of the Lord Ordinary. His Lordship considered that, by the original agreement, the parties were bound to make and to maintain the canal so far as it passed through their respective grounds; but they had laid no farther burden on themselves or their property. In particular there was no constitution of any servitude of a road, over the ground of any of the parties, in favour of the others. His Lordship was, therefore, not disposed to sanction the imposition of any new burden upon property which had not been consented to by the proprietor.

LORD GILLIES.—The question is, what is necessarily inferred from the tenor of the original agreement, by which a canal was formed, and was to be maintained at the expense of the parties to the agreement, so that a common property was constituted. It is obvious that nimious proceedings on either side must be checked; whether they consist in the frequent traversing of Weir's ground when the supply of water is complete, or in the exclusion of Glenny from that ground when the supply of water is withheld. But though the nimious use of the right of passage to inspect the state of the canal is to be restrained, I conceive that such a right, to the effect of performing every necessary examination of the canal, results to Glenny from the tenor of the agreement. It is out of the question to say he must go to the Judge Ordinary, and crave inspection whenever he finds the water run dry. Before the Judge could arrive, the supply of water might be restored, and it might be impossible to ascertain the cause of its having been, for a time, intercepted. I am satisfied, that, under the agreement, the right to the sole regulation of the sluice was not left to any one of the parties. Yet the Lord Ordinary has found that it was; and his Lordship was quite consistent in finding this, since he denied all right of access to the other parties. But I differ from him, as I think that there is a right of access, and that Weir has not the sole regulation of the sluice. Glenny has a right to go along the canal to examine any obstruction to the due supply of water. Such a right is liable to the abuse of being nimiously exercised; but in that case, it will be restrained by the law; and the mere risk that a right may be hereafter abused, cannot prevent us, in the meantime, from doing that which is just.

THE COURT then pronounced this interlocutor:—“Advocate the cause; and in respect, 1. That by an agreement entered into of date 10th August, 1801, between Mr Morehead, Mr Napier, and Mr Reid, it was agreed that a damdyke should be erected across the river Carron; and that a cut, or canal, should be made, of certain dimensions, through the lands of the parties, in such a direction ‘as should be found most suitable for all concerned;’ and that the parties should have full power and ‘liberty to erect such mills as they should think proper upon the sides of the canal, each within his property;’ by which agreement an operation was undertaken and executed, for mutual benefit and advantage, and in which all were jointly interested: 2. In respect that such mutual contract and agreement necessarily imposes on all concerned an obligation to implement what has been respectively undertaken, and creates a legal interest in all to whom it belongs to see that it is so done: 3. In respect that a contract entered into for mutual benefit and advantage, also necessarily supposes such concessions of right, and such

permissions hinc inde, as may enable parties to support their agreement ; No. 162. and that the law of Scotland always prefers the preventing of injury or of damage, to any future reparation by indemnification in the way of damages —Therefore recall the interlocutor of the Sheriff and of the Lord Ordinary, ^{Feb. 4, 1832.} ~~Weir v. Glenny, &c.~~ and find, 1. That in consequence of the foresaid agreement, the respective parties concerned, or persons properly authorized by them, have a right to ^{Millar v. Mills,} ~~&c.~~ pass along the bank of the cut or canal to examine the same, and see that it is kept in proper repair by all concerned, and that the stipulated quantity of water is supplied to the parties interested, and so as either to prevent apparent injury, or to remedy such when it does happen as speedily as possible, but for no other end or purpose : 2. Find, that such right of passing along the banks of the cut or canal, for the purposes above mentioned, is not to be exercised unnecessarily or nimiously ; and if any such improper exercise of the right should be attempted, reserve to all concerned right to complain to the Judge Ordinary thereupon : Find, in the whole circumstances of the case, no expenses due to either party, and decern."*

M'LEAN and GIFFEN, W.S.—J. MACANDREW, S.S.C.—Agents.

ROBERT MILLAR, Jun., Pursuer.—Wilson.

No. 163.

W. MILLS and W. VARY, Defendants.—Jameson—Christison.

Process—Expenses.—A party allowed to amend his libel without being subjected in the expense of the condescendence and answers already prepared, he agreeing to abide thereby without alteration.

In an action by Millar against Mills and Vary, the Court adhered to ^{Feb. 4, 1832.} an interlocutor sustaining a preliminary defence, and remitted to the Lord Ordinary to allow an amendment of the libel, on payment of such expenses as might be deemed reasonable.¹ Revised condescendence and answers had been previously lodged, prepared with a view to the amendment that might be necessary. An amendment was then offered, which the Lord Ordinary sustained, and found the defenders entitled only to the expenses of the debate on the relevancy of the summons and subsequent procedure. Both parties reclaimed, the defenders claiming the whole previous expenses, and the pursuer objecting to any expenses being awarded. At the bar he agreed to hold his condescendence, as stating all his averments, and the Court, in respect thereof, refused both reclaiming notes.

JO. PATTISON, jun. W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

* During the dependence of this case, Weir erected a gate, with a lock upon it, so as to impede Glenny's access to the dam-head. Glenny applied to the Sheriff to have the gate, or at least the lock, removed. The Sheriff granted the application, and Weir having advocated, the Court remitted simpliciter.

¹ Ante, LX. 625.

No. 164.

**JOHN AITCHISON and Co., Pursuers.—D. F. Hope—Hamilton.
BURNSIDE'S TRUSTEES, Defenders.—Thomson.**Feb. 4, 1832.
Aitchison v.
Burnside's
Trustees.*Title to pursue—Partnership.*—An action at the instance of a company firm, without libelling the individual partners, dismissed as incompetent.

Feb. 4, 1832.

2d DIVISION.
Ld. Mackenzie.

DAVID Burnside and John Aitchison entered into a contract of copartnership, to be carried on in Glasgow, under the firm of John Aitchison and Co.; it was stipulated that whatever sums (to the extent of £2000) should be recovered on the part of David Burnside from the trustees of his deceased brothers John and Alexander Burnside, should be appropriated to the purpose of carrying on the concern; and that in the event of the death or insolvency of either partner, the concern should be wound up by the other. Burnside immediately went abroad, but left with Aitchison a general factory for the management of his affairs during his absence. He also drew three bills upon his brother's trustees, for £300 each, in favour of John Aitchison and Company, and rendered an account, showing a balance due to him by his brother's estate, amounting to £978, and upwards. He also wrote to the trustees in these terms:—"I have valued to you on account, as annexed, at three months, and at ten days' date, in favour of Messrs John Aitchison and Company, which I trust will meet with due honour." The trustees having refused to accept or pay these bills, an action was raised against them on one of the bills in March 1824, before the Sheriff of Lanarkshire, in name of John Aitchison and Company, but without specifying the individual partners. The Sheriff remitted the cause to an accountant, and while the process was in that stage, David Burnside recalled the factory granted to Aitchison, and lodged a minute, declaring himself satisfied with the accounts as prepared by the trustees, and disclaiming the action. After the case had been sent to the accountant, a commission of bankruptcy was issued in England against John Aitchison, but the Sheriff, "in respect that the commission of bankruptcy was against John Aitchison as an individual, and not against John Aitchison and Company," overruled a plea founded thereon by the trustees. Arrestments having been used in the hands of Burnside's trustees, they brought a multiple poinding in this Court, and called, among others, John Aitchison and Company; to which process, that depending before the Sheriff was advocated ob contingentiam. The trustees denied that the company of Aitchison and Company existed, except in the person of John Aitchison, who was bankrupt, and they called for a specification of the individual partners. The Lord Ordinary pronounced this interlocutor:—"Finds no reason averred to exist why the names of the other partners, or some one or more of the other partners of Aitchison and Company, are not stated, in order that the defenders, who deny the existence of such Company otherwise than in the person of John Aitchison himself, may be able to bring forward evidence on the

subject. Therefore ordains the pursuers within ten days to give in a No. 164. minute, stating the names of the other partners, or some one or more of them, with certification that if they fail, they will be held to be confessed that there are no such other partners."

Feb. 4, 1832.
Aitchison v.
Burnside's
Trustees.

The pursuers thereupon condescended upon David Burnside as the other partner, and produced a copy of the contract, having this note signed by David Burnside appended thereto, "Annexed you have the copy of our copartnery, which please copy over, and send me your acceptance thereof." The Lord Ordinary thereafter found, "that the evidence now produced of the existence of said Company, taken in connexion with the draft or order libelled on, is sufficient to establish the right of the pursuers as a Company to maintain this action, and therefore repels the defences, so far as founded on the alleged bankruptcy of Aitchison as an individual."

The trustees were then allowed to put in an additional plea in law, that David Burnside being the only party entitled to sue for or discharge debts due to John Aitchison and Company, in consequence of Aitchison's bankruptcy, and that he having disclaimed the suit, the action must be dismissed; but no plea was stated as to the incompetency of suing in name of the Company. The Lord Ordinary found, "that in the circumstances of this case, as now appearing from the record and productions, this action cannot proceed at the instance of Aitchison and Company, and therefore sustained the reasons of advocation, advocated the cause, dismissed the action, and found the expenses due to the advocates,"* &c.

The pursuers reclaimed, and pleaded that the utmost which could be done, *hoc statu*, was to *sist process* until the assignees of John Aitchison should become parties to the action.

LORD MEADOWBANK.—But there is an objection not noticed either by the Lord Ordinary or the parties. I can find no authority whatever for sustaining this summons at the instance of John Aitchison and Company merely. No individual partner is libelled, and I do not know that the Company was in existence.

* * **NOTE.**—The former interlocutor of the Lord Ordinary related solely to the defence then founded on the bankruptcy of Aitchison, as being individually the sole pursuer in this action. The Lord Ordinary did not think it appeared that he was pursuer merely as an individual, and therefore that his bankruptcy did not take away the instance, which was in the name of Aitchison and Company. But now it appears that the company of Aitchison and Company was dissolved by Aitchison's bankruptcy, in truth before they came to do any business at all, so that the concern was as if it had never existed; and further, in case it could be viewed as having any existence, then David Burnside, not Aitchison, was the only person entitled to do any thing in name of the Company. In these circumstances, an attempt by Aitchison alone, against the will of David Burnside, and without concurrence of his own creditors, to raise any action in the name of the Company, seems quite inadmissible. Nor indeed is it easy to see how, in such circumstances, there could possibly be room in any shape for an action, of which the effect was to be to enforce the inputting of stock by David Burnside into this perished Company."

No. 164.

LORD GLENLEE.—Yes. I see it stated that this was a simple summons in the name of a company firm. I think there ought to be a new plea in law.

Feb. 2, 1832.
Aitchison v.
Burnside's
Trustees.

Smitton v.
Taylor, &c.

LORD JUSTICE-CLERK.—The objection stated by Lord Meadowbank has been overlooked altogether; but although the Lord Ordinary had not the objection in view, his interlocutor could not have been better expressed if he had. We must just refuse this note, in respect that the action is raised merely in the name of the Company.*

THE COURT accordingly, “in respect that the present action has been raised in the name of Aitchison and Company, without specifying the names of (the partners of)† that Company,” refused the reclaiming note “without prejudice to any competent action being brought by the pursuers.”

JAMES BURNSIDE, W.S.—JOHN CAMPBELL, W.S.—Agents.

No. 165.

ROBERT SMITTON, Pursuer.—*Thomson.*

W. TAYLOR and Others; Claimants.—*D. F. Hope.*

Process.—Circumstances in which productions, previously in possession of the party, were received after the record was closed.

Feb. 4, 1832.

2d DIVISION.
Lord Medwyn.
T.

SMITTON, a creditor of James Richard, merchant in Auchterarder, having poinded and sold certain effects belonging to him, two other creditors, William Taylor and John Richard, alleging that the debtor had become bankrupt within 60 days thereafter, claimed a rateable proportion of the proceeds under the act 1696. To have this claim determined, a multiplepoinding was raised in name of Smitton. In the condescendences and claims for Taylor, &c., it was averred, that the debtor had been rendered bankrupt “by diligence,” at the instance of parties named Gourlay. The answer to this was—“Not admitted.”

The captions, at the instance of Gourlays, and executions thereon, were produced, but the claimants neither founded on nor produced the hornings, and the record was closed. Thereafter the claimants were called upon for the warrants of the captions, but when the hornings were produced, Smitton objected, that having been previously in the possession of the party, they could not be received. The Lord Ordinary pronounced this interlocutor:—“Having heard parties’ procurators, on the objection on the part of the raiser to production of the hornings on which the captions proceeded, on the ground that they were in the hands of the party, or within his power; and that it is, therefore, not competent now to produce them after the record has been closed: Finds, that the averment in the condescendence is, that the common debtor was rendered bankrupt by

* Lord Cringletie was absent.

† The words in parenthesis appear to have been omitted in the interlocutor per incuriam.

certain captions, and executions of search thereon, which are produced; No. 165.
 that the claimant did not found on the hornings, nor had occasion to do
 so, and, therefore, was not bound to support his claim, by production of
 them before they were specially called for by a competitor; and, there-
 fore, it is no objection—now, that the claimant has been called upon to Macdonald v.
 produce the warrants of the captions—that they were previously in his Brunton, &c.
 own custody; and allows the productions now made to be received and
 seen by all concerned, till next calling."

Smitton reclaimed, but the Court adhered.

J. MOWBRAY and A. HOWDEN, W.S.—THOMAS LEBURN, ROBERT LOCKHART, and JOHN
 MURRAY, S.S.C.—Agents.

NORMAN MACDONALD, Pursuer.—*M'Dougal.*
 ROBERT BRUNTON and Others, (Creditors), Defendants.—*Tawse.*

No. 166.

Cessio.—Circumstances in which a party obtained the benefit of a cessio, although he failed to instruct the losses alleged.

MACDONALD brought a process of cessio against his creditors, which was opposed on the ground that the pursuer had given no satisfactory account of his funds or losses. The Court, "before answer," ordained "the pursuer to give access to any of the defenders, or their agents, to inspect his books at the sight of the Judge Ordinary." The books were accordingly produced, and examined at sight of the Judge Ordinary, by the opposing creditors' mandatory, who reported as follows:—

Feb. 4, 1832.
 2d DIVISION.
 T.

"1. Mr Macdonald never did keep regular books while in business.

"2. The only books kept by Mr Macdonald were two scroll waste books; and it does not appear he made any entries until the year 1826.

"3. It cannot be ascertained from Mr Macdonald's books what amount of business debts he is owing, as he never made any entry except of such goods as he sold out of the shop on credit.

"4, 5, and 6. There is no entry of any kind to show that Mr Macdonald lost £25 by the wreck of the Robert and Janet; that he ever paid any sums as interest on loans; or that he paid £54 for shop rent.

"7. It appears from the books produced by Mr Macdonald, that the amount of debts, bad, doubtful, and good, owing to him, are correctly stated, say about £130; but there is no entry to show what stock he had on hand. All the accounts in his books, not included in the amount of his debts, are either marked paid, or settled in full, without any date.

"8, and 9. Mr Macdonald never kept any profit and loss account; so that his profits in business do not appear, nor is there any entry to show what the extent of his transactions were.

No. 168.

Feb. 4, 1832.
Macdonald v.
Brunton, &c.M'Ra, &c. v.
Macartney.

" 10, and 11. There are no entries to show that Mr Macdonald ever had any transactions with Messrs Fenton and Company, or Mr Brunton; nor is there any account of any debt having been paid to Messrs Fenton and Company in May or April last, or at any other time."

The opposing creditors contended, that the pursuer having failed to instruct his case, was not entitled to the benefit of a cessio.

LORD JUSTICE-CLERK.—I can see no tangible ground in this case for refusing the cessio. There is no appearance of fraud.

LORD MEADOWBANK.—If your Lordships are to hold it as a rule that a man is not bound to prove the losses he alleges, then certainly this pursuer must get his cessio; but I must say that I, at least, am not satisfied by the report upon the state of his books.

LORD GLENLEE.—I think we must grant this cessio, unless we are to refuse 99 out of 100.

THE COURT accordingly granted the cessio.



GEORGE MUNRO, S.S.C.—ANDREW TAWSE, W.S.—Agents.

No. 167. ALEXANDER M'RA and Others, Suspenders.—Sol.-Gen. Cockburn—
Wilson.

ALEXANDER MACARTNEY, Charger.—Jameson.

Meditatio fugæ—Diligence Legal—Process.—Debtors under a bill past due having taken refuge in the Sanctuary, and a warrant being obtained against them, as in *meditatio fugæ*, “to incarcerate them within the tolbooth of Holyroodhouse, until they find caution *de judicio sisti*, in any action to be brought,” &c., “or to abide the diligence on the bill, any time within six months from this date”—held a regular warrant.

Feb. 7, 1832.

1st DIVISION.
Bill-Chamber.
Ld. Moncreiff.
B.

MACARTNEY presented a petition to the Bailie of the Abbey of Holyroodhouse, setting forth that M'Ra and others were indebted to him under a bill for £200, which was past due; that they had taken refuge in the Abbey; and were in *meditatio fugæ*. He craved warrant to apprehend and examine them, and, on admission or proof of the *meditatio fugæ*, that they should be committed “to the tolbooth of the Abbey, or other warding place, therein to remain until they respectively find sufficient caution, acted in your Honours’ books, *de judicio sisti*, in any action to be brought by the petitioner against them, within six months, for payment of theforesaid debt, or to abide the diligence to be raised on the said bill.”

Macartney having made oath, and M'Ra and others having been apprehended and examined, the Bailie granted warrant to incarcerate them “within the tolbooth of Holyroodhouse, until they find caution *de ju-*

dicio sisti, in any action to be brought by the petitioner against them, No. 167. before any competent Court, for payment of the debt within mentioned, or to abide the diligence on the bill mentioned in the petition, any time within six months from this date." Their agent then applied to the clerk of the Abbey court for a draft of bond of caution, with the view of finding caution, and being liberated. The clerk drew up a bond, by which the cautioner was made to bind himself as surety acted in the court-books, "for the said Alexander M'Ra de judicio sisti, in any action which (within six months from date of said interlocutor) may be brought against them at the instance of the said Alexander Macartney; or to abide the diligence raised, or that may be raised, against them, within said six months, on the bill for £200," &c. "And it is hereby conditioned and declared, that days' notice and intimation," &c. "shall be held as legal requisition for my producing the said persons, within the court-house of the Abbey, and that under the penalty of being liable in payment of the bill mentioned in said petition," &c.

Feb. 7, 1832.
M'Ra, &c. v.
Macartney.

Thereafter the estates of M'Ra and others were sequestrated on their application, with the concurrence of a creditor; and they presented a bill of suspension and liberation, in which they contended, 1. That the warrant of commitment was illegal in requiring them to find caution to abide the diligence raised, or to be raised on the bill, that being equivalent to caution judicatum solvi; whereas, under a meditatione fugæ warrant, caution de judicio sisti was all that could be required. 2. That Macartney had no interest to insist for a bond that the cautioner should produce them in the court-house of the Abbey, for there they would be protected from his diligence; and he had no right to ask for production of their persons elsewhere, because they were within the precincts of the sanctuary before he got his meditatione fugæ warrant; and though that warrant might prevent their farther escape, it could not deprive them of the benefit of the sanctuary. 3. That there was no evidence of intended flight to justify the warrant, and the subsequent measure of a sequestration proved their desire to do justice to all their creditors alike.

Macartney answered, 1. That he held a past due bill, under which he might either pursue action or raise diligence. He was entitled, therefore, to insist for caution de judicio sisti, in any action to be raised within six months for payment, or alternatively, to abide the diligence to be raised on the bill. This was not a demand for caution judicatum solvi. 2. That he had an interest to insist on caution to produce M'Ra and others in the court-house of the Abbey, as that gave him his relief if they left the kingdom, and he did not demand their presentation in any other place. And, 3. That there was sufficient evidence in their conduct and declarations to justify the warrant of committal.

The Lord Ordinary, on considering the bill and answers, "and the

No. 167.

Feb. 7, 1832.
M'Ra, &c. v.
Macartney.

draft of a bond of caution produced, before answer, appointed the complainers to produce the proceedings before the Bailie of the Abbey,"* &c.

M'Ra and others then produced the proceedings, and, *inter alia*, complained that their detention in the jail of the Abbey deprived them of the remedy of pursuing a *cessio*.

The Lord Ordinary, "having again considered this bill, with the answers and productions, and particularly considered the proceedings before the Bailie of the Abbey now produced, refuses the bill, finds expenses due, &c.; and in case the complainers shall reclaim against this interlocutor, ordains them to print the Lord Ordinary's former interlocutor, and the note subjoined thereto, as well as this interlocutor, and the annexed note."†

M'Ra and others reclaimed; and at the advising, Macartney consented to their being removed to any other jail which they desired, with a view to pursue a *cessio*.

The Court unanimously adhered.

Suspender's Authorities.—1 Ersk. 2, 21; 1 Bell, 381 and 384; Scott, Dec. 7, 1784 (1929.)

ADAM WILSON, S.S.C.—D. HOUSTON.—Agents.

* "NOTE.—The Lord Ordinary is entirely satisfied, that the ground of suspension mainly insisted on cannot be maintained. Though the bond bears that the complainers shall abide the diligence raised, ' &c.' the obligation is only to produce his person 'within the court-house of the Abbey,' where it can have no more force than in any other case. And as the respondent holds a liquid ground of debt, the case is plainly within the principle of the judgment, in the case of Cockburn v. Inglis, June 25, 1776, which is fully recognised in practice. But as the complainers also dispute the legality of the warrant on the merits of the proceedings, of which he cannot judge without seeing them, he gives them an opportunity of producing them.

† "NOTE.—The Lord Ordinary is satisfied, 1. That the proceedings have been regular and correct; 2. That the grounds of belief of an intention to leave the country being very clearly and fairly stated, are probable and pregnant, and that they are materially confirmed by the admissions of the defendants as to the circumstances under which they severally disappeared from their places of residence, the admissions of two of them as to the money brought with them, and the refusal of Alexander M'Ra to state the amount of the money which he had in his possession; and, 3. That the plea founded on the peculiar nature of an imprisonment in the jail of the Abbey, as excluding the possibility of a process of *cessio bonorum*, is altogether absurd, because, if there were a serious difficulty, it would arise from the choice of the complainers themselves, and because they surely know, that whenever they choose to offer themselves to the ordinary diligence of the law, that difficulty will be at once removed."

WILLIAM RAE, Pursuer and Suspender.—*Sol.-Gen. Cockburn—Wilson.* No. 168.
 JOHN HAY and Others, (for the London and Edinburgh Shipping Company,) Defenders and Chargers.—*D. F. Hope—Boswell.* Feb. 7, 1832.
 Rae v. Hay, &c.

Nautæ Caupones, &c.—Carrier—A smack, belonging to a Shipping Company for the conveyance of goods, having been stranded in the course of her voyage, and the cargo landed in boats, and forwarded to a canal, and thence onward to the destination—held that the Company were not relieved from responsibility for a package never delivered, and supposed to have been lost, by proving that all due care and attention was taken by the master and crew, there being no proof that it was lost at sea at the time of stranding.

IN April 1824, a package of goods, addressed to the pursuer, William Rae, at Glasgow, was shipped at London by the smack Comet, belonging to the London and Edinburgh Shipping Company—a Company established for the conveyance of goods between London and Edinburgh. On her voyage to Leith, the Comet was stranded on Waxham Beach, about nine miles north of Great Yarmouth. The cargo was got on shore in boats, and carried some miles overland to a canal, by which it was forwarded to Yarmouth, and thence to its destination. The goods addressed to Rae not having been delivered, he in the month of August made a demand for their value. This was resisted; but Rae being then in embarrassed circumstances, no legal proceedings were adopted by him. His estates were sequestrated in March 1826. He did not give up the claim against the Shipping Company in his list of debts under the sequestration; but in 1827, some months after having been discharged under a composition contract, he raised an action against the Shipping Company, before the Judge Admiral, for the value of the goods. In defence, the Shipping Company alleged that the goods were lost among others, in the confusion attending the landing, but they did not aver that they were lost at sea at the time the vessel was stranded. The Judge Admiral pronounced this interlocutor:—"Finds it admitted by the defenders that the goods in question were on board of the defenders' vessel, the Comet, at the time she was stranded near Yarmouth, and have not been delivered: finds it not alleged by the defenders that any of the goods on board of the vessel were lost at sea at the time the vessel was stranded, but that it is asserted merely, that in the confusion attending the landing of the goods, some packages were lost, and among others the goods in question: finds it asserted by the defenders, that every prudent measure was adopted by the master and the crew, in order to preserve the cargo: and before answer as to the relevancy of the defence, allows the defenders a proof of their averments respecting the care and diligence of the master and crew in the preservation of the cargo; allows the pursuer a conjoint proof; and grants commission to the Mayor of Yarmouth, or any fit person he shall name, to take the proof," &c.

2D DIVISION.
LD. MONCREIFF.
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No. 168. A proof was accordingly taken, from which it appeared, that, after the vessel had been stranded, all due care was taken by the master and crew ^{Feb. 7, 1832.} Rae v. Hay, &c. to have the cargo brought safely ashore, and thereafter carried to the canal, and so on to Yarmouth. There was, however, no evidence tending to show that the goods in question could have been lost when the vessel stranded, but, on the contrary, there were grounds to believe that they must have been lost after having been brought ashore. On advising the proof, the Judge Admiral pronounced the following interlocutor:—"Finds it proved, that after the vessel was stranded, every due exertion was made by the master and crew to land and preserve the goods on board: finds sufficient grounds to presume that the package in question, if not washed out of the vessel by the force of the sea, was lost amidst the confusion arising in consequence of the wreck of the vessel: finds that the defenders are not responsible for a loss arising in such extraordinary circumstances; therefore assuages them from the action, with expenses of process."

Rae thereupon brought a reduction in this Court, and pleaded—That the obligations arising out of the contract of affreightment did not cease by the stranding of the vessel; that according to the edict *Nautæ caupones, &c.*, proof of due care and attention will not relieve the carrier, who must, to discharge his liability for goods intrusted to him, prove that they were actually lost by inevitable accident; and that in the present case there was no proof incompatible with the supposition that the goods in question were safely landed, or that they might not still be in possession of the Company.

To this it was answered, that under circumstances such as occurred in this case, all that could be required from the party intrusted with goods, was, that he should bestow all due care and attention on their safety, and take every reasonable precaution to ensure it; that the proof clearly established that the master and crew had done so; and that if there was any deficiency of evidence, the pursuer could not avail himself of that circumstance, seeing it arose necessarily from his own delay in bringing his action, whereby the crew of the vessel had been allowed to be dispersed, and to get beyond the reach of the defenders.

The Lord Ordinary reduced, decerned, and declared in terms of the libel, with expenses, adding the subjoined note;* and in a suspension of

* "NOTE.—The Lord Ordinary is far from thinking that the case is not attended with difficulty. He has given to it a great deal of consideration, both during the hearing and since; but after having read the entire record several times, he finds it impossible for him to affirm the judgment brought under reduction. He thinks, that if the case is considered as depending on matters of fact, the party bound to prove has not proved what it was necessary for him to prove; and that, as a case of law, without such evidence, it involves principles of great importance to the mercantile world.

a charge for the expenses found due by the Judge Admiral, suspended No. 168.
simpliciter.

Feb. 7, 1832.
Bee v. Hay, &c.

"It would require a long statement to explain all the grounds on which the Lord Ordinary founds his opinion. The main point is this:—It is proved and admitted (notwithstanding a very groundless objection to the title) that the goods were delivered into the hands of the defenders or their agents at London for transportation. They were not delivered; and it has not been proved at all, in what manner, or by what cause, at what time, or at what place, they were lost. It is proved, indeed, that the ship was stranded; but the defenders' own statement, as well as all the evidence, establishes that all the goods which were in the ship were got safely out of it. (See App. p. 6; p. 19, B; 22, F; 23, C, D; 33, F; 36, E.) The first interlocutor of the Judge-Admiral on the merits, never complained of, and clearly final when the last judgment was pronounced, expressly 'finds it not alleged by the defenders that any of the goods on board of the vessel were lost at sea, at the time the vessel was stranded.' And this is followed by the finding, that the averment of the defenders was simply, that the goods were lost among others, 'in the confusion attending the landing of the goods.' Whether this, if proved, would have furnished a good defence, may be doubtful. But there is no such fact in evidence: It is not proved that the goods were so lost; and the probabilities are great—increased by the evidence of care and attention—that they were not so lost. The Lord Ordinary will not be supposed, in dealing with a case of law, to say or insinuate any thing to the prejudice of the particular parties in the cause. But the fact is, that the matter is left in such a state by the evidence, that, for any thing that appears, the bale of goods might have been still in the possession of the defenders when the action was raised. It should not have been so. It is stated that inventories were made, and the defenders had them in their own possession. (See Defences in this action, quoting Letter, p. 5, par. 5.) The defenders were in every view bound to preserve these lists—to compare them with the manifest, which must then at least have been in their power—and to communicate them to the pursuer, which it is not averred they ever did. As the matter stands, whether from necessity or otherwise, it is left in absolute doubt and uncertainty in what manner the goods were lost, or whether they were lost at all, and were not safely delivered to the defenders at Leith.

"The case therefore resolves into this important question, whether, by the event of the stranding, the contract of affreightment was so ended, that the strict responsibility of the defenders as carriers was extinguished, and they became merely liable in ordinary diligence as mandatories or negotiorum gestores. The Lord Ordinary thinks it unnecessary to give any opinion on the point, whether they have shown such diligence or not. The greatest failure is in the non-preservation or production of the manifest and inventories, which they should have had and compared and preserved from the first moment of the report of the accident—still the more especially, as the master was alive for at least six months after the raising of the action. But these things seem to the Lord Ordinary to be of comparatively little consequence. Supposing the defenders to have proved generally the utmost apparent care, the question is, are they thereby relieved as carriers, subject to the Roman edict under our law, followed as it is by the equivalent rule of the common law of England? The Lord Ordinary humbly thinks, that it furnishes no relevant defence. He can by no means enter into the idea that this responsibility ceased by the stranding. He holds, that the master's duty continued to preserve the goods and earn the freight, and that, as long as he was so proceeding, at least without notice to the owners of the goods, (though the competency of ending the contract by such notice seems to be more than doubtful,) the ship-owners must still be considered as subject to the ge-

No. 168. The Shipping Company reclaimed, but the Court adhered.

Feb. 7, 1832.
Rae v. Hay, &c.

LORD JUSTICE-CLERK.—There has been nothing brought forward to meet the points of fact stated by the Lord Ordinary, and particularly the non-production of the lists and inventories mentioned in the defences. These should have been taken at the time when the goods were landed on the beach, and not when carried 14 miles inland, as the question was, what had been saved when the cargo was landed on the beach, and they ought to have been preserved. There is no ground to suppose any thing was washed from the deck, for the defenders themselves, at the first, took the position that the goods were lost after landing. Then this being the state of the facts, I cannot differ as to the law. It is impossible to concur in the interlocutor of the Judge Admiral. Parties in the situation of the defenders are not relieved of their obligation by proof of care; and in this case the goods have not been proved to have been lost by the wreck. I therefore agree with the Lord Ordinary.

LORD GLENLEE.—I concur. It seems to me the matter before the Judge Admiral was, whether these people had conducted themselves so as to relieve them of all responsibility. Now, the goods may have been lost, but they should not have left this to presumption; and they might have put it out of doubt by the lists of the goods saved and the manifest. As to expenses I have some doubts. It is a very severe action against the Company, particularly after so much delay.

LORD MEADOWBANK.—If there had been any unnecessary delay in claiming the goods, I would have agreed to a modification of the expenses; but the demand was made in a very few months, and the pursuer never led the Company to suppose that he acquiesced in their view, and in these circumstances I do not think he should be refused expenses.

LORD CRINGLETIE concurred, stating in addition, that he thought there was real evidence from the proof, that the stranding of the vessel must have been occasioned by mismanagement.

LORD JUSTICE-CLERK.—This is certainly not a case for favour, but still there are no grounds to refuse expenses.

SMILLIE and MURDOCH, S.S.C.—HOARE and ROSE, W.S.—Agents.

neral law applicable to their peculiar trade. How far that goes even beyond what is necessary for the case of the pursuer, appears from the authorities, some of which are quoted in the summons. And the Lord Ordinary is of opinion, that it is a law of great general importance, however it may appear occasionally to bear hard on individuals.

“The interlocutor of the Judge-Admiral, finding the pursuer liable in the whole expenses, notwithstanding the serious discussion on the objection to his title, could not, in any view, be supported.”

ADAM LUKE and Others, Pursuers.—*Sol.-Gen. Cochburn—Forsyth—Robertson.*

No. 169.

WALTER BROWN and Others, Defenders.—*D. F. Hope—Brown.*

Feb. 10, 1832.
Luke, &c. v.
Brown, &c.

Church—Burgh Royal.—One of the ministers of a collegiate church, who was 85 years old, and in bad health, having applied to the Town-Council, the patrons, to nominate an assistant and successor, and the other minister having consented, and a presentation being made, which the church courts sustained—held that the presentation was not liable to reduction.

THE church and parish of Tron, in Edinburgh, is a collegiate charge, Feb. 10, 1832. in which the Rev. Dr Simpson and Dr Brunton were incumbents. Of this church the Town-Council are patrons. For about three years prior to 1829, ^{1st DIVISION.} _{Ld. Moncreiff. D.} Dr Simpson, from age and infirmity, had found it necessary to avail himself of the services of an assistant. On the 30th of April of that year, he, with consent of Dr Brunton, addressed this letter to the Lord Provost:—“ Having been ordained a minister of the Church of Scotland in 1771, and a minister of Edinburgh in 1786, I felt, about three years ago, that my strength, and particularly my voice, was scarcely sufficient for my public duties, and with the full approbation of my people, and my colleague, Dr Brunton, I appointed Mr Goldie my assistant in the Tron Church. I am informed that that gentleman is shortly to be presented to a parish in the country; and as it is my earnest wish that the congregation of the Tron Church should have the important advantage, in my lifetime, of the labours of a minister of standing and experience in the church, as already ordained, and such a one as would be deemed by your Lordship and community worthy to be appointed to the charge, were it actually vacant, I now use the liberty to state to your Lordship, for the information of the Magistrates and Council, that it would give me much comfort and satisfaction to have such a minister associated with me as my assistant and successor, if that arrangement should be agreeable to your Lordship, and the Magistrates, and Town-Council.”

At this time Dr Simpson was 85 years old. It was alleged by the pursuers, that this letter was the result of “an intrigue, private concert, or project, between the Rev. Dr Simpson, and certain leading members of the Town-Council of Edinburgh, to introduce the Rev. John Hunter, minister of Swinton, into the office and situation of a minister of the Tron Church of Edinburgh, and that without a vacancy, by the previous resignation of Dr Simpson, or otherwise.” No evidence was taken as to the truth of this allegation. A petition and remonstrance was presented to the Town-Council, by a majority of the kirk-session; but the Council, on the 13th of May, by a majority of 19 to 12, resolved to appoint Mr Hunter assistant and successor, against which a protest was made. A presentation was in consequence executed in favour of Mr Hunter, who

No. 169. accepted ; and on the 29th of June it was sustained by the presbytery.

Feb. 10, 1832. Against this Dr Lee, one of the ministers of Edinburgh, and Mr Somerville of Currie, protested, and appealed to the synod, but their appeal was dismissed. These gentlemen then appealed to the General Assembly ; where the sentence was affirmed, but with a remit, and instructions to the presbytery, in the particular circumstances of the case, “ that if a civil action, as to the right of the Town-Council to nominate helpers and successors to the ministers presented by them, shall be raised and carried on, and if due intimation of this be made to the presbytery, that they do not complete the settlement of Mr Hunter till the decision of the civil Court shall be pronounced.”

In the meanwhile Luke and others, as dissenting members of the Town-Council, burgesses and elders of the kirk-session, raised an action of reduction of the acts of Council and presentation, against the other members of the Town-Council, Dr Simpson, and Mr Hunter, chiefly on these grounds :—1. The acts of Council and presentation were not authorized by the powers which are vested in the said Town-Council, as patrons of the parishes of the city of Edinburgh. These powers are of the nature of a commission in trust for the community, to endure for the period of each Town-Council, and to be exercised in the administration of the town’s affairs, arising during the period of the existence of each Council. The true and legitimate occasion for the election to an office or benefice in the gift of the Town-Council, as the trustees of the community, arises upon such office or benefice becoming vacant, as, until that event happen, any step taken by the existing Council to appoint a successor becomes an assumption of powers not vested in them, but remaining with their constituents, the community, ready to be brought into operation through the medium of the Council existing when the true occasion for their exercise emerges. 2. An appointment to a church-benefice by anticipation is an act in itself illegal, inexpedient, and prejudicial to the interests of the church and of the community, in so far as, in the first place, it affords opportunities and holds out inducements to the exercise of simony, or illegal barter of church-rights ; it excludes, in a great measure, all salutary competition among the applicants, who are only brought forward by the occasion of the office for which they are candidates being vacant, and even among the few persons who have an opportunity of making an application for a successorship, all those are necessarily excluded whose abilities and usefulness lead them to form expectations too high to be satisfied by a small portion of another incumbent’s stipend ; it induces a necessity on the part of the patrons, who might otherwise act freely and deliberately, of consulting the feelings, and giving effect to the wishes of the existing incumbent, who, having an interest in having an assistant of his own choice, is allowed indirectly to extend that interest to a successor ; and it has a tendency to deprive the members of the con-

gregation of an opportunity of expressing their sentiments openly and freely in a matter which, though put beyond their power and control, is to them, more than to any other members of the community, a subject of natural and laudable interest, and about which, accordingly, they ought to be and generally are consulted by liberal and independent patrons ; and accordingly such appointments by anticipation of ministers to benefices that are not vacant is not warranted by practice, and least of all by the practice of town-councils. And, 3. in the present instance, there did not exist any necessity for the appointment of a successor to the present incumbent, insomuch as the cure was sufficiently provided for by the services of his colleague and assistant ; and the appointment of Mr Hunter was peculiarly inexpedient, he being nearly as unfit from bad health for discharging the duties of the cure of the parish as Dr Simpson from old age."

To this it was answered :—1. That the question was no longer open, whether it was expedient and necessary, in consequence of Dr Simpson's infirmities, to appoint an assistant and successor, the appointment having been sustained in the Church Courts, who are the only and proper judges of that question. But, moreover, the necessity and expediency of the appointment were sufficiently proved to the patrons before it took place.

2. That the Church Court having found that the appointment of assistant and successor was expedient for the interests of the parish, and the incumbent having given his full consent, the party vested in the right of patronage were entitled (as well as bound by the duties towards the parish) to appoint an assistant and successor ; and no one has a title or interest to object.

3. That the presentation having been granted by the majority of the Town Council, a minority of that body cannot object in a court of law to the act, if the power vested in the body was regularly exercised upon any grounds which were the proper subject for the deliberations of the body having the right of patronage. And,

4. That by the law and practice of Scotland, an assistant and successor may be named by the patron, where the circumstances of the parish require it, although the benefice should not be vacant ; and in this matter, there is no distinction in principle, and no distinction has ever been made in practice between individuals and corporations possessed of the right of patronage. In respect of this latter proposition, various instances were referred to.

During the discussion of the reduction, Dr Simpson died, and the succeeding Magistrates and Council raised a separate action of reduction of the presentation, and a declarator of their right to present to the incumbency, as having become vacant by Dr Simpson's death. This action was conjoined with the first. The Lord Ordinary sustained the defences, and

No. 169. assizied, with expenses. His Lordship at the same time issued the subjoined note.*

Feb. 10, 1832.

Luke, &c. v.
Brown, &c.

* " NOTE.—The Lord Ordinary has considered this case with care, because it has been treated as a case of importance. It is undoubtedly a case of great importance in some views of it; but he should not do justice if he did not state, that it is a case in which he has never entertained the slightest doubt.

" The material facts are simple: Dr Simpson, at the age of 85, intimated to the Town-Council that he had no hope of being able to continue to discharge the duties as minister of the Tron Church of Edinburgh, and that he was desirous, if the Town Council approved of it, of having an ordained minister of experience appointed assistant and successor to him. The proposal lay a week on the table of the Council, and was then approved of. Dr Brunton, the collegiate minister of the same church, expressly consented. On the 19th May 1829, the Council resolved to present Mr John Hunter, a person in all points qualified; and no step having been taken to prevent this, a presentation was given to him on the 10th June 1829. That presentation was regularly sustained by the Presbytery, without any objection having been stated by any private party. Then a question on the ecclesiastical merits of the case arose among the members of the Court themselves, and was terminated by a final judgment of the General Assembly, 1830, holding the presentation to be good; but, as an action of reduction had been raised, on the eve of the sitting of the Assembly, superseding the induction till the issue of that process, according to the uniform practice since the case of Lanark.

" Mr Hunter's induction was prevented solely by the proceedings in the Church Courts, to which the pursuers were no parties, and if he had been inducted, there must have been an end of the matter.

" The first reduction was not brought till after the presentation had been sustained by the Presbytery, and their sentence had been affirmed by the Synod. There seems therefore to be much ground for the plea, that the pursuers had no right afterwards to insist in any reduction, the act 1567, c. 7, being explicit as to the effect of the judgment of the Church Courts, and no civil impediment having been previously attempted. But the Lord Ordinary does not rest his opinion on this, though he has yet heard no good answer to it.

" The main question is—Had the Town Council, the undoubted patrons, power, on the application of Dr Simpson, to grant the presentation to Mr Hunter? There is no difficulty in form. The particular objections stated appear to be groundless, and were scarcely insisted on at the bar; and the presentation is in the usual form in such cases. The question is—Have the patrons power to make the presentation to the effect of warranting the Presbytery to ordain or admit Mr Hunter as minister, assistant and successor in the parish?

" The case has been argued to the Lord Ordinary, on a denial of the legality of this in any parish. He is humbly of opinion that the plea is untenable as matter of law, and irrelevant and groundless in any other view.

" In order to take a right view of this question, it is necessary to attend to the genius and constitution of the Church of Scotland. It cannot justly be tried by any reference to the rules or the proprieties applicable to establishments of a different nature, or by analogies drawn from offices of a different character. The fundamental principle of the Scottish church is, that every man admitted into ecclesiastical orders—every man ordained as a minister—must be ordained as actually the minister of some parish, or of a chapel-district precisely fixed. There is no such thing in the Church of Scotland as ministerium vagum, either practically or theoretically—no

Luke and others reclaimed, and rested inter alia on the case of Turnbull; but the Court unanimously adhered. No. 169.

Feb. 10, 1832.
Luke, &c. v.
Brown, &c.

such thing as plurality of benefices—no such thing as a minister ordained without a *cura animarum*, to which he is appointed for his life.

" From this principle, fixed at the Reformation, difficulties have naturally arisen, when ministers fall into great age or infirmity. These difficulties are lessened by the practice of allowing candidates for the ministry to preach after being licensed by a presbytery. But these are not, and cannot be, ordained ministers, enabled to administer the sacraments, and to discharge other duties dependent on ordination; and still, therefore, in many special cases a different remedy was required. That remedy was found, at an early period, in the plain, simple, and very sensible expedient of the presentation and induction of a fit person into the condition of a minister of the parish for his life, as assistant and successor to the existing incumbent. The person so appointed becomes immediately an ordained minister of the church, subject to all the obligations implied in the character. He is received as a member of the presbytery and synod, entitled to vote whenever the principal is absent, and eligible as a member of the General Assembly. These things are beyond all doubt, and are sanctioned by at least a century of undisputed practice.

" It is manifest, therefore, that the institution of assistants and successors in the Church of Scotland, introduced from a necessity inherent in the very constitution of the Church, and for the advantage of the people, has no resemblance or affinity to grants of offices in reversion, and is essentially different even from the appointment of assistants and successors in any other case. And it must be kept firmly in remembrance, that it is attended with the most important securities against abuse. The consent of the existing minister, at least if he is capable of consent, is indispensable. The patron of course must consent; but when these two are agreed, the consent of the presbytery, and, if called for, of the Synod and General Assembly, must be obtained. The whole question of reasonable necessity, expedience, and propriety, undoubtedly belongs to these Courts; and if they think the measure improper, or an abuse of the patron's right, they certainly have power to put a negative on the proposal. And practically the statement of the pursuers, as to the small number of such appointments, compared with the number of livings and vacancies, while the legality of them has been recognised for a century, demonstrates that these checks have been effectual, that the practice has been kept under due control, and that there is no evil or abuse involved in it.

" It is admitted on the record, that there is a series of examples to the number of forty-three, well authenticated, of assistants and successors so appointed, from 1742 to the present time. There is reason to think that the practice was introduced much earlier. See note in Connell on Parishes, p. 515. These examples run over the whole Church and country. They comprehend royal boroughs as well as country parishes:—Glasgow, Dumfries, Montrose, Cupar, Ayr; and one of the last instances, though in a country parish, was by the presentation of the Town-Council of Edinburgh. In not one of all the cases was the legality of the appointment, as matter of civil right, disputed. The Lord Ordinary holds this alone to be decisive of the general question—an admitted and unchallenged practice over the whole Church during ninety years. It might have been more extensive if any serious abuse had been practicable; but if the control is efficient, the extent of the practice is of course limited by the necessity.

" But there is much more in the case. In the first place, the legality of such appointment has been recognised by the Church Courts. The assistants and successors have not only been duly ordained and inducted, but they have been recognised

No. 169. LORD PRESIDENT.—I concur in the interlocutor, and generally in the note of the Lord Ordinary, which is so full as to leave little room for additional observa-

Feb. 10, 1832.
Luke, &c. v.
Brown, &c.

as members of all the Church Courts, exercising the most important rights, both ecclesiastical and civil. They have been incorporated in the constitution of the Church, and public acts to which they are parties have been recognised in all the civil Courts. In the next place, they have been expressly acknowledged as holding a legal status, both by the Court of Session and by the Court of Teinds. See Connell on Parishes, pp. 517-8. Case of Cadder. Muir v. Dunlop, December 9, 1791; and Campbell v. Stirling, March 4, 1813. And see the case of Melrose, Connell on Tithes, vol. i. p. 455, where a process of augmentation having been brought by the principal minister, and the augmentation having been refused to him, the Court, on a petition by the assistant and successor, and with the consent of the heritors, awarded an augmentation to him out of the teinds. He could not indeed have raised the process, because he is only conditionally vested in the benefice, as decided in Shaw v. Heritors of Robertson, January 29, 1806. But his character was clearly recognised as a lawful status, otherwise no consent of the heritors would have warranted the proceeding.

In the third place, these assistants and successors have been recognised in various British statutes. They are so in the acts establishing the Widows' Fund, 17th Geo. II. (1744) cap. 11, sec. 11; 22d Geo. II. cap. 21; and 19th Geo. III. cap. 2, sec. 9. Their status as churchmen is therefore sanctioned by statutes in full force ever since 1744. They are to be deemed and taken to be ministers to all the purposes of the acts. But the later statute of 48th Geo. III. cap. 50, relative to grants of offices in reversion, is still more important, as containing an express exception from its provisions, which it is assumed might otherwise have been taken to apply to the case, 'that nothing in this act shall extend, or be construed to extend, &c., to prohibit the appointment of assistants and successors to the parochial clergy of Scotland.'

"It seems to the Lord Ordinary to be quite impossible, in the face of these facts, and without a single authority or decision on the point, to maintain that such appointments, when duly proceeded in, are illegal. The passages in Erskine and other authors which are quoted, only announce the undoubted general truth, that no patron can present to the expectancy of a benefice. This plainly does not contemplate the special case of the immediate induction of an assistant and successor into the whole duties of the parish, on a declared necessity by the proper authority. That is not a presentation to an expectancy, but to an immediate cure, and at any rate it is a special case fully established by a long usage.

"Neither do the cases referred to by the pursuers appear to have any material application to the question. The only one to which it seems necessary to advert is, that of Arnott, &c. v. Flints, &c., as decided by the House of Lords 26th May 1809. Though that case was much relied on by the pursuers, it humbly appears to the Lord Ordinary that it can afford them no aid. For, 1st, It was the case of a professor in a university. That is altogether different from the case of a minister of the Church; it has not in it the important quality, that without ordination the full duties of the place cannot be performed. Neither has it the same sanctions; and each university being independent of all the rest, may be only affected by practice within itself. 2d, The very case of assistants and successors in the ministry, is expressly acknowledged as beyond dispute lawful, by both the parties in that cause. 3d, It was the case of a professorship, where the other professors were the patrons, and where consequently there could be no jurisdiction to control an abuse. 4th, The king being the visitor of all colleges, it might be competent to the King's Courts to control the exercise of

tion. But I think his Lordship has perhaps laid it down rather too broadly, that every ordained minister of the Church of Scotland must have a parish or chapel-district precisely fixed as the sphere of his functions. Missionaries are daily ordained for our settlements abroad, and I am not satisfied that our practice at home is such as to justify the unqualified terms used by the Lord Ordinary. I do not think the case of Turnbull is at all a precedent to this one. He was a chamber-

Feb. 10, 1832.
Luke, &c. v.
Brown, &c.

the right of patronage in such a case, and more especially to determine whether it was warranted by the terms of the endowment, which was one of the points put in issue. 5th, It was plainly a case of the grant of an expectancy; for the very terms of the appointment showed that it was not intended or expected that Dr Flint, junior, should immediately, or at any given time while his father lived, enter on the duties of the office; and 6th, It was in its circumstances liable to other very serious objections. But while these considerations plainly place the decision, the particular grounds of which are nowhere reported, on a footing which entirely removes it from the principles of this case, it is to be remembered, that it was only in the previous session of Parliament (1908) that the statute 48th Geo. III. was passed, in which all grants of offices in reversion were prohibited, with the express exception of the appointments of assistants and successors to the parochial clergy of Scotland, while no such exception was made of similar appointments to professorships.

" If the general plea of the pursuers against the legality of such presentations cannot be sustained, it seems to be clear that there is no specialty which can avail them. The Town Council of Edinburgh have the same powers as other patrons; and the question being one which relates to the Church at large, it can be of no consequence whether the practice has been followed, or has been frequent in Edinburgh or not. What has been law for Glasgow, Ayr, &c., and generally over Scotland, must be law also with regard to the powers of the patrons of Edinburgh in this matter. They have power to present upon actual vacancies by death, &c., and they have power to present assistants and successors, when the cases which render this necessary or expedient arise. And the Lord Ordinary can see no evil or danger in this. For, the question of expediency being subject to the control of the Presbytery, when the case does occur, the Council for the time is just as competent to present a fit person for the benefit of the public, as any Council which succeeds them can be presumed to be. If they do not take due pains, that is their fault, and in a question of law is not to be presumed. They are to exercise the power (as Dr Simpson expressly asked them to do) precisely as they would if there was a vacancy by death.

" As to the statement of this being a collegiate church, Dr Brunton being fully competent to the whole duties, &c., the Lord Ordinary thinks them altogether irrelevant in this Court. They were very fit to be stated to the Presbytery, if the pursuers thought them of importance; and, though the pursuers did not state them, it has been stated by the defender, that they were fully canvassed in all the Church Courts. As the church or parish has two ministers by law, it must be presumed that two in full orders are necessary, and this may very well be, from the nature of the population, though the parish be not large. Dr Brunton is also a professor in the University; but though he had not been so, he had a right to an efficient colleague, and Dr Simpson was 85 years of age.

" The Church Courts, therefore, having confirmed the appointment, and ordered the induction, the Lord Ordinary is of opinion that all questions of particular expediency are excluded, and that the case must stand on the same footing as if it had arisen on the last presentation of an assistant and successor, given by the Town-Council of Edinburgh, or on such a presentation by any other patron, which had been sustained by the Presbytery."

No. 169. *John of the Town-Council, and it was very properly held, that to grant him an appointment for life, was beyond the power of any Council for the time being.* His
 Feb. 10, 1832.
Luke, &c. v. Brown, &c.
 office was that of a factor or servant to his employers, and therefore it was right that he should be liable to be dismissed when they thought fit; the proper relation between his employers and himself would have been destroyed, if the Council for any current year could have given him an appointment for life. The principles, therefore, on which that case was determined, have no application here.—I would only farther observe, that, though the specialty has been urged that the Tron Church is a collegiate charge, I have no difficulty in setting that specialty aside. The office of preaching, however important, does not form the sole duty of a minister; and although an assistant might be had to divide that duty, I see no reason why all the other parochial duties should be devolved on the single colleague who remains capable of discharging them. And at all events, I think the validity of the presentation is not affected by the accident that it occurs in a collegiate charge.*

LORD CRAIGIE was for adhering; but observed, that this case would afford no precedent for protecting any future presentation, if made *mala fide* by the patron.

LORD GILLIES.—I am clearly for adhering to the interlocutor, as I think we cannot hold this to have been an illegal presentation; but I do not implicitly adopt the whole of the Lord Ordinary's note. The appointment of an assistant and successor was proper in this case, if it can ever be proper in any, and the Town-Council made the appointment in the fair administration of their powers. Such an appointment is supported by a very considerable extent of general practice, as appears from the number of similar appointments which have been made. But if I had held this appointment to have been made *mala fide*, and as a job on the part of the Town-Council, I apprehend it might be reducible. I demur to that part of the note where the Lord Ordinary says, “the whole question of reasonable necessity, expedience, and propriety, undoubtedly belongs to the Church Courts.” I am not prepared to assent to this, and to hold that we are entirely excluded from all cognisance of this question in any shape. I should at least find it necessary to weigh the matter farther before I could assent to this doctrine, and I merely wish to guard myself against being supposed to have done so. But it is a point not requiring to be decided at present. I concur with your Lordship in doubting whether it be essential for the ordination of a clergyman that there should be a special parish or district of which he is made minister. I believe it is matter of history, that, in the earlier ages of the Church, ministers were ordained who had a missionary character, and who used to traverse a considerable portion of this kingdom in the exercise of their functions.

Pursuers' Authorities.—Arnot, May 26, 1809 (Appeal Papers, Adv. Lib.); 1 Erik. 5, 11; Stuart, Jan. 24, 1677 (9899); Connell (Parishes), 514; L. Garbet, Dec. 15, 1693 (13115.)

Defenders' Authorities.—17 G. II. c. 11, § 11; 22 G. II. c. 21; 19 G. III. c. 2, § 9; 19 G. III. c. 20; 48 G. III. c. 50. Connell (Parishes) 514; Dunlop, Dec. 9, 1791 (7470); Campbell, March 4, 1813 (F. C.)

D. FISHER, S.S.C.—HUNTER, CAMPBELL, and CATHCART, W.S.—Agents.

* The Lord President added, that Lord Balgray was confined by indisposition, but had sent him a note, in which his Lordship intimated that he concurred with the Lord Ordinary.

ROBERT LESLIE, Petitioner.—*Russell.*
A. B. Respondent.—*Walker.*

No. 170.

Poor's Roll.—An unmarried labouring man, with an annuity of £52 in addition to the profits of his labour, not entitled to the benefit of the poor's roll.

ROBERT LESLIE, an unmarried labouring man, having an annuity of Feb. 10, 1832. £52 in addition to the proceeds of his labour, presented an application for ^{2d Division.} admission to the poor's roll. This was opposed, on the ground that he ^{Leslie v. —} was not in such a state of poverty as to entitle him to this privilege. ^{Gallie v. Ross.}

LORD JUSTICE-CLERK.—A man with £50 a-year, and his own labour, cannot ^{Craigie v. Creall, &c.} be allowed to litigate on the poor's roll. If the only question were, whether a party could afford to carry on a lawsuit in this Court, we would have to admit nine-tenths of the litigants.

Petition refused.

JOHN GALLIE, Pursuer.—*Robertson—J. W. Dickson.*
JOHN and DAVID ROSS, Defenders.—*Rutherford—Penny.*

No. 171.

SPECIAL case of expenses, in which the Court adhered to the Lord ^{Feb. 10, 1832.} Ordinary's interlocutor.

P. PEARSON,—R. ROY, W.S.—Agents.

^{2d Division.}
 Ld. Moncreiff.
 R.

CRAIGIE, Petitioner.—*Neaves.*
CROALL and MORRISON, Respondents.—*Shene—R. Bell.*

No. 172.

Poor's Roll.—Circumstances in which the Court granted warrant to cite two elders who had declined granting any certificate to a party applying for the benefit of the poor's roll, to give evidence at the bar as to their knowledge of the applicant's condition, &c.

CRAIGIE, with a view to raising an action of damages against the Com- ^{Feb. 10, 1832.} missioners of Police of Perth, applied to the Kirk-Session of the parish of St Paul's there, to receive his declaration, and grant the certificate required by the Act of Sederunt, towards his being admitted to the benefit of the poor's roll. At a meeting of Session, at which were present the minister and other elders, Craigie emitted a declaration, and the Session adjourned, in order to make enquiry as to the accuracy of his statements. At the next meeting, the minister stated that he was satisfied that a certificate in his favour should be granted; but the elders being of opinion that he wasted all his money in drinking, and that in consequence he was not entitled to

^{2d Division.}
 T.

No. 172. get on the roll, instead of granting a certificate stating the real circumstances of the case, declined to grant any certificate whatever. Craigie, after Feb. 10, 1832. taking a notarial protest, setting forth what had occurred, presented a petition to the Court praying for a remit to the Sheriff, or for such other proceeding as the Court should deem requisite to satisfy themselves of his title to be put on the roll, and stating that Croall and Morrison, two of the elders who had declined to grant a certificate, were members of the Board of Police, against which his intended action was to be directed. In these circumstances, the Court allowed a certificate from the minister to be put in, and granted warrant to cite Croall and Morrison to give evidence at the bar as to their knowledge of Craigie's circumstances, &c. These parties attended this day; but on their being called,

Skene and R. Bell for them objected to their being examined, on the ground that Kirk-Sessions were not bound to give any obedience to Acts of Sederunt of this Court, and that their declining to do so afforded no ground for the unusual measure of citing them to appear at the bar, instead of granting commission to take their depositions according to the usual manner in which witnesses are examined.

Neaves answered, that the Court were entitled to call all parties as witnesses to give evidence in any matter before them, when that was required for the ends of justice, and that they might in their discretion require such witnesses to be examined in their own presence.

LORD JUSTICE-CLERK.—Notwithstanding what I have heard for these parties, I am decidedly of opinion, that, under the circumstances, the Court took a proper step in directing them to be cited to appear here. We are not by this laying down any rule, that in all cases elders are to be called as witnesses; but under the circumstances stated here, and certified by a notary-public, the Court was fully justified in calling these parties to give evidence at the bar of the Court. The statement is not that this Kirk-Session did not proceed at all; for they did receive the application, and so far made enquiry, and then stopped short, and defeated the object of the Act of Sederunt. If these persons wished from delicacy to abstain, they might have kept away altogether; but they did not, and we can follow no other course than we have done. As to any claim of remuneration for trouble and expense, it is not *bujus loci*, though, if they are subjected to any, it is their own fault. The clergyman has given the certificate, which they refused, and the order of the Court was properly pronounced for the ends of public justice, that they should be ordained to give evidence.

LORD CRINGLETIE.—I am of the same opinion. The Court, by their Act of Sederunt, have adopted the most humane mode of ascertaining the necessary facts, by receiving a mere certificate, instead of requiring evidence on oath. In general, the minister and elders are acquainted with their parishioners, and can have no difficulty in certifying; and it is an act of humanity and justice on their part to grant the certificate. If they know nothing of the applicant, they are allowed to say so. As to how far the Court might control the Kirk-Session, I will not say. In the present case, however, these people accepted the commission contained in the Act of Sederunt, examined the man, and entered into enquiries regarding him, and yet they will not give a certificate of the result of their enquiry. I think they could

not "conscientiously" refuse it; and the proper course is that which has been No. 172, adopted.

LORD MEADOWBANK.—I agree. These people are not brought here for contempt, but as witnesses; and the only question is, whether the Court has power, if it see cause, to examine witnesses in their own presence. Such a thing was never mooted before; and it is impossible to doubt it, if there be enough of *prima facie* statement to warrant it, and there is sufficient statement here. If the circumstances are incorrectly stated by the party, *sibi imputet*; we cannot make a separate cause *ferrier et Walker*.
about every incidental matter of that kind, and take a proof whether the averments be true, before we will grant warrant to cite. The statements, however, are not now denied. As to the question of expenses, it is not here. It is said that Kirk-Sessions find themselves aggrieved by the Act of Sederunt. By it, however, we make no order on the Kirk-Session; but, for the benefit of the country generally, and those unable to litigate, and for the purpose of checking improper litigation through means of the poor's roll, and, at the same time, securing the benefit of its humane provisions to those who really deserve it, we have pointed out a cheap mode, by which the Court will be satisfied of the propriety of the application. It would be utterly inconsistent with the character of the church, if they refused to give assistance to the Court in saving expenses to their poor brethren; and no such statement could be made in any church court, without creating universal indignation; and I am sure there are not twenty elders in the church who would refuse their aid in this matter.

THE COURT accordingly repelled the objection, and examined the witnesses.

ROBERT WARK, Charger.—*Shene—Patton.*

WILLIAM WOTHERSPOON, Suspender.—*Jameson—Moir.*

No. 173.

Expenses.—THIS was a question of expenses, in which the Lord Ordinary pronounced a special judgment, and the Court adhered.

R. MACFARLANE, W. S.—WOTHERSPOON AND MACK, W. S.—Agents.

1st Division.
Lord Newton.
H.

CHARLES FERRIER, Suspender.—*D. F. Hope—Neaves.*

JAMES WALKER and Others, Respondents.—*Shene—G. G. Bell.*

No. 174.

Possessory Judgment—Interdict—Where a passage between two streets of a burgh had existed for above a century, and though of irregular width, was defined by buildings on either side; and a party, having right of free iish and entry by that passage, and alleging himself to have a common property in its solum, had been in the use of the passage for a long term of years—Held that he was entitled to an interdict against encroachments on the passage by a conterminous proprietor, who alleged that he held the exclusive property of the solum of the passage, and that he had left ample space for the iish and entry of the first party.

FERRIER, Walker, and Others, were conterminous proprietors in the burgh of Montrose. Between their respective buildings there was a close or passage leading from Murray Street, or High Street, of Montrose, to

1st Division.
Lord Newton.
H.

No. 174. some minor or back street in the suburbs. This passage has subsisted for more than a century; it was of unequal width at different places. Walker Ferrier v. Wal- and others, having taken down some of their old buildings bounding the Feb. 14, 1832. passage, were in cursu of making a new erection, which covered part of the close or passage, which had been previously vacant. Ferrier presented a bill of suspension and interdict, which was passed on 27th November 1830.¹ Walker and others maintained that the solum of the close or passage was theirs; that Ferrier had no right even of passage, but that if he had such a servitude, the new building left ample room for passage, as it only narrowed the court in some places where it was uselessly and irregularly wide. Ferrier answered, 1. That, in a question of interdict, it was enough for him to instruct that he had possessed, for seven years, the close or passage as it stood previous to the encroachment; and he alleged that the passage was a thoroughfare used by the burgesses; and, 2. That his titles proved that he had not only a right of free ish and entry through the passage, but that the solum was common property to him and Walker and others.

Each party founded on a series of titles, going back to the year 1700, when the same party was proprietor of the whole. The Lord Ordinary found, "that the solum of the close or passage on which the buildings complained of were erected, belongs wholly to the respondents, but that the suspender has a servitude of free ish and entry through the same, both to the front and back street; that as he has no farther right in consequence than that of a road or passage, he is not entitled to prevent the respondents from bringing their buildings forward, where the close is wider than necessary for the full use of the servitude; and remitted to an inspector to inspect the premises, and to report whether, in his opinion, and considering the width of the close in other places, the buildings complained of have the effect to deprive the suspender of the fair use of his right, and if so, to specify what width ought to be left open to secure him in the enjoyment of it."

Ferrier reclaimed.

LORD PRESIDENT.—I am satisfied that the judgment of the Lord Ordinary embraces a point which ought not to be decided in this process; I mean the right of property in the solum of the passage. This is merely a question of interdict as to an admitted encroachment on the existing condition of the passage as it stood previously for a much longer term of years than suffices for a possessory judgment. I am for continuing the interdict. I think the grant of "free ish and entry" conferred the use of an actual passage as it stood at the time.

LORD BALGRAY.—If I thought the question competently before us, I would incline to hold, that under the titles of the parties, the solum of the passage belonged to Walker and others. But that question is not here; and it is now no longer

¹ Ante, IX. 85.

disputed that Ferrier has a right of free iah and entry, under titles which conferred No. 174.
 this right a century ago. After the use of an existing passage for so long a term,
 are we, in a possessory question, to abridge it? I think the case is not in a shape
 for us to determine the point decided by the Lord Ordinary; and in this process
 I concur with your Lordship that we must continue the interdict.

Feb. 14, 1832.
 Ferrier v. Walker,

LORD GILLIES.—I take a different view of the titles, and incline to think the
 solum of the passage was a common property to the conterminous heritors, a free
 iah and entry being also equally the right of each of them. But, at all events, after
 the passage has existed, with certain boundaries by buildings on either side, as a
 thoroughfare in Montrose from the public street to a back street, I cannot allow
 Walker and others to encroach upon it, merely on condition of a passage being left,
 such as a surveyor may deem advisable, so as to leave "free iah and entry." What
 is "free iah and entry?" I apprehend just as ample a passage as it was before. I
 think the interdict should be continued.

Sorley's Trustees v.
 Grahame, &c.

LORD CRAIGIE was understood to concur.

THE COURT accordingly altered, and continued the interdict.

W. DOUGLAS, W.S.—DENNISTOUN and CHRISTIAN, W.S.—Agents.

SORLEY'S TRUSTEES, Pursuers.—D. F. Hope—Robertson.

No. 175.

ARCHIBALD GRAHAME, Defender.—Jameson—Monteith.

WILLIAM GILMOUR, Defender.—Shene—Marshall.

Sale—Principal and Agent—Cautioner—Process.—1. Circumstances under which a party who purchased property was held liable for the price, although it was known to the seller that the purchase was for a company, of which the buyer was the secretary. 2. Where a party purchased property under a declaration that he should not be entitled to withhold the price in respect of any defect in the progress of titles; and one of the titles was a disposition by a daughter as faiar, while the parent (who was the true faiar) consented as filerentrix, and for all right, title, and interest she had in the subject; and the daughter predeceased her—Held that as such conveyance would found an action of constitution, and an adjudication in implement, the purchaser was not entitled to object. 3. Competent to conclude for decree against principal and cautioner in the same summons, "either conjunctly and severally, or each respectively in terms of their several obligations." 4. Circumstances held not sufficient to liberate a cautioner on the plea that the contract guaranteed had been innovated, or his relief injured.

IN 1823, a joint stock company was formed in Glasgow for the purpose of opening a new street there, called London Street. Grahame was named secretary. In that character he applied to Sorley, who held property in the line of the new street, to offer it, at a valuation, to the company. Sorley made an offer, which was addressed to Grahame as secretary to the Company. This Grahame accepted in February 1824, at the price of £6900, and an annuity of £50. In the original draft of the contract of sale, it was proposed that Grahame should be described as acting for the Company; but he struck out these words, so that it bore

Feb. 14, 1832.
 1st DIVISION.
 Ld. Corehouse.
 S.

No. 175. to be between Sorley and Grahame as individuals. Sorley's agent then wrote to Grahame:—“As the contract is not on account of the new company, as mentioned by you yesterday, Mr Sorley desires me to request you will inform him what security he has for the implement thereof,” &c.

Feb. 14, 1832.
Sorley's Trustees v.
Grahame, &c.

Grahame offered Gilmour as his cautioner; and, when the contract was signed, Gilmour addressed to Sorley this holograph obligation, “I bind myself to see the contract of sale of your subjects in Tradealand, entered into, of this date, betwixt you and Mr Archibald Grahame, writer, fulfilled in terms thereof; and failing Mr Grahame paying the price, as thereby stipulated, I oblige myself to pay you the sum, being £6900; also the annuity of £50 at the terms therein stipulated.” The contract was in consequence executed, and set forth that it was “entered into betwixt the parties following, viz. John Sorley, merchant in Glasgow, proprietor of the subjects after mentioned, on the first part, and Archibald Grahame, writer in Glasgow, on the second part.” It then stated, “that the said John Sorley, in consideration of the price after stipulated, and the other obligations under written, has sold, and hereby, in the terms after specified, obliges himself, on receipt and payment of the price, to execute and deliver a valid and sufficient disposition to, and in favour of, the said Archibald Grahame, and his heirs and assignees of all and whole,” &c.

Grahame “bound himself, his heirs and successors, to make payment, in manner following, viz. £1400 at Martinmas next, and the remainder, being £5500, at Whitsunday 1828,” &c., and to pay Sorley an annuity of £50 during his lifetime, “declaring that the said Archibald Grahame shall not be entitled to receive a disposition to the said subjects, or any portion thereof, till payment of the said price or prices thereof; but shall be entitled to dispositions to any part or portion thereof, on payment of the price of such part and portion at the rate of fifteen years' purchase for the houses and warehouses, and seventeen years' purchase for the shops, but so always as not to exceed three dispositions at the said John Sorley's expense.”

It was also declared, “that the said Archibald Grahame shall be held to have satisfied himself with the sufficiency of the title-deeds and writings of the subjects hereby sold, and shall not be entitled to withhold the price, or any part thereof, on account of any defect or deficiency in the progress. And as the only burden affecting the said subjects is an inhibition at the instance of Robert and John Stirling,” &c., “therefore, in case the said inhibition shall not be recalled, or discharged, before the last instalment of the price after-mentioned is payable, the said Archibald Grahame, and his foresaids, shall be entitled to withhold from the said last instalment, (but not from the first instalment,) a sum adequate to discharge the said inhibition.”

Under this contract was included a shop (No. 3,) the titles of which stood in this situation. It had been disposed formerly to a Mrs Montgomery in life-rent, and her children nascituris in fee. She had an only

daughter, who, on the assumption that she was fair, disposed in favour of No. 175.
Sorley's author, for an onerous cause, and the mother consented, as life-rentrix, and for all right, title, and interest which she had. Miss Mont- Feb. 14, 1832.
Grahame, &c. Sorley's Trustees v.

The titles of another portion of the subjects stood on this footing. Sorley held, inter alia, a pro indiviso half of a shop, "together with the spaces of ground which lay below the piazzas of said tenement of land between the said shop and the street, and are now enclosed in said shops respectively," &c. When acquired by Sorley, the shop lay in a piazza, behind some pillars, and as various other shops in Glasgow were formerly in a similar position, a statute was passed, (39, 40, Geo. III. c. 88,) authorizing the magistrates "to bargain with the proprietors of said shops for leave to them to bring forward their respective shops to the front of the said pillars, so as to include the area of the said piazzas into the shops," &c., taking such price "for the privilege before mentioned," as parties should agree upon. Under this statute, Sorley purchased the right to bring forward his shop, and got this receipt from the magistrates, "August 23, 1811, received from Mr John Sorley the sum of £38, being the price for ground before his shop, sold him by the city of Glasgow, on condition that he takes upon himself his responsibility for every claim of damages sustained by the conterminous proprietors, in consequence of bringing his said shop out to the front of the piazzas," &c. He accordingly brought forward his shop.

The contract was signed on the 4th of February, 1824, and on the 7th, a meeting of the managers of the Company was held, and was attended by Gilmour, (the cautioner,) who was an active promoter of the undertaking. The minutes bore that "the meeting, in the first place, took into consideration the purchases which had been made, by certain private individuals, of properties in the first section of the line, and came to the following resolution, That the company shall, and do take off the hands of these gentlemen, the purchases made by them as aforesaid, in the secretary's name, upon the terms thereof."

In May 1824, an act of Parliament was passed, which incorporated the Company, and declared the subscribers to be liable only for the amount of their respective subscriptions. Gilmour was named a commissioner under this act, and Grahame appointed secretary.

Previous to this, and under the operations for opening the new street, the tenements sold by Sorley were pulled down; and in December 1824, Grahame wrote to Sorley's agent that the commissioners meant to pay to Sorley the whole price, but objected to the title of that part of the property derived from Miss Montgomery.

Thereafter, £1400 were paid by the commissioners, and a conveyance of part of the subjects was executed by Sorley, with Grahame's concurrence, in favour of the commissioners. Grahame subsequently wrote to Sorley, "that it was now three weeks since I informed you that it was necessary

No. 175. for the London Street commissioners to pay up a second portion of the price of the subjects purchased by me from you, and assigned by me to them, and since I required you, in terms of the contract of sale, to execute a conveyance thereof in their favour." It now appeared that another inhibition, laid on in 1788, affected the subjects, and Sorley bound himself to warrant against it, or allow part of the price to lie, until prescription had run. He then executed a conveyance in favour of the commissioners, received a farther payment from them of £4565, and Grahame also signed the conveyance on the following day. This left a balance of £935 of the original price still due, being the proportion which accrued to a shop which remained still undisposed by Sorley.

In May, 1825, Sorley granted a receipt to the treasurer of the Company, for one half of the annuity, "as provided by the contract of sale betwixt Mr Archibald Grahame and me;" and also for the interest of £900, "part of the price of the subjects in said contract remaining unpaid." Sorley died in 1826, having appointed testamentary trustees. Their factor, in May and November 1828, granted receipts to the treasurer of the Company for interest "of balance of price of subjects sold to A. Grahame, Esq., for behoof of said commissioners;" and it appeared from the sederunt book of Sorley's trustees, that repeated references were there made to the sale of his subjects, as if it had been a sale to the Company.

The inhibition at Stirling's instance was discharged in October 1828; and the other inhibition was prescribed. The balance of the price was demandable, in terms of the contract, at Whitsunday 1828; and at Whitsunday 1829, the funds of the Company being now deficient, a demand was made by Sorley's trustees on Grahame and his cautioner Gilmour. They resisted the demand, and the trustees raised action to enforce it, stating, that they were ready "to grant a disposition of the said shop, upon payment of the price thereof, they being vested with all the right thereto which stood in the person of the said John Sorley, and that either in favour of Grahame or any person whom he may name." And they concluded that Grahame and his cautioner should be ordained "in terms of the said contract and obligation, and that, either conjunctly and severally, or each respectively, in terms of their several obligations, to make payment to the pursuers, of the foresaid principal sum of £935," &c.

Pleaded in defence by Grahame.

1. Although the contract of sale appeared to be entered into, in point of form, with him as an individual, yet it was perfectly known and understood by all parties, that he was truly the agent of the Company. Accordingly, the subsequent conveyances by Sorley were in their favour, and Grahame's name was adhibited merely as a matter of form. The Company made all the payments; and it was evident, from the receipts granted by Sorley's trustees, that they considered the real purchaser to be the Company.

2. By suffering the Company to pull down the subjects sold, so that No. 175. they could no longer be made over to Grahame; by not having done diligence against the Company at Whitsunday 1828, when the balance of Feb. 14, 1832.
the price became exigible; and by not having intimated to Grahame, till Sorley's Trustees v. Whitsunday 1829, that they looked to him,—the pursuers were barred Grahame, &c. from demanding the balance of the price from him.

3. The pursuers could not give a good title to part of the subjects sold; and the defect was fundamental, so as not to fall under the clause in the contract of sale. In particular, although Mrs Montgomery was the fiar of one of the shops sold, yet her daughter had granted the conveyance, and the mother had merely consented as liferentrix.

And, in regard to the other shop, Sorley had no right to the solum which lay under the piazzas; the receipt, and the statute founded on, having merely put him in possession of the privilege of covering that solum with his shop, while the property of it was not conveyed to him.

Answered by Sorley's trustees.

1. Graham contracted with Sorley in his own name; and accordingly Sorley insisted on a cautioner, which he did expressly on finding that the Company were not to be direct parties to the contract. Though it was known that the subjects sold were ultimately intended for the Company, as Grahame's disponees, yet neither that circumstance, nor any thing else in the conduct of Sorley, had ever released Grahame from his individual obligation.

2. It was by sufferance of Grahame, rather than of Sorley, that the Company had pulled down the subjects; a proceeding fully known to Grahame their secretary. It was only in October, 1828, that Stirling's inhibition was discharged, and the other inhibition prescribed in the same year, prior to which time Sorley's trustees could not call up the balance of the price. They had demanded it from Grahame in Whitsunday 1829, while the contract remained in full force, and were not bound to discuss the Company first.

3. The contract declared Grahame to have satisfied himself with the titles offered. But besides, the objections taken were unfounded.

As to the first shop, the daughter as fiar, and the mother as liferentrix, and for all right, title, and interest which she had, conveyed the subjects for onerous causes. This was enough to found an action of constitution and adjudication in implement; and, in reference to the clause in the contract of sale, Sorley's trustees were not bound to do more.

Again, as to the other shop, Sorley was entitled, in virtue of the statute (39, 40, Geo. III. c. 88), and the purchase from the magistrates, to sell not only his shop, but also "the space of ground which lay below the piazza," &c.

Pleaded for Gilmour (besides repeating the pleas by Grahame),

1. Grahame should be first discussed.

2. The original contract with Grahame had been completely innovated,

No. 175. without the cautioner's consent. The subjects had been allowed to be pulled down, which should not have been suffered till the price was paid, because it disabled Sorley's trustees from conveying to the cautioner these subjects for his relief, and he was not bound to accept a conveyance to other buildings erected thereon.

Feb. 14, 1832.
Sorley's Trustees v.
Grahame, &c.

Answered by Sorley's trustees.

1. The present action was a sufficient discussion of Grahame.

2. Nothing had been done to injure the cautioner's relief; but, as he was an active promoter of the Street Company, and a commissioner under the statute incorporating it, he was barred personally from objecting that their proceedings had freed him from his cautionary obligation.

The Lord Ordinary "found that an effectual right to the shop, No. 3, in the said contract of sale, is vested in the pursuers, although the feudal progress produced is defective; and therefore, and in respect of the clause in the contract by which the purchaser declares himself satisfied with the titles produced, and becomes bound not to withhold the price on account of defects in the progress, repelled the defence founded on alleged fundamental nullities or imperfections in the titles: Found that the contract of sale was entered into by the defender Grahame, as principal party, and in his own name, and not factorio nomine, or as agent for the London Street Company; therefore, that he was personally bound for payment of the price of the subjects sold: That there are no circumstances in the conduct of Sorley, or of the pursuers, his trustees, subsequent to the sale, proved or alleged, which infer that he or they agreed to release, or did release, the said defender, from the obligation so undertaken, and in particular, that the circumstance of their allowing the buildings on the subject to be taken down and destroyed by the London Street Company, or their commissioners, had not this effect: And with respect to the defender, William Gilmour, found that he became effectually bound as cautioner for Archibald Grahame,—that this process is sufficient discussion of the principal debtor,—that the cautionary obligation has not been cut off or weakened by any of the circumstances stated in defence,—that he is barred personali exceptione from pleading that his security has been affected, or his relief endangered, by the conduct of Sorley or the pursuers; supposing, what is not proved, that their conduct has had these effects; and on the whole matter, repelled the defences, and decreed against both the defenders, in terms of the libel; found them liable in expenses,"* &c.

* "Note.—There is an obvious defect in the progress to the shop, No. 3, in the contract of sale. Miss Montgomery, who disposed that shop, in 1797, to Sorley and Stirling, was not in right of it. She was not even heir apparent, but only a substitute in the destination. But her mother, who evidently was the real fai at the date

The defenders reclaimed; but the Court stopped the counsel in support No. 175. of the interlocutor, and pronounced this interlocutor:—

Feb. 14, 1832.
Sorley's Trustees v.
Grahame, &c.

"Refuse the desire of both notes, and adhere to the interlocutor re-claimed against, repelling the defences stated for both defenders. Find the defenders liable to the pursuers in terms of the libel, and in the expenses of process, and remit, &c., and ordain the said defenders to make payment to the pursuers of the principal sum and interest libelled, on the pursuers furnishing to the said Archibald Grahame a disposition or other deed of conveyance to the subjects in question, and decern: remit to the Lord Ordinary to settle the terms of the conveyance to be granted, and to do farther in the cause," &c.

J. STUART, S.S.C.—T. GRAHAME, W.S.—Agents.

of the disposition, is a consentor, not only in the capacity of liferentrix, but for all right, title, and interest which she had in the subject; and as that consent is a virtual conveyance, or imports an obligation to convey, it affords the means of completing a title, by action of constitution, and adjudication in implement, in the ordinary way.

"There is a satisfactory explanation given in the minute, as to that part of the piazza which is included in the shop, Sorley having acquired the privilege from the Magistrates of Glasgow, in virtue of an act of Parliament.

"It is manifest, that the purchase made by the defender, Grahame, was intended ultimately for behoof of the London Street Company, to enable them to form the new street, a circumstance perfectly known to both parties. But that does not decide the question, whether Grahame was or was not personally bound. The res gesta proves that he undertook the obligation upon himself. It was intended at first, that the disposition should be to him for behoof of the Company, and as taking burden for the Company; but that arrangement was departed from, as he had no authority to do so, and therefore he purchased in his own name, and brought forward Gilmour as cautioner for implement. If it had been meant that the Company should be bound, the cautionary obligation of Gilmour, one of the partners, would have been absurd. But Grahame and Gilmour being both bound as individuals at first, nothing afterwards occurred which can fairly be held to have released them from that obligation. It is true, the pursuers addressed letters to Grahame, as secretary of the Company; that the Company, or its commissioners, paid instalments of the price, for which receipts were granted; and that the dispositions to several parts of the subjects were taken in their favour: but in all this the Company appeared only in the capacity of Grahame's assignees, in whose favour, as well as of himself, the contract of sale was conceived. It is also true that the buildings, and this shop in particular, were pulled down by the commissioners without any formal intimation by the pursuers to either of the defenders, that being the avowed and only purpose of the sale, and that farther indulgence was given to the commissioners, by postponing payment of at least one instalment of the price. But all this was done with the perfect knowledge and acquiescence, if not express concurrence, of the defenders, one of whom was secretary to the Company, and the other, as admitted on the record, a principal supporter of the undertaking, and appointed by the statute one of the commissioners for carrying it into effect. The defenders, therefore, are not entitled to plead want of notice, or that their real security is lessened by operations on the subject, or that their respective claims of relief, namely, that of the principal against the Company, or of the cautioner against his principal, have been injured or lost by these operations."

No. 176.

JAMES FLORENCE, Pursuer.—*Skene—Moir.*
CHRISTIAN FLORENCE, Defender.—*Lumsden.*Feb. 14, 1832.
Florence v.
Florence.

Proof.—A deed purporting to be a declaration of intention, as expressed in a prior delivered deed, not allowed to affect the proper legal construction of the previous deed.

Feb. 14, 1832. THE late James Florence held the farm of Overfishford under a missive of lease from Mr Duff of Hatton, dated 16th February, 1788. The 2d DIVISION. term of endurance was for the tenant's lifetime; but the missive contained

F. the following clause:—"And I further oblige myself and foresaid, to add to the above lease the lifetime of any lawful son of yours, named by a writing under your own hand, he paying yearly the above rents, customs, and services, and other prestations, with twenty pounds sterling of grassum, at the term of his entry, but secluding all other heirs and assignees whatever." In 1808, Florence put his two sons, William, the eldest, (husband of the defender,) and James, (the pursuer,) in possession of the farm and stocking thereon, each of them becoming bound to pay him £60. In 1815, the affairs of William having become embarrassed, he deserted his family, and left the country, and his father thereafter ranked on his estate for the £60 above mentioned, and drew a dividend of £48. On the 17th May, 1816, Florence, in virtue of his powers under the missive, executed and delivered to the pursuer a nomination in these terms:—"I, James Florence in Overfishford, hereby nominate and appoint my son, James Florence, also in Overfishford, to succeed me in terms of my minute of tack granted by the late Alexander Duff of Hatton;" and of the same date he executed another writing, of the following tenor:—"Mr Duff of Hatton having allowed me, some years ago, to divide my farm between my sons, William and James, and my son William having left his family in autumn last, I hereby agree to give my son William's part of said farm to his wife, Christian Singer, and family, for their support during the currency of my lease, she agreeing to pay the just and equal half of all the rents, grassum, farm-meal, customs, and services exigible from me, in terms of said lease, and to cultivate the land in the manner specified in the tack, and more expressly pointed out in the Hatton Lodge regulations; and I request Hatton to sanction this agreement."

This writing was delivered to the defender, Mrs Florence, (William's wife,) who, in March 1817, obtained from the landlord a confirmation thereof, in these terms:—"In terms of James Florence, senior, present tenant of Overfishford's letter to you, dated 17th May, 1816, agreeing to allow you to possess the half of the farm formerly occupied by his son and your husband, William Florence, I hereby corroborate said letter, by allowing you to sublet your half during the currency of your father-in-law's lease, provided you get a tenant for my satisfaction, who shall be able for the

place, and willing to abide by the regulations laid down for the Hatton Lodge property; and it also being understood, that there is to be no additional far allowed on the farm possessed by you." No. 176.

Feb. 14, 1832.
Florence v.
Florence.

Mrs Florence accordingly continued in possession of one half of the farm, which she subsequently let to a subtenant, and she also paid half of the £20 grassum stipulated for in the original missive on the entrance of the nominee, and with which her right was burdened in the writing executed by Florence in her favour. In the year 1824, the pursuer, James Florence, obtained from his father, (who was now a very old man,) a deed, which, after narrating the tack and nomination of his son James, proceeded thus:—" And considering that, by a minute or writing under my hand, dated the 17th day of May, 1816, I nominated and appointed my son, James Florence in Overfishford, to succeed me in terms of my said minute of tack, as the same duly subscribed by me bears; and considering that, after granting and subscribing said writing to and in favour of my son James Florence, and delivering same to him, I, with consent of

Duff of Hatton, divided my said farm of Overfishford between the said James Florence and Christian Singer, spouse of my deceased son William, and family, during the currency of my lease, during my lifetime, she agreeing to pay the half of all rents, grassum (already paid by me) at my entry, farm-meal, customs, and services exigible from me, in terms of my said lease, during my lifetime. Now, in case of there being any doubt as to my meaning in executing the foresaid writings, I hereby declare, that it was my intention that the occupation of the said farm in halves, by the said James Florence and Christian Singer, should only continue during my lifetime, and then it should wholly devolve on the said James Florence, my son, in terms of the said minute in his favour, of date the 17th day of May, 1816: Therefore, in order to make my intention more explicit, and the said writing under my hand more complete and legal, I hereby ratify and approve of said writing in favour of my son, James Florence; and without prejudice thereto, but in corroboration thereof, I hereby assign, convey, and make over to the said James Florence, my son, during all the days of his lifetime, from and after my death, being the end of my lease, the whole farm of Overfishford, to be occupied and possessed by him, in terms of said minute of tack, granted by the said Alexander Duff to me, but secluding all other heirs and assignees, the said James Florence paying the whole rents, customs, and services, and other prestations therein specified during his lifetime, with right to have one cottar, as also therein specified, with £20 sterling of grassum at the term of his entry; and I have herewith delivered up to the said James Florence, my said minute of tack, to be used by him as his own proper title."

Old Florence died in 1830; and the pursuer thereupon brought an action of declarator and removing against Mrs Florence, founding on the nomination of him as his father's successor, and on the deed of 1824, as

No. 176. establishing that the right intended to be given to Mrs Florence, was only during the lifetime of the old man, and not during the prolonged period which he was allowed to add to the original term of the lease by deed of nomination. In defence it was pleaded, that the nomination and the assignation in favour of Mrs Florence, afterwards sanctioned by the landlord, being of the same date, must be considered *partes ejusdem negotii*, whereby the father, while fixing on the life of his son, as determining the additional period allowed to be added to his lease, conferred on his daughter-in-law, and her family, the benefit of it, to the extent of one-half; that the terms, "currency of the lease," necessarily embraced the whole period of endurance, and that the intention to extend this benefit beyond his own life, was further evident from the circumstance that she was taken bound to pay one-half of the grassum stipulated in the missive for the entry of the nominee, and that the sanction of the landlord was requested, that having been already granted, as stated in the writing itself, in regard to the period during his own lifetime; and specially that the deed of 1824 was plainly impetrated from the old man without his being aware of the import of it, as the narrative was clearly false and inconsistent with the previous deeds; but at any rate, that the old man could not thereby revoke the previous delivered deed, nor by any subsequent declaration affect the true construction thereof.

The Lord Ordinary assailed with expenses, adding the subjoined note;* and the Court adhered.

GORDON AND BARROW, W.S.—A. DUNN, W.S.—Agents.

No. 177.

THE KING'S ADVOCATE, Pursuer.—*Sol.-Gen. Cockburn.*
MAGISTRATES OF KIRKWALL, Defenders.—*Rutherford.*

King—Expenses.—Incompetent to award expenses against the King, even as to questions regarding the hereditary estates of the Crown.

* "The Lord Ordinary thinks, that it is not possible to view the lease, which was divided, and of which a half was given to the defender, Christian Singer and family, as any thing less than the whole lease of the father, James Florence, with its extended term of endurance. The nomination of the pursuer was necessary, in order that this lease might have such a term as was originally stipulated, i. e. the lifetime of one son of the original tenant; the landlord not having agreed to allow it to have two separate terms, one for each half; and also to secure what the tenant probably thought the longest continuance of the lease, by making it to depend wholly on the youngest and best life. The subsequent declaratory writing produces on the mind of the Lord Ordinary an impression directly the reverse of what it appears to have been intended to do. Perhaps the reason of the thing is not wholly to be left out of consideration; why should the father wish to provide for the family of his eldest son during his life, and until the first term after his death, and then to leave them destitute? The landlord's understanding of the matter is evident."

THIS was the sequel of the case reported ante, VIII. 755, (which see,) No. 177. at the instance of the King's Advocate on behalf of the Crown, for having the right of the Crown to certain patronages declared. This Court having decided a question of law as to a title to prescribe against the Crown, an appeal was taken to the House of Lords, who affirmed their judgment. On the cause having returned, a demand was made by the defenders for expenses. This claim the Lord Ordinary reported verbally to the Court, stating the difficulty to be, whether in a case where the Lord Advocate, pursuing directly for the Crown, under sanction of the sign-manual, was unsuccessful, it was competent for the successful party to claim expenses against the Crown.

Feb. 14, 1832.
2d DIVISION.
Ld. Mackenzie.

King's Advocate v. Magistrates of Kirkwall.

Rutherford, for the Magistrates of Kirkwall, contended that it was nowhere ruled that the Crown was not liable under circumstances where it was not disputed that an ordinary pursuer would have been subjected in the expenses of the action. On the contrary, there were analogous cases, where expenses had been awarded against the Crown, such as questions with the Commissioners of Excise and Customs; and more especially that the Board of Ordnance had been found liable in expenses, which depended upon no statute, and was a case in point.

LORD JUSTICE-CLERK.—I would like to know how you could make good such a claim of expenses.

Rutherford.—That is for after consideration ; I am not bound to point that out.

LORD JUSTICE-CLERK.—I think you are bound both to point out the fund, and how you are to operate upon it. The Exchequer of Scotland is out of the question, as the whole expenses are now paid by estimate, and there is no fund to look to there.

Sol.-Gen. *Cockburn*, for the Crown, admitted that the Crown had no case on the merits, and that when the appeal reached the House of Lords, the present Lord Advocate (Jeffrey) and himself, differing from their predecessors in office, had abandoned the case as untenable. But he maintained the invariable rule to be, that where the Crown was directly pursuing, as in this instance, by the Lord Advocate under the sign-manual, the King neither asked expenses on the one hand, nor could be subjected to them on the other, as was established by the practice of the Courts of Justiciary and Exchequer ; and that the cases put were not in point, being those where the Crown was only indirectly a party.

LORD MEADOWBANK.—I am quite aware that in the Courts of Exchequer and Justiciary, the King neither claims expenses, nor is subjected to them. But in all those cases the King is a pursuer, as representing the state. But is there not a distinction betwixt such cases, and where the King is pursuing in regard to his own hereditary revenues ? This is an action of declarator of church patronage, and certainly falls under the latter class of cases ; and therefore, although the Lord Advocate pursues under the sign-manual, it appears to me that a distinction may be drawn, and I would wish to be better informed. I would like to know, for instance, what is done in the case of the Commissioners for Woods and Forests ?

LORD JUSTICE-CLERK.—I am for refusing this application at once. There is no precedent for such a claim.

LORDS GLENLEY and CRINGLETIE concurred with the Justice-Clerk, and the Court instructed the Lord Ordinary to refuse the claim for expenses.

No. 178.

GEORGE JOHNSTONE, Pursuer.—*Forsyth.*JOHN CLARK, Defender.—*Monteith.*

Feb. 14, 1832.

Johnstone v.
Clark.2d DIVISION.
Lord Medwyn.
F.

SPECIAL case, in which the Lord Ordinary approved of an architect's report, and the Court adhered.

ALEXANDER JOHNSTONE, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

Hamilton v.
Bennet, &c.

No. 179.

JOHN HAMILTON, Common Agent.—*Keay—Marshall.*
REV. G. BENNET and Others, Objectors.—*D. F. Hope—Anderson.*

Legacy—Trust—Clause.—A party having conveyed his whole property, mortis causa, to trustees, with instructions to sell part of his lands specially enumerated, for payment of debts and legacies, and thereafter “to employ the surplus, if any shall be, of my personal estate, and the produce of my land estate, in the purchase of lands,” to be entailed in favour of the heirs of his body, &c., and the fund set apart proving insufficient to cover the legacies—found that the provision of tailzie was not of the nature of a special bequest to the effect of disappointing the legatees, but was merely residuary.

Feb. 14, 1832. THE late Mr Ogilvie of Gairdoch conveyed his whole heritable and moveable property to trustees by a mortis causa deed, for payment of his debts, and certain annuities, legacies, and donations therein specified;

2d DIVISION.

Lord Medwyn.

T. “Item, for payment of all other annuities, legacies, or donations, which I may hereafter grant to any person or persons by a regular deed, or by any writing, instruction, or letter to my said trustees, under my hand, at any time during my life, or even on death-bed.” The trustees were authorized to sell certain parts of his heritable property, specially enumerated, and “to apply the price of the said lands, and others which are so appointed, to be sold in payment of my debts, and of the legacies and donations herein before-mentioned; and of all other legacies and donations which I may hereafter grant.” The deed further provides, “in order that my said trustees, after payment of the expenses to be incurred in the execution of this trust, the debts due by me, the provisions which, in case of my marriage, I may leave to my widow and children, the legacies and donations hereby granted, and all other legacies and donations to be hereafter granted by me as aforesaid, either by a regular deed, or by any writing, instruction, or letter under my hand, may lay out and employ the surplus, if any shall be, of my personal estate, and the produce of my land estate, in the purchase of lands, and thereafter make, grant, and execute a valid and formal disposition and entail of the lands so to be purchased, and of the whole residue and remainder of my lands and estate, and others herein particularly and generally before-mentioned, which I hereby direct and appoint to be called, in all time hereafter, the lands and estate of Gairdoch, to and in favours of the heirs of my body,

and their heirs and assigns whatever, whom failing," (then follow substitutions in favour of certain relations of the grantor, nomination, and the heirs male of their body,) "whom failing, to such other heirs or members of tailzie as I shall hereafter appoint by any writing under my hand, at any time during my life, and even on death-bed," &c. Besides his life-rent, the trustee reserved power to sell and burden the subjects at his pleasure gratuitously, or for onerous causes; and also to cancel, revoke, or innovate the trust-deed. Subsequent to the date of the trust-deed, Mr Ogilvie, by various codicils, left instructions to pay legacies to a number of individuals. The property did not turn out so lucrative as the nature of the provisions indicated that the trustee supposed it would do, and the personal funds and lands specially directed to be sold, proved insufficient for payment in full of the debts and legacies burdening the estate. A ranking and sale was thereupon brought by certain creditors, in which Mr John Hamilton, W.S., was appointed common agent, and made up a state of ranking, wherein he found that the legatees could not be allowed to rank on the price of the lands which were ordered by Mr Ogilvie to be entailed.

Objections were given in by the legatees, on considering which, with answers for the common agent, the Lord Ordinary pronounced an interlocutor, which, after narrating the terms of the deed, proceeded thus:— "Finds the instructions to entail the whole residue and remainder of his lands, beyond those specially enumerated which were to be sold, cannot be construed to imply a special provision or conveyance to the heirs of entail of specific lands, entitling them to plead that it must be preferable to general legacies; and although instructions have not been given to sell lands sufficient for payment of these legacies, it must be presumed that this has arisen from his not supposing that his personal funds and lands sold would fall short of the sum necessary for fulfilling all the purposes of the trust, and not that it was with the view of preferring the heirs of entail at all events, to the disappointment of legatees subsequently favoured by him; therefore finds, that the legatees are entitled to payment out of the trust-estate, and the residue to be entailed is only after all the other purposes of the trust have been executed; and ordains the common agent to alter the order of ranking in terms of this interlocutor."

The common agent reclaimed, and pleaded that the direction to entail, in favour of the heir-at-law, was of the nature of a special bequest, with which general legatees could not interfere any more than they could with special legacies; and that if the grantor could have foreseen a defalcation in his means, it was to be presumed that he would have preferred the heir-at-law.

To this it was answered, that such a plea was inconsistent with the terms of the deed, which named the heir of entail expressly as residuary, and had clearly named special funds for the payment of the legacies, only

Feb. 14, 1832.
Hamilton v.
Bennet, &c.

No. 179.

No. 179. upon the supposition that they were sufficient for the purpose; and the case of *Erskine v. Wemyss* (Ante, VII. 594), was referred to as ruling the point in favour of the legatees.

Feb. 14, 1832.
Hamilton v.
Bennet, &c.

LORD JUSTICE-CLERK.—I can see no reason whatever for differing from the Lord Ordinary. This was clearly a mortis causa deed; all the instructions and codicile just form a part of the general settlement, and ride over the whole. This gentleman had evidently formed an exaggerated idea of the value of his property. His debts might have increased so as to take the whole of his estate. Much stress has been laid upon the provision which gives power to sell a part specially named, but I cannot find in that provision a single word expressly limiting to that extent, nor, on the other hand, is there one condition attached to these legacies, on which the heir-at-law can be preferred. I use the very words of an opinion in the case of *Wemyss*, and say I have no doubt that the legacies affect the estate, and must be paid at all events. The whole puzzle has arisen from the trustee having over-estimated the value of his estate.

LORD GLENLEE.—I cannot see how it is possible to bring this provision to the heir of entail under the doctrine of special bequest, when it is made so dependent upon other provisions. It is not maintained that there is any expression in the deed expressly appropriating and limiting the fund for the legacies. It is only got at by means of an inference. We are not allowed to go far in the way of inference, when the question is as to the interpretation of such deeds; but really, if I were to adopt that mode of reasoning, I would be much puzzled to see the inference, that had this grantor anticipated the defalcation, he would not have preferred the legatees to certain remote heirs, in whom he might not have had the same interest.

LORD CRINGLETIE.—I am sorry to differ from your Lordships, but I must adopt the argument for the common agent. When I see, in terms of this deed, a special donation of lands to the heir of the grantor's body, I cannot help considering it just as special as any of the legacies. I see there were particular articles of furniture destined to particular persons—will it be said that the trustees may take these too, and sell them? Now, it appears to me, that the grant to his heir was just as much of the nature of a special bequest as any one of these articles. If he had foreseen that his funds would prove insufficient, would he not have curtailed the legacies in favour of the heir of his own body? This is under the law of special bequest, as distinctly laid down by Mr Erskine, and I bring it to this short issue, that it is a special bequest.

LORD MEADOWBANK.—I agree with the majority of your Lordships. This was a special bequest, but then it was burdened specially with the payment of debts and legacies.

THE COURT accordingly adhered to the Lord Ordinary's interlocutor.

Common Agent's Authorities.—Ersk. 3, 9, 12.—Wauchope, 3d July, 1724 (8063.)
Objector's Authority.—*Erskine v. Wemyss*, 13th May, 1829.—(Ante, VII. 594.)

JOHN HAMILTON, W.S.—ANDREW SCOTT, W.S.—Agents.

JOHN M'LAURIN, Advocator.—Jameson.
ALEXANDER STEWART, Respondent.—D. F. Hope—Russell.

No. 180.

Feb. 14, 1832.
 M'Laurin v.
 Stewart.

Process—Justice, Administration of.—A Justice of Peace, acting under a commission to take a party's deposition on a reference, having, after putting him on oath, declined to proceed, and granted a certificate that he considered him not in a condition of mind to undergo an examination—held competent to investigate, in the process in which the commission had been granted, averments that this certificate was false, and granted collusively, to prevent the deposition actually emitted being taken down.

In an action before the Sheriff of Lanarkshire, at the instance of the late James Stewart, against the advocator, M'Laurin, for payment of a sum contained in a bill which had fallen under the sexennial limitation, after a great deal of procedure unnecessary to be detailed, and agreeably to an interlocutor in the Bill-Chamber on a bill of advocation, a judgment was pronounced, (20th May, 1825,) whereby it was found that the constitution of the debt had been proved by the oath of M'Laurin, (to which reference had been made,) and that the extinction had not been thereby established, but that he was entitled to prove payment or compensation by the oath of Stewart. The case having returned to the Sheriff, a reference to Stewart's oath was given in and sustained, (29th July, 1825,) and a commission granted, in general terms, to the Justice of Peace nearest Stewart's residence. This commission was presented to a Mr M'Gown, Justice of the Peace, resident at a considerable distance, but said to be the nearest to the residence of Stewart, who was an old infirm person, unable to leave his house. This Justice, along with M'Laurin and the agents for the parties, and one Peter Stewart, attended at Stewart's house on the diet fixed. The Justice appointed Stewart's agent to be clerk under the commission; but after putting Stewart on oath, and proceeding a certain length with the examination, he withdrew, with the agent and Peter Stewart, to a neighbouring village, and there signed a certificate, to the effect that he found Stewart's intellectual faculties so much impaired as to render him totally unfit, in his opinion, to undergo an examination, and that he had therefore declined to proceed with it. On the other hand, M'Laurin took a notarial protest, setting forth that Stewart had actually deponed that he, M'Laurin, owed him nothing, but that on this the agent acting as clerk, and the Justice, had refused to take the deposition down, and had withdrawn at the instance of the agent and Peter Stewart, (who was averred to be the real pursuer,) and after consulting privately with them, refused to close the deposition. Thereafter (November 18) the Sheriff pronounced an interlocutor, holding Stewart as confessed for not deponing, and asoilzieing M'Laurin. A reclaiming petition was then lodged in name of Stewart, pleading that it was impossible for him to depone in his condition, and that he should not therefore have judgment pronounced against him as for default; and an application was also made

2d Division.
 Lt. Fullerton.
 R.

No. 180. for the appointment of a curator ad litem, on the ground of his alleged mental incapacity. The Sheriff-substitute refused the reclaiming petition; but the Sheriff-depute, in respect of the irregularities attending the proceedings for taking Stewart's oath, recalled the former commission, and of new granted commission to the Sheriff-substitute or Sheriff-clerk of Dumbartonshire. A deposition was emitted under this commission, a medical man having attended, and stated his conviction that Stewart was in a capacity to be examined. At the taking of this deposition no one was present for M'Laurin, who stated that he could not undertake the expense of proceeding a second time to the remote quarter where Stewart resided. On advising this deposition the Sheriff found it negative, and decerned against M'Laurin, who thereupon brought an advocation, alleging that the proceedings under the first commission were the result of collusion between the justice, the agent, and Peter Stewart, said to be the real pursuer, to prevent a record of the deposition being taken; that old Stewart was in point of fact in a condition to depone; and that he did depone that M'Laurin owed him nothing; and contending that he ought to have been allowed to establish this before a second commission was granted, and that he ought still to have the benefit of it, if it could be established, to the effect at least of holding Stewart confessed; and at all events, that the second deposition, taken after an application for a curator ad litem on the ground of Stewart's incapacity, ought not to have been considered conclusive against him. On the other hand, these averments were denied, and it was contended that the certificate of the Justice of the Peace was conclusive evidence of the fact there stated, till regularly set aside in a process of reduction, and that it warranted the subsequent proceedings taken by the Sheriff; and that at all events M'Laurin could not be allowed to establish, otherwise than by the report of the commissioner, the deposition alleged to have been emitted by Stewart.

Pending this discussion Stewart died, and the respondent, Alexander Stewart, his executor, was sisted in his place. M'Laurin did not now propose to renew the reference to the executor; and the Lord Ordinary pronounced this interlocutor, adding the subjoined note:—"“ Remits

* “ NOTE.—The interlocutor of 20th May, 1825, was pronounced agreeably to the judgments in the Bill-Chamber, refusing two bills of advocation offered by the present advicator. That interlocutor, therefore, cannot be disturbed. The only point reserved by the Lord Ordinary on refusing the second of these bills, was the defendant's right, ‘if so advised, to prove, by reference to the pursuer's oath, his pleas of compensation.’ That reference was sustained. But the commissioner appointed to take the pursuer's oath, certified (3d October, 1825) ‘that he found the pursuer's intellectual faculties to be so much impaired, that he was totally unfit in his (the commissioner's) opinion to undergo an examination, and that he therefore declined to proceed with it.’ This cause having been assigned by the commissioner for not reporting the oath, there was clearly no ground for the Sheriff-substitute's interlocutor of the 18th November, 1825, ‘holding the pursuer as confessed for not depo-

the case to the Sheriff, with the following instructions: First, to recall No. 180. the whole interlocutors pronounced in the inferior Court subsequently to that of date 29th July, 1825. Secondly, in respect that the advocator ^{Feb. 14, 1832.} *M'Laurin v. Stewart.* has not proved his pleas of compensation by the oath of the late James Stewart, the original pursuer, to repel the advocator's plea of compensation; to recur and adhere to the interlocutor of the 20th May, 1825, and to decern, in terms of that interlocutor, in favour of the respondent. And, lastly, to find neither party entitled to the expenses incurred since the date of the said interlocutor of 20th May, 1825. The Lord Ordinary finds neither party entitled to the expenses incurred in this Court."

M'Laurin having reclaimed, the Court stood repeatedly equally divided. Finally, the papers were laid before the other Judges for their opinion. Thereafter the following opinion was returned, M'Laurin having in the meanwhile raised an action of reduction of the Justice's certificate:—

LORDS PRESIDENT, CRAIGIE, BALGRAY, GILLIES, MACKENZIE, CORKEHOUSE, MEDWYN, MONCREIFF.—“ We have considered the record in this case, with the papers printed in the appendix, and the interlocutor and note of the Lord Ordinary.

“ We are of opinion that the interlocutor is right, in so far as the Lord Ordinary finds that the whole interlocutors subsequent to that of the 29th July, 1825, should be recalled. We think that all those interlocutors were irregular, for the reasons stated by the Lord Ordinary in his note.

“ But, with regard to the merits of the cause, in the extraordinary state into which they are brought by the proceedings detailed, and the facts offered to be proved in the record, we are of opinion that no conclusive judgment can be pronounced, until the averments so made shall, in one form or another, be investigated,

On the other hand, the Lord Ordinary thinks, that, after this intimation of the pursuer's incapacity, and in particular after the application made on that ground by those acting for him, for the appointment of a curator ad litem, in the petition of January, 1826, it was quite irregular to allow the cause to proceed in his name before instituting some enquiry into his true situation, and, above all, to grant another commission for taking the oath.

“ The Lord Ordinary has, therefore, directed the whole interlocutors subsequent to that of 29th July, 1825, sustaining the reference, as directed in the Bill-Chamber, to be recalled. But as the advocator's pleas in compensation have not been proved by the oath of the original pursuer (now dead); and as the Lord Ordinary does not understand that there is any intention of making such a reference to the oath of his representative, now the respondent, it follows that effect must be given to the interlocutor of 20th May, 1825, now discharged of all reservation.

“ It is true, the advocator challenges the certificate of the commissioner of 3d Oct. 1825, and maintains that a deposition was on that occasion made by the original pursuer, which was sufficient to decide the case in his favour, and which ought to have been reported. But however competent and relevant such allegations may be in a petition of complaint, or separate action of reduction and damages against the commissioner, and those concerned in the alleged irregularity of which the advocator complains, the Lord Ordinary feels himself bound in this action to receive and give effect to the commissioner's report or certificate, until the proper measures be taken to impeach it.”

No. 180. and either verified or disproved. The statement of the advicator amounts to this, that there was a conspiracy, to which the original pursuer, James Stewart, his agent Feb. 14, 1832. Mr John Burnett, and the Justice of Peace, Mr Robert M'Gown, who acted as M'Laurin v. Stewart. commissioner, or at least the two last, were parties, to prevent the advicator from obtaining a record of the deposition of the pursuer on the reference to his oath, and that the certificate granted by the commissioner is a false certificate. This general statement is rendered special by the particular averments as to the whole res gesta. We are of opinion, that such a statement being deliberately put upon record, the Court is bound to entertain it; and we farther think, that the question, whether the pursuer shall be held as confessed, or the defender shall be held to have failed in proving the fact which was referred to the pursuer's oath, after a judgment which excluded all other evidence, must depend on the result of an investigation into the truth or falsehood of that statement.

"It does not appear to us to have been incompetent for the advicator to make the statement in this process; nor do we think that it would be legally incompetent to allow the proof of it. It is a matter which relates to the purity and correctness of the proceedings under the commission granted by the Sheriff in this process; and we do not think that the certificate of the commissioner can be considered as probatio probata of the facts set forth in it, to exclude enquiry by the Court. But, on the other hand, as it is evident that the investigation must be of a nature which deeply involves the characters both of Mr M'Gown the commissioner, and of Mr Burnett the agent, we are of opinion that it ought not to be allowed to proceed until they are made parties to the suit.

"For this last reason, we had formed an opinion that this process ought to be sisted until a regular action were brought, calling all these parties into the field. But we now find that there is a regular action of reduction of the commissioner's certificate, and of all that has followed upon it, with a conclusion for damages, directed against Mr Stewart and Mr M'Gown, already in dependence before Lord Moncreiff. A record has been closed in that case, and it stands in the debate roll. We therefore think that the process, in which our opinion is now asked, ought to be remitted to Lord Fullerton, and that the reduction should be remitted to it, and that then the enquiry may be proceeded in, in the manner which may be thought most expedient. It may be necessary that Mr Burnett should be made a party; but that can be done by a supplementary summons, if the closing of the record in the reduction should be thought to create an obstacle to any shorter process."

LORD FULLERTON.—"Although I did not consider the certificate of the commissioner as probatio probata, absolutely exclusive of all enquiry by the Court, I felt myself bound to give effect to that certificate, while no separate measures, directed against the proper parties, were taken to impeach it. As that difficulty is now removed by the procedure alluded to in the above opinion, I entirely concur in the propriety of the course there pointed out."

THE COURT now accordingly remitted, in terms of this opinion.

WOTHEASROON AND MACK, W.S.—C. FISHER,—Agents.

JAMES STEVENSON, Pursuer.—*D. F. Hope.*
CHARLES M'ILWHAM and Co., Defenders.—*Skene.*

No. 181.

Feb. 15, 1832.
M'Ilwham, &c.

Expenses—Auditor.—An unsuccessful party held chargeable with fees, 1. to the junior counsel of his opponent, for advice as to closing the record; 2. to the senior and junior counsel at adjusting issues; 3. to a junior for advising as to a precognition; and, 4. to a senior and junior moving for the expenses of the trial, the party having intimated an intention to oppose the motion.

M'ILWHAM and Co. raised an action against Stevenson before the Sheriff of Renfrewshire, concluding for the balance of the price of certain machinery. Stevenson pleaded in defence that the machinery was defective, and unfit for use. A proof was led regarding the condition of the machinery, after which the Sheriff assailed, with expenses. Stevenson then raised an action against M'Ilwham and Co., concluding for repetition of £35, paid to account of the machinery, and for £800 of damages, in consequence of breach of agreement. In the Jury Court he obtained a verdict for £35, and £10 of damages. He was allowed his expenses, and the account laid before the auditor, including the country agent's account, amounted to £271. The auditor made various taxations, against some of which Stevenson lodged objections.

1. When the action stood on summons and defences, these papers, along with the Sheriff Court process, were sent to counsel, that he might say, previous to the cause being called in the Lord Ordinary's weekly roll, whether the record should be closed at the first calling, without farther papers. A fee of £2, 2s. was sent along with them. At the taxation the auditor struck off £1, 1s.; to which Stevenson objected, on the ground that the advice of counsel had been properly taken, and the fee sent was moderate.

The Court sustained the objection.

2. A fee of £2, 2s. was twice sent to senior counsel to adjust the draft of an issue, and to attend on the jury clerks. A fee of £1, 1s. was on each occasion sent to the junior. The auditor disallowed the two fees to the senior. To this Stevenson objected, that as the adjustment of an issue was the most important step in the whole cause, and especially where opposition was made, it was justifiable to employ senior counsel to revise and adjust the issues.

The Court sustained the objection.

3. Before the trial, the process was sent, along with the precognition which was then in progress, to junior counsel, with a fee of £3, 3s., that he might peruse them, and advise whether farther proof was requisite. The auditor disallowed the fee; but the Court sustained Stevenson's objection, and allowed it.

The LORD PRESIDENT observed, that, in general, there was no occasion

No. 181. more seasonable for taking the advice of counsel than when a party wishes to be directed as to what proof it will be necessary for him to prepare.

Feb. 15, 1832. Stevenson v. M'Ilwham, &c. It frequently saves the expense of an accumulation of unnecessary proof.

Gordon v. Dunn. 4. When expenses were to be moved for by Stevenson, his agent intimated to the agent of M'Ilwham and Co., that if no opposition was to be made, the motion for expenses would be taken at less cost. Notice was sent that opposition was to be made. Two counsel were instructed to support the motion, the senior being allowed a fee of £2, 2s., and the junior of £1, 1s. No opposition was actually made by M'Ilwham. The auditor disallowed the junior's fee. Stevenson objected, and stated, that as the motion for expenses was of great importance to him, and as he expected to be opposed, it was proper to instruct two counsel to support it.

The Court sustained the objection; and observed, that, generally, it is expedient, according to the present system, to retain two counsel in the Inner House, in support of any important motion where opposition is anticipated.

There still remained three items of taxation for agency, which were objected to, and which the Court remitted of new to the auditor to reconsider, and to make the subject of a special report. These were ultimately waived by Stevenson; and, on a reference to M'Ilwham's counsel, the expense of objecting to the auditor's report was awarded in Stevenson's favour.

Bowes and Camperell, W.S.—R. and A. Kennedy, W.S.—Agents.

No. 182. LIEUTENANT-COLONEL GORDON, Pursuer.—*Kcay—Cunninghame.*
REV. GAVIN GIBB DUNN, Defender.—*Robertson.*

Teinds.—A decree-arbitral, under a submission by the proprietor and titular, to which the minister of the parish was no party, cannot be the foundation of a valuation by the High Commission, the minister objecting thereto.

Feb. 15, 1832. IN the year 1759, the Earl of Errol, proprietor of the barony of Slains

2d Division. (now the property of the pursuer, Colonel Gordon), entered into a sub-
Ld. Moncreiff. mission with the titulaires for the valuation of the teinds; but to this sub-

D. mission the minister of the parish in which the barony lay was no party. A decree-arbitral was pronounced, finding the teinds to be of a certain value; and in 1830, in consequence of certain proceedings in a process of locality, Colonel Gordon raised a summons to have this decree-arbitral approved of as a valuation, and the teinds declared to be of the value found therein. In defence, the minister, Mr Dunn, (besides founding on certain specialties unnecessary to be adverted to,) pleaded generally that the incumbent or his predecessor not having been a party to the submission, the decree-arbitral could not be conclusive against him, or form the foundation of a valuation by the Court.

With reference to this defence, it was pleaded by Colonel Gordon, No. 182. that it had been determined that a judicial sub-valuation was good, and might be approved of, although the minister, when stipendiary, was no party thereto,¹ and that there was no authority for holding that the same rule should not have place in regard to extrajudicial valuations.

To this it was answered for the minister, that sub-valuations and extrajudicial contracts or decrees-arbitral under submissions were totally different; the former being proceedings under the statutes, while the latter were simple transactions of private parties; that in regard to sub-valuations, if the forms required by the statutes were complied with, they fell to be approved of; but as to contracts or decrees-arbitral, they merely formed a ground of an original valuation by the High Commission (not being capable of approval in the strict sense of the term), where the proper parties to the valuation were bound thereby, or did not object thereto, and that they could not affect parties who had never consented to them, and who appeared in the process of valuation, and objected.

The Lord Ordinary sustained the defences, and assailed, adding the subjoined note.*

Colonel Gordon reclaimed.

¹ Macneil v. Minister of Campbelton, June 3, 1801, affirmed Feb. 20, 1809.

* "NOTE.—The Lord Ordinary holds these points to be settled :

" 1. That in a process of valuation before the High Commission, the minister of the parish must be called, in order to make the decree binding on his successors. Forbes, 399, 401; Ersk. 2, 10, 35; Minister of Kirkbean, Feb. 4, 1708.

" 2. That in a process of approbation of a sub-valuation, the rule is the same. Lord Saltoun v. Cook, May 22, 1827, F. C. Minister of Speymouth and Duke of Gordon, Dec. 2, 1828.

" 3. That where the benefice was a parsonage, and the minister, of course, titular, a report of valuation by the sub-commissioners cannot be approved of, unless it appears that it was made in a process under the old statutes or commission, to which the minister was called as a party. Ferguson v. Gillespie (Arrochar), Feb. 4, 1795, affirmed Feb. 15, 1797.

" 4. That where the minister was a stipendiary, and the titular was duly called, a sub-valuation may be approved of, though it does not appear that the minister was either called or present. Macneil v. Minister of Campbelton, June 3, 1801, affirmed Feb. 20, 1809.

" 5. That extrajudicial contracts or transactions may be the grounds of decrees of approbation, if it appears either that they were consented to by the minister, or that he, being duly called in the process of approbation, makes no objection to the decree being pronounced. This point might have been thought at least doubtful, but seems to be settled by these cases. Lockhart v. Duke of Hamilton, Nov. 20, 1793; Hamilton v. Colbrook, Nov. 30, 1803; Goldie v. Hamilton, Nov. 20, 1820.

" 6. In the last case mentioned, it was decided, that where the minister was duly called in a process of approbation of such an extrajudicial valuation, to which he had not been a party, and did not appear to object to it, he could not afterwards reduce the decree of approbation pronounced. The ground of decision was, that the decree must be held to be equivalent to a decree of valuation by the High Commission. Counsel, 1, 215. But the Court were much divided in opinion on that case;

Feb. 15, 1832.
Gordon v.
Dunn.

No. 182. **LORD GLENLEE.**—A private transaction between parties, and a valuation by sub-commissioners, are two totally different things in their own nature. In the valuation, if correctly gone through, we are bound to approve it, whatever we may think of it; but as to a private agreement, although we commonly use the word "approve," our proceeding in regard to it has nothing analogous with a proper "approbation," as of a valuation by sub-commissioners. We are truly asked to decern in terms of the agreement. It is an original valuation by us, in terms of the agreement, on the ground that the agreement is binding on all the parties; and why should it be different from the case of an agreement as to any thing else besides teinds, so as to affect those who have not been parties to it? There are no termini habiles for approving of it as binding against one not a party to it. Except for the decisions to the contrary, I would, with the Lord Ordinary, doubt exceedingly if this is a competent procedure at all. But at least, in all these cases, the minister was called, and did not appear to object.

LORD CRINGLETIE.—What the Lord Ordinary has laid down appears a truism. With reference to the minister, this submission is *res inter alios acta*, and cannot bind him. Lord Glenlee has properly stated the law. Cases like this are proper valuations, not approbations; and the contract or submission is merely received as proof, but cannot bind the minister, who is not a party. It is absurd to require him to show irregularity in regard to it, the circumstance of his predecessor not having been a party to it superseding any necessity for this.

LORD JUSTICE-CLERK.—I am quite clear on all the authorities. The principles on which the Lord Ordinary has decided are invincible. This is a private arrangement, but the minister was no party to it; and now, at the distance of 70 years, an

and the judgment does not well accord with those in the cases of Kinnoul and Speymouth in 1823.

"But, taking all these points to be so far settled, it has never been held or decided that any extrajudicial valuation, by contract or arbitration between the titular and the heritor, to which the minister has been no party, can be insisted on as the ground of a decree of approbation, where the minister appears in that process, and expressly objects to it. That is the present case. The judgment in the case of Knox v. the Heritors of Slamannan, June 23, 1773, is express, even in a case where the minister for the time had been a party to the contract, 'that nothing can ascertain the value of the teinds in a question with the minister, but a proper decree of valuation by the proper Court.' Con. 1, p. 216. And in the case of Colbrook, the Court expressly condemned the practice of extrajudicial valuations, even while they granted the approbation, on the defect of title and interest in the objecting party.

"The Lord Ordinary conceives, that any valuation obtained by arbitration is in quite a different situation from a report of the sub-commissioners. In the latter, though not bearing that the minister was called, it may be held, that the Procurator-fiscal of the Presbytery acted for the interest of the Church: but, independent of this, such reports have the express authority of the statutes, declaring, that they shall be the grounds of decrees of approbation. Extrajudicial arrangements, however well conducted, have no such sanction.

"There are strong specialties in this case, arising from the clause of relief in the decree-arbitral, from the decree of valuation in 1802, and from the remarkable terms of the decree of absolvitor in the process of reduction between the King's College of Aberdeen and Mr Gordon, in 1809. But the Lord Ordinary having a clear opinion on the general point, does not think it necessary to go into these specialties."

Feb. 15, 1832.
Gordon v.
Dunn.

approbation is asked, and of what? Of a private arrangement, as conclusive against No. 182. one who was no party thereto. None of the decisions go to support what is here asked. None of the statutes give warrant for such a proceeding. Even the case of *Gordon v. Dunn*. Feb. 15, 1832. the minister of Campbellton comes under the statute. If we were to go into the Dunn. specialties, the pursuer would have great difficulty in regard to them also; but it is *Forbes v. unnecessary to proceed on these, and I have no doubt whatever that we must affirm Livingstone.* *Livingstone.* the interlocutor of the Lord Ordinary.

Kibbles v. M'Donald, &c.

THE COURT adhered.

C. F. DAVIDSON, W.S.—H. GRAHAM, W.S.—Agents.

WILLIAM FORBES of Callendar, Pursuer.—*Keay—Alison.*
ALEXANDER LEARMONT LIVINGSTONE of Parkhall, Defender.—
D. F. Hope—M'Niell.

No. 183.

Process.—SPECIAL case, in which a question of runrig lands and mutual property having arisen in the progress of an action of declarator of exclusive right, the Court held—that the summons was not relevantly drawn to bring out the question.

W. FORBES, W.S.—A. DOUGLAS, W.S.—Agents.

MISSES JANET and ELIZABETH KIBBLE.—*Greenshields.*
JOHN M'DONALD (STEVENSON'S TRUSTEE.)—*Jameson—A. Dunlop.*
JANET JOHNSTONE.—*Jameson—A. Dunlop.*
Competing.

No. 184.

Bona Fide—Implied Assignment.—1. Circumstances in which an eldest son, whose father had been infest under a contract of marriage destining the lands to the "children" of the marriage, having passed by his father, and served heir of line to his grandfather in the whole lands, and possessed these for several years, both prior and subsequent to his making up titles, was held not to have been in bona fide, so as to entitle him to plead retention of the rents of that portion of the lands belonging to the younger children in satisfaction of alleged meliorations. 2. A widow infest in an annuity out of lands, having consented to heritable bonds granted by her eldest son, which, to a certain extent, were ineffectual in respect of part of the property truly belonging to the younger children. Held, that her consent was not equivalent to an implied assignation, and that the bonds being ineffectual, the creditors could not compete with her for the annuity so far as payable out of the younger children's portion.

JAMES STEVENSON of Braehead, and Janet Spreull, his wife, in the contract of marriage of their son James Stevenson, junior, with Janet Johnstone, dated August, 1793, disponed to him, "and the children to be procreated of the marriage," their lands of Braehead, out of which an annuity of £15, a cow's grass, and certain other accommodations, were

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No. 184. provided to Janet Johnstone. Infestment passed on this contract in favour of the spouses and their children, in terms of the contract; but the instrument having been omitted to be recorded within the sixty days, a second infestment was taken, and duly recorded.

Feb. 16, 1832.
Kibbles v.
M'Donald, &c.

James Stevenson, junior, survived his parents, and died in 1804, leaving four children of his marriage with Janet Johnstone. During the minority of the eldest, she continued in possession of the lands. In 1817, the eldest son, James Stevenson, tertius, attained majority, and entered into possession; and in October, 1819, he made up titles, as heir of line to his grand-parents, passing over his father, whose infestment under his marriage contract had been taken base, and had never been confirmed, so that old Stevenson and his wife still remained vested with a mid superiority. Immediately on making up these titles, James Stevenson, tertius, proceeded to borrow money, for which he granted heritable bonds over the lands. The earliest bonds were dated in November, 1819, and prior thereto, a search of encumbrances was made, the certificate of which stated that there appeared on the record, the infestment of his father in fee, and of his mother, Janet Johnstone, in liferent, to the extent of her annuity on a disposition, set forth as "contained in a marriage contract" between these parties. To the heritable bonds, Janet Johnstone was a consenter "for all right of liferent, annuity, terce, or other right and interest which she has over the lands and others, either by contract, deed of settlement, or by law or otherwise."

Two of the bonds were in favour of Misses Kibble, who ultimately acquired right to all the others, and were proceeding to bring the lands to sale in 1828, when they were stopped by an intimation on the part of the younger children of the marriage between James Stevenson, junior, and Janet Johnstone, that they had right under the contract and infestment thereon to three-fourths of the lands, and were about to make up titles thereto. These parties accordingly expedite a service immediately thereafter, as heirs of provision to their father, and made up titles to three-fourths of the lands by precept of clare constat, obtained on a charge from their brother, James Stevenson, tertius, as superior, in virtuē of his having taken up the mid superiority constituted in his grand-parents, by the base infestment on the contract of marriage. They then raised the present process of multiplepoinding in name of their brother, who was in actual possession of the lands, to have the right to the rents of the three-fourth parts of the property determined. Misses Kibble thereupon instituted a reduction of the infestment on the marriage contract, and the titles made up by the younger children, chiefly on the ground that the precept in the contract was exhausted by the unrecorded infestment, so that the second sasine was inept. In this action the younger children were ultimately assoilzied by judgment of this Court, mentioned Ante, IX. 283, and affirmed on appeal.¹

In the meantime, the younger children and Misses Kibble had agreed No. 184.
 that the rents of the property should be drawn by a factor, and disposed Feb. 16, 1832.
 of according to the judgment to be pronounced in the multiplepoinding. In Kibbles v.
 this process claims were lodged, 1. for Misses Kibble, in their own right, M'Donald, &c.
 and in virtue of an assignation subsequently obtained from James Stevenson,
 tertius, of any claim he might have for ameliorations, debts paid by him,
 for which the younger children were liable, or for retention of the rents
 as bona fide consumpti; 2. for the younger children, (afterwards insisted in
 by M'Donald as their trustee,) who limited their claim to the rents sub-
 sequent to their brother's attaining majority; and, 3. for Janet Johnstone,
 the widow, for her annuity effeiring to the three-fourths of the lands be-
 longing to the younger children.

Misses Kibble pleaded,—

1. That the destination in the marriage contract to the children of the marriage, carried the property to the eldest son.
2. That at least down to the period when the younger children pro-
ceeded to make up their titles, as heirs of provision under the marriage
contract, the eldest son must be held to have possessed the whole lands in
bona fide, so as to warrant a plea of retention of them as bona fide per-
cepti and consumpti.
3. That he was at all events entitled to repetition of sums expended in
ameliorating the subjects, and in payment of debts, for which the younger
children were jointly liable; and as to these sums, they claimed that they
should be preferred so as to be ranked on the outstanding rents in the
factor's hands.
4. That the widow, having consented to the bonds, could not compete
with the creditors for any part of the rents.

M'Donald pleaded,—

1. That a destination to the "children" of a marriage, undoubtedly
carried the subject to the children equally among them, and consequently,
that the children, as in right of three-fourths of the property, were en-
titled to three-fourths of the rents, in competition with parties whose
rights flowed, so far as regarded these three-fourths, a non domino.
2. That so far as regarded the three-fourths belonging to the younger
children, there was no title of any kind in the person of the eldest son,
the lands standing destined to the "children," and the titles to his grand-
parents having only taken up a mid superiority; that without a title of
some kind, there was no room for a plea of bona fides;¹ and besides, that
it was impossible to hold an eldest son could be in bona fide to pass by
his father, and take up the family estate by serving to his grand-parents;
that he must be presumed to have known of his father's titles, and that
actual knowledge, at least from the date of the titles having been made up,

¹ Moir, June 14 1831, (Ante, IX, 744.)

No. 184. was proved here by the certificate of search, and the consent of the widow taken in the bonds, which could only have been required on the assumption that her husband had been infest; and,

Feb. 16, 1832. Kibbles v. McDonald, &c. 3. That whatever claim the eldest son might have in respect of ameliorations, or of debts paid by him, it could only entitle him, or his assignees, to have these set off against the rents due by him.

Janet Johnstone pleaded,—

That her consent to the bonds was not equivalent to an assignation to the creditors of her annuity, but merely amounted to an agreement to postpone her claim to any right created by the bonds, and that as these truly gave the creditors no right whatever to three-fourths of the lands, they had no title of any kind to compete with her as to her annuity out of these three-fourths.

The Lord Ordinary pronounced the following interlocutor :—“ Sustains the claim of John Macdonald, junior, as trustee of John Stevenson, for three-fourths of the rents, forming the fund in medio, after deduction from the said rents of the widow's provisions by her contract of marriage, and of any sums paid by James Stevenson in extinction of debts affecting the lands of Braehead, and of any sums or claims for which the children of the marriage of his father and mother, taking these lands, were liable : Finds the bona fides of James Stevenson, tertius, not proven, and therefore that the claim for retention of rents and for meliorations, on the ground of bona fides, cannot be sustained : Sustains also the claim of the Misses Kibble, for the remainder of the fund in medio ; repels the claim of Mrs Janet Johnstone or Stevenson, and appoints the cause to be enrolled, with a view to the application of these findings.”

Against this interlocutor Misses Kibble reclaimed, in so far as the plea of bona fides and the claim for ameliorations were repelled ; and the widow also reclaimed, in so far as her claim was not sustained.

M'Donald consented that, in regard to the meliorations, the interlocutor should be varied so as to allow any sums expended in meliorations to be set off against the rents claimed from the eldest son, and the Court varied the interlocutor accordingly ; but quoad ultra adhered as to the Misses Kibble ; and as to the widow, altered and sustained her claim.

C. J. F. Orr, W.S.—J. FORRESTER, W.S.—Agents.

E. and R. ELICE and Co., Pursuers.—*Jameson—Baxter.*
WALTER FINLAYSON, Defender.—*D. F. Hope—Rutherford.*

No. 185.

Feb. 17, 1832.
Ellice & Co. v.
Finlayson.

Cautioner—Process.—1. Where a letter of guarantee for £200 was granted, in consideration of giving a party “a credit on your house,” and the house afterwards spontaneously arranged with the party as to the details of operating on the credit, and some deviation from the arrangement eventually occurred—held that, as the letter of guarantee had no reference to the subsequent arrangement, the cautioner was not entitled to found on the deviation. 2. Where a principal debtor wrote a letter acknowledging a balance to be due, and granted a bill for it, which he failed to retire, and was forth of the kingdom; and an action was brought against his cautioner—held not necessary to call the principal debtor as a party.

ON 25th August, 1827, Finlayson addressed to Ellice and Co. of London this holograph letter:—“ In consideration of your having agreed to give Messrs Robert and William Ballingall a credit on your house, I hereby engage to be surety to you for them to the extent of £200; my obligation to continue in force for a period of four years, but no longer.” Ballingalls at the same time procured other five letters of guarantee, each for £200; and on 1st September they enclosed these, along with Finlayson’s, in a letter to Ellice and Co., and asked leave to draw on them. Ellice and Co. answered on 5th September, stating,—“ Our understanding is, that, to the extent of £1200, your house are to have a standing credit with us; that is to say, that they are to be at liberty, as circumstances may require, to draw bills to that extent, but not beyond it, making such provision for our reimbursement, that we shall at no time be brought under any actual advance of money: that we are to discount all bills remitted, and place them as cash to the credit of the account: that interest on both sides thereof is to be after the rate of five per cent: that we are to have one-half per cent for paying, and one-half per cent for receiving; and that we are at any time to be at liberty, on giving six months’ previous notice, to require the accounts to be closed.” Ballingalls approved of this, and drew bills. An account was then kept by Ellice and Co. in the name of Ballingalls, under which, on 6th May, 1828, the balance due by Ballingalls was £1096, 5s. 10d., of which £366 consisted of an advance of cash. Ellice and Co., of that date, wrote Ballingalls, stating that they found the account with them to be unsuitable, and added, “ we therefore hereby revoke the credit in your favour, per £1200. You will be so good, then, as to pay up the money we have actually advanced, and as the bills running become due, to send us your notes of hand, payable in this country six months after date, to cover them.”

On the 28th, Ballingalls sent Ellice and Co. a bank draft for £750; and on the 29th, drew two bills on them for £465 and £360, falling due on 16th and 19th August, but took no notice of Ellice and Co.’s letter. Ellice and Co., on the same day, answered,—“ We are favoured with your letter, dated London, the 28th instant. The bill enclosed in it for £750 is

No. 185. good to your credit on that day for £742, 1s., as after noted. In that letter,
 Feb. 17, 1832. no notice is taken of our letter to you of the 6th instant. We beg, therefore,
 Ellice & Co. v. to enclose copy of ours, and to repeat, that the credit is revoked and in-
 Finlayson. operative, and that hereafter we accept no more bills." They at the same
 time accepted the two drafts of £465 and £360.

No farther transactions occurred between the parties ; and on 19th August, the balance due by Ballingalls was £1189, 14s. 8d., and of that date they granted their bill at seven months for the amount. Afterwards, by their letter of 19th December, they acknowledged this to be the true balance under the account current. They were unable to retire their bill when it fell due, and left this country. Ellice and Co. called on the cautioners for payment, three of whom paid £200 each ; a fourth paid £150 ; but Finlayson resisted payment. Ellice and Co. then raised an action against him for the balance remaining due after deducting these payments.

Finlayson pleaded in defence,—

1. Ballingalls should have been called as parties.

2. The letter of 5th September from Ellice and Co. prescribed their terms of dealing with Ballingalls. These had been departed from in various particulars, and, *inter alia*, the accounts showed Ellice and Co. to have been brought under advances of cash, contrary to stipulation, without their revoking the credit, or giving notice to the cautioners.

3. On 6th May, 1828, £1096 was due ; and on that day the credit was revoked, so that all future operations to the effect of enlarging it necessarily ceased. On the 28th a remittance of £750 was made by Ballingalls, which necessarily fell to be imputed in extinction of the previous balance. Ellice and Co. should have refused to accept the two new bills ; and, at any rate, after the revocation, such acceptances did not fall under the guarantee, but were discounted by Ellice and Co. at their own risk alone. On these principles, and with the payments received from the other cautioners, the balance was overpaid.

Ellice and Co. answered,—

1. As the debt was liquid, having been acknowledged by the principal debtors, and as they were forth of the kingdom, it was not necessary to call them as parties.

2. The arrangement under the letter of 5th September, was a matter entirely between Ballingalls and the pursuers ; the guarantee was granted prior to it, and had no reference to it, or to any special mode of dealing, so that they were at liberty to alter their mode of dealing without liberating the cautioner. But at any rate, as through Ballingalls' failure to pay their bills, the pursuers were brought under an advance of cash, the defendant was liable.

3. Although the pursuers revoked the credit on 6th May, yet Ballingalls did not acquiesce in this, or even acknowledge receipt of the letter of 6th May ; and they drew two bills farther on 28th May, at the same

time remitting £750. The pursuers could not keep the contents of that draft, without doing the counterpart of accepting the two bills, which they did, and again intimated "that the credit is revoked." They were therefore entitled to place these drafts to the debit of the account with the cautioners.

Feb. 17, 1832.
Ellice & Co. v.
Finlayson.

The Lord Ordinary found, "that as the debt is acknowledged under the hands of the principal debtors, and that they are forth of the kingdom, the defender is not entitled to demand further discussion; found that the debt falls under the guarantee, and that the pursuers have sufficiently accounted for, and duly communicated the benefit of the collateral obligations; therefore, repelled the defences; decreed in terms of the libel; found the defendant liable in expenses,"* &c.

* * Note.—The pursuers, in their letter of the 6th of May 1828, to R. and W. Ballingall, state, that they revoke the cash credit. In this intimation, the Ballingalls did not acquiesce. On the contrary, on the 28th of May, they sent a remittance to the pursuers, and upon the 29th drew upon them to the amount of £825. These drafts were accepted by the pursuers; and, of the same date, the pursuers again wrote, that 'the credit is revoked, and inoperative, and that hereafter we accept no more bills.' This letter implies that they had accepted, or would accept, bills presented on or before the 29th, and their conduct in accepting those bills presented on the 29th, confirm this construction. To a certain extent, therefore, the letter of the 29th, though referring to the letter of the 6th, is a departure from it, as it extends the credit to the 29th, and declares that it is then revoked, viz. on the 29th, and that bills presented after the 29th will not be accepted. The reason of the extension appears to be this: It had been stipulated that the pursuers were entitled to close the account, that is to say, to revoke the credit, on giving six months' previous notice. But no such notice had been given. The only ground, therefore, on which the pursuers were entitled to revoke the credit was, that the Ballingalls had not attended to one of the conditions, viz. that they should make provision for retiring their acceptances in such a manner, as that the pursuers should never be in advance. But it appears from the account, that upon the 6th of May they were in advance to the amount of £366. On the 28th, the remittance covered that advance. If the Ballingalls, therefore, had gone on punctually afterwards, there might have been some doubt whether it would not have been too strict a construction of the agreement to have revoked the credit, without the six months' notice, on account of this single failure. But whether this was the view of the pursuers or not, the fair inference is, both from their letter of the 29th May, and their conduct in honouring the drafts presented on that day, that they did hold the credit extended to that period. If this be admitted, it follows that the debt sued for is covered by the guarantee, the Ballingalls having passed no subsequent drafts on the pursuers.

"The distinction betwixt this case, and that of Spiers and others against Houston's executors, in the House of Lords, is sufficiently obvious. In that case it was clearly held, that the guarantee which covered the drafts on the mercantile concern, did not extend to those subsequently passed on the banking-house; and the question attended with difficulty was, whether an indefinite remittance, after the change of operations, should be imputed in liquidation of the account which was guaranteed, or that which was not guaranteed. In the present case, if it be held that the notice of the 6th of May was departed from, to the effect of extending the credit to the 29th, no question as to the appropriation of the remittance arises."

No. 186. was directly liable to them for the damage claimed, leaving him to seek relief against Dixons if he could.

Feb. 17, 1832.

Mack v. Allan,
&c.

The Sheriff decreed against Mack for £15 as the value of the horse, and for £8 of damages. Mack brought an advocation, in which the Lord Ordinary found, "that the horse of the respondents mentioned in the pleadings was killed by falling into an old ironstone pit on the estate of Cliftonhill: that the pit was situate on the side of the turnpike road from Edinburgh to Glasgow, and within about a yard of that road, and that it was not fenced in any way except by some rotten boards laid over the mouth, and partially covered with rice or spray: that the averment of the respondents that the horse was worth £15, is not distinctly denied, and that no proof to the contrary is offered: that the respondents sustained damage by the want of a horse for four days to the amount of £8; and therefore remitted simpliciter to the Sheriff, and decreed: found the advocator liable in expenses, both in this and in the Inferior Court,"* &c.

Mack reclaimed.

LORD BALGRAY.—When a person lets the coal or ironstone on his property to a tenant, and an accident occurs under the circumstances of this case, the sufferer may recur directly on the landlord. He does not know where the lessee of the coal-works is to be found. But when he raises action against the landlord, if the landlord points out a sufficient tenant as the immediate author of the injury, I think the Sheriff shouldsist procedure until such tenant be made a party. That would be the most proper course. But although Dixons were not made parties in the Sheriff Court, I do not think that to be any reason for our refusing, at this stage, to sanction the Sheriff's judgment, as I conceive the landlord, or Mack, to be directly liable to the pursuers. He may look for his relief against Dixons, but in the meantime he is liable to the pursuers.

LORD PRESIDENT.—I concur. The principle involved is analogous to that in the law of master and servant, in virtue of which, if my coachman accidentally injures a passenger, while driving the coach, the passenger may claim damages directly from me, and leave me to operate my own relief against the immediate author of the injury, if I choose.

LORD CRAIGIE concurred, and observed, that though the responsibility of a landlord for the acts of his tenant was, at one time, much greater than it now is, it still remained sufficient to subject him in a question like this, leaving him to recur for relief against the tenant, if he can instruct good ground for it.

LORD GILLIES.—I am of the same opinion. All the specialties of this case are

* "Now.—It is assumed in the advocator's pleadings, that the pit was worked at the time of the accident by Messrs Dixon, and that they were bound to have it fenced; but the averment as to the working is intentionally equivocal, and it is disproved by the fact that the pit was full of water when the horse fell in. The sum allowed by the Sheriff in name of damages appears to be large, but the advocator has afforded no data for reducing it. He has failed to prove that another horse might have been hired to do the work for four days at a less sum, or that the men thrown idle might have been otherwise employed, so as to diminish the loss."

adverse to the plea of the defender. He states that the pursuers were the servants of Dixons, and I doubt if it be sufficiently proved that the pit had been long disused, for the water at the bottom might have collected in the space of half-an-hour. But the general rule is in favour of the pursuers, and suffices for them. If &c. a horse starts off the highway and falls into an unsenced pit, the owner may go directly to the landlord of the ground for his damages, and is not obliged to seek out and raise a question with the tenant in the first instance. There are cases in which, perhaps, the tenant may not be liable, but the landlord is. And where both are liable, the sufferer may go against the landlord, and leave him to take his recourse against the tenant.

Feb. 17, 1832.
Meek v. Allan.

Glas v. Stewart.

THE COURT accordingly adhered.

Advocator's Authority.—Linwood, March 19, 1821 (1 Shaw's Ap. Ca. 20.)

Respondents' Authority.—Black, Feb. 9, 1804 (13905.)

WOTHEASPOON AND MACK, W.S.—T. and J. DARLING, W.S.—Agents.

GLAS, Petitioner.

No. 187.

GLAS'S CREDITORS, Compearers.—Jameson.

C. C. STEWART, Respondent.—D. F. Hope—M'Neil.

Expenses.—A party having petitioned for the removal of a judicial factor on his estates, and, in the course of the discussion, several of his creditors having sisted themselves in support of the petition; and the original petitioner remaining a party till the petition was dismissed with expenses—held that the creditors were not liable for any of the expenses prior to their appearance, but were liable for all subsequent expenses occasioned by them, or in relation to proceedings in which their names were used as parties.

A JUDICIAL factor was appointed on the estates of Glas, who eventually petitioned for the factor's removal. A discussion ensued, in the course of which some of the creditors of Glas sisted themselves in support of the petition. The petition was dismissed with expences, which were awarded generally against Glas, and the creditors compearers. On moving the auditor's report, a question arose to what extent the creditors were liable for the expenses of process. The respondent, Stewart, contended that they were liable, in the same way that a trustee on a bankrupt estate would become liable by taking up a pending process; and farther, because of the interlocutor awarding expenses generally against Glas and these creditors. The creditors answered, that it was not decided that even a trustee on a bankrupt estate would be liable for expenses incurred before he took up a pending process; but this case was different, as the trustee in these cases comes in the room of the bankrupt, whereas Glas remained a party till the end of this process, and was entitled to insist alone. The interlocutor had not found parties liable conjunctly and severally in the ex-

1st Division.

No. 187. penses of process, and thus the measure of their liability under that interlocutor remained an open question.

Feb. 17, 1832.

Giles v. Stewart. Their Lordships were understood to distinguish between this case, where the original petitioner remained a competent party to the end of the process, and the case of a trustee on a bankrupt estate, who must subject himself to a pending process, and constitute himself the sole dominus litis, Turcan, &c. v. or decree will go against the bankrupt without farther discussion. Cox, &c.

THE COURT accordingly held, that the creditors who had appeared, were liable for no expenses prior to their appearance; but that they were liable for all the expenses subsequent to their appearance, occasioned by them, or in relation to proceedings in which their names were used as parties.

D. FISHER, S.S.C.—A. DOUGLAS, W.S.—Agents.

No. 188. JOHN BUCHANAN, Suspender.—*James Anderson.*
JAMES GLASSFORD, Charger.—*Penny.*

Feb. 17, 1832. SPECIAL case, in which the Lord Ordinary refused a bill of suspension of a decree of removing, and the Court adhered, but allowed a reference 2d Division. Ld. Moncreiff to oath. T.

JOHN M'GILL,—HORKIRK and IMLACH, W.S.—Agents.

No. 189. JOHN TURCAN and OTHERS, Petitioners.—*D. F. Hope—Greenshields.*
JOHN COX and Others, Respondents.—*Robertson—A. M'Neill.*

Bankrupt—Sequestration.—An election of commissioners on a bankrupt estate declared null and void, on the ground of adverse interest.

Feb. 17, 1832. The late John Stead was proprietor of certain buildings on Leith Walk, in which he carried on business as a card-manufacturer. In 1817, he 2d Division. Ld. Moncreiff assumed as partner John Paterson, and thereafter granted a lease, which F. was to endure to the 30th of June, 1817, to the company of Stead and Paterson. The lease included the whole machinery of the manufactory; and it provided, that if the company were dissolved before the expiry of the lease, and if either partner should take up the stock and machinery belonging to the company, he might have the benefit of the remainder of the lease. The rent from the company to the proprietor, for the whole subjects, was £360; and part of the property was sublet by the company at a rent of £390. Stead died insolvent in the year 1819, and Paterson took possession of the company stock and machinery, in terms of the lease. Mr Orr, W.S., acting for Stead's heirs, was ultimately appointed factor on his heritable estate, which was brought to a judicial sale.

Misses Mary and Magdalene Stead, sisters of the deceased, and for No. 189.
 whom Orr was agent and mandatory, became the purchasers of the pro-
 perty, and to these ladies Paterson paid the rent down to the year 1830. In 1831, Paterson became bankrupt, and the estates of Stead and Paterson as a company, and of John Paterson individually, were sequestered, and Cox was confirmed trustee thereon. The Misses Stead lodged an amended claim upon the estate by their mandatory Orr, to the amount of £2004 and upwards, and thereafter assigned this claim in trust to Turcan. Cox, the trustee, on the other hand, raised an action of declarator, and of count and reckoning, to try a question of property in the machinery of the manufactory, and involving a claim for repetition of rent overpaid, as between the Misses Stead and Paterson's bankrupt estate.

Feb. 17, 1832.
 Turcan, &c. v.
 Cox, &c.

A meeting was held in terms of the statute, on the 11th of August, 1831, for the purpose of electing commissioners, when creditors claiming to vote, appeared to the amount of £3599. Turcan claimed in virtue of his trust assignation from the Misses Stead, which greatly exceeded the other interests. Thomson claimed in virtue of a debt of £20, purchased by the Misses Stead, and assigned by them to him under a guarantee, as was alleged, from the expense of a contested election. The other voters had small interests of various amounts. Two sets of commissioners were proposed. Cox, the trustee, proposed John Cox, (his own cautioner and nephew,) Megget, and Mabon. Orr proposed Turcan, (the trust assignee of the Misses Stead,) Thomson, and Mabon. The votes for the latter set of commissioners preponderated. No application for confirmation having been made by either party, the trustee presented a petition to the Court, to determine the election. This petition was refused as incompetent, under the circumstances already reported, ante, p. 122.

Pending those proceedings, Turcan, Thomson, and Mabon presented a petition to the Lord Ordinary for confirmation. No petition was presented by the opposite candidates; but they gave in answers to that for the other party. Mutual objections were allowed. Turcan, &c. objected,
 1. That it was incompetent to oppose their confirmation, without applying for confirmation. 2. That at any rate, they were preferable, in respect of the amount of the votes in their favour. 3. That John Cox and Megget could not be elected, as they were conjunct and confident with Cox the trustee, and in particular, that John Cox was ineligible, being his nephew and cautioner. John Cox, &c. objected, 1. That the Misses Stead, and their assignee, Turcan, had an adverse interest, both in respect of the claims against them as debtors, in terms of the action of declarator raised by the trustee, and also in respect of their large claim, got up for the purpose of engrossing the management; that this would have been a good objection to a party elected trustee, and the office of commissioner was in pari casu. 2. That Turcan was ineligible, being a trustee for the Misses Stead, who, as females, were ineligible; and he could not be in a better

No. 189. situation than them. 3. That Thomson was ineligible, being merely a creditor, for whom a debt had been purchased, under a guarantee by Turcan, &c. v. Misses Stead against all expenses. The Lord Ordinary ordered Cases to the Court, adding the note below.*

Feb. 17, 1832.
Cox, &c.

LORD JUSTICE-CLERK.—I have not the least doubt of the general power of this Court to control the election both of a commissioner and a trustee, though there may be no special legal disqualification urged. The case of Paterson (15th Jan. 1812) puts the power beyond question, and also points out the nature of the adverse interest which is objectionable. Without entering minutely into the circumstances, I think there is such an adverse interest here. Assuming that the summons at the instance of the trustee against the Misses Stead, was not executed till after the date of the meeting to elect the commissioners, still it must have been

* “**NOTE.**—The Lord Ordinary is in difficulty, and therefore pronounces no judgment. The interlocutor of the Court may imply, and so it is represented by one of the parties, that, in the case of a competition for the office of commissioners, it is necessary that there should be an application for confirmation by the opposed candidates. The Lord Ordinary finds no such thing in the statute; and though the interlocutor seems to refer to the act of Parliament, he does not think that this was the meaning of it. But the parties differing as to the views of the Court, and the precise objection being raised, that the respondents have no title to object, because they have not presented a petition for confirmation, (to which proposition he is quite unable to assent,) he thinks it his duty to report the cause.

“In other respects, the case seems to depend on the following very important points:—

“On the one side—

“1. Whether a creditor, who happens to be nephew of the trustee, is thereby objectionable as a commissioner.

“2. Whether the cautioner of the trustee is objectionable.

“On the other side—

“1. Whether a person, claiming as a creditor, for whom the debt has been purchased and assigned under a guarantee against all expense, is qualified to be elected.

“N. B.—The fact of guarantee denied, but the purchase for the purpose not apparently disputed.

“2. Whether an assignee in trust is eligible, where the creditor, being a woman, would not be eligible.

“3. Whether there is ground for inferring an adverse interest in the Misses Stead, and, of course, in their trust-assignee, sufficient to disqualify him from being a commissioner.

The Lord Ordinary is inclined to think that the case mainly depends on this last point; and, as it is stated, and, apparently, is according to the fact, that nearly all the creditors who voted for the commissioners recommended by the Misses Stead have, in fact, been created by themselves, it is difficult to escape from the belief, that the object is, to quash the action which has been raised against them by the trustee. He may be right or wrong in that measure; but this is not a mode of stopping it which can be entitled to favour.

“It does not appear that, in this sequestration, there is much room for choice of impartial commissioners; two named appear to be quite clear of objections—Mr Mabon and Mr Megget.”

perfectly known to them that such a question was to arise ; and a most important one it was,—for the claim of the Misses Stead, if sustained to the full amount, would carry off nearly the whole estate. When I look to the terms of the statute, and see how the duties of a commissioner are there defined, I cannot doubt the inexpediency of sustaining the election of the assignee of these ladies. I think we were quite right in our former judgment ; the commissioners who had not applied for confirmation, could not possibly be confirmed. I am clearly of opinion that John Cox would be a very unfit commissioner, in the relation which he stands to the trustee ; and although no objection is taken to Mabon by either party, yet it is not to be presumed that the others would have been chosen if Turcan had not been appointed. Therefore I think we must just declare the whole election void, and order an election of commissioners competent to fulfil their duties.

The other Judges concurring.

THE COURT pronounced this judgment :—“ Annul the whole election of commissioners as illegal, and declare it to be void, and decern ; appoint the creditors to hold a meeting,” &c., “ for the purpose of electing new commissioners, previous advertisement being made in the Edinburgh and London Gazettes, in terms of the statute : find Messrs Cox and Megget entitled to expenses of process against Messrs Turcan, Thomson, and Mabon individually, and without recourse against the sequestered estate for repayment thereof to them.”

Petitioners' Authorities.—Bankrupt Act, § 27, 28, 34, &c. ; Act of Sederant, July 11, 1828, § 92; Spence, Nov. 1815 ; Brown, Nov. 25, 1809 (F. C.) ; White, Jan. 28, 1824 (ante, II. 661) ; M'Callum, Dec. 1, 1827 (ante, VI. 193) ; 2 Bell's Com. 342 and 415 ; Stair, 719 ; Campbell, July 11, 1805 (reported 2 Bell, 367.)

Respondents' Authorities.—Stair, 788 ; 2 Bell's Com. 342, 384-5 ; Berrie, Feb. 1, 1825 (ante, III. 486.)

C. J. F. ORR, W. S.—JAMES TAYLOR, W. S.—Agents.

ANDREW BOUSIE (WALLACE'S TRUSTEE,) Suspender.—Keay.
ALEXANDER HARVEY, Charger.—Cunningham.

No. 190.

Bill of Exchange—Expenses.—1. A party, while under advance for a cargo of wood consigned to him, having granted a bill to one of the owners for the accommodation of all the owners, and the bill being endorsed to another owner, who gave a charge upon it—held that he could not enforce payment as a bona fide onerous holder. 2. A suspender not having produced his accounts, till after a charge, though often required before—held entitled to his expenses only after the date of producing his accounts.

HARVEY was part owner of a ship, and cargo of wood, along with Gray and Others. The cargo was consigned to Wallace, who made advances on it, and, while considerably under advance, granted a bill to Gray for the accommodation of the owners of the wood. Gray endorsed the bill to D.

Feb. 18, 1832.
1st Division.
Lord Newton.

No. 190. Harvey, who gave a charge upon it, and Wallace presented a bill of suspension, which was passed, and was afterwards insisted in by his trustee Feb. 18, 1832.
Bousie v. Har- Bousie. Before the charge was given, Wallace had received the proceeds
 vey. **Coldstream, &c.** of some partial sales of the wood, and had been frequently required by
 v. Threshie. Gray to send him an account of sales, but had failed to do so until after he received the charge. The accounts showed a balance due to Wallace by the owners. The Lord Ordinary, "In respect that the bill charged on was granted for the accommodation of the owners of the wood consigned to the suspender, and when the suspender, instead of having funds of theirs in his hands, was greatly in advance, found that the charger, who held 40-64th shares of the wood, although he may have got the bill endorsed for value by his partners, was not entitled to enforce payment as a bona fide onerous holder, at least after he was furnished with a state of the suspender's account, therefore suspended the letters simpliciter; found the charger liable in the expenses incurred subsequent to the 23d of June, 1830, when the suspender's account was lodged in process," &c.

Harvey reclaimed, chiefly in relation to the question of expenses. The Court adhered.

J. HATTON, W.S.—GARIG and MORTON, W.S.—Agents.

No. 191. R. COLDSTREAM and J. SCALES, Pursuers.—Sol.-Gen. Cockburn—Marshall.
 ROBERT THRESHIE, Defender.—D. F. Hope—G. G. Bell.

Process—Road Act—Reparation.—Where a party, alleging that in May 1829 he had, by the negligence of road trustees, sustained damage on a road; and the act constituting the trust was repealed in June, and a new one, differing in many particulars, was passed; and the party, in November, raised an action, libelling the injury, and concluding for damages against the road trustees, but not specifying which set of trustees, nor setting forth distinctly the grounds of action—the Court dismissed the action.

Feb. 18, 1832. In the year 1819 an act was passed, being the 59th of George III., intituled, "An act for making and maintaining certain turnpike roads 2d DIVISION. Ld. Fullerton. within the county of Dumfries, and the other highways, bridges, and ferries therein; and for more effectually converting into money the statute-labour in the said county," which provided, inter alia, "that every person in his own right, or in the right of his wife, in the actual possession of enjoyment, as proprietor or liferenter, of the dominium utile of lands lying in the county of Dumfries" of a certain value, "and all and every the eldest sons of such proprietors and liferenters," &c. "shall be, and they are hereby appointed, trustees for surveying, altering, making, repairing, &c. "the several roads hereinafter mentioned," &c. The nomination included various ex officio trustees, and also certain individual trustees not possessing the general qualification. The act, moreover, contained a pro-

vision "that the said trustees may sue and be sued for any matter or thing No. 191.
 to be done in the execution of this act, in the name of their principal clerk
 or treasurer for the time being, and that no action or suit wherein the said Feb. 18, 1832.
 trustees shall be concerned as pursuers or defenders, in the name of their v. Threshie.
 said clerk or treasurer, by virtue of this act, shall abate by the death or
 removal of any such clerk or treasurer; but that the clerk or treasurer to
 the said trustees for the time shall be deemed to be the pursuer or defender
 (as the case may be) in every such action." The trustees appointed as
 their principal clerk, Robert Threshie, jun., writer in Dumfries; and in
 the year 1826, while this act was in operation, they caused a toll-house
 to be erected betwixt Langholm and Annan, which being within six miles
 of another toll-bar on the same road, and near a cross road, required a
 check bar, to prevent evasion. This was done by means of posts, and an
 iron chain stretched across the road, but which was generally wrapped
 round one of the posts. In May 1829, while the above act was in force,
 a gig belonging to Coldstream and Scales, in which Scales was travel-
 ling, was thrown down by the chain stretched across the road. For
 the damage thereby sustained, Coldstream and Scales, in Nov. 1829,
 raised a summons, in these terms:—"Whereas it is humbly meant and
 shown to us, by our lovites, Measrs Coldstream and Company, merchants
 in Leith, and Robert Coldstream and John Scales, the individual partners
 of that firm,—that on or about the 23d day of May, 1829, when the said
 John Scales was travelling on the business of the foresaid house, with a
 horse and gig, on the public high-road between Langholm and Annan,
 about half a mile past the Becktonhall toll-bar, which is believed to lie
 in the parish of Half Morton, he suddenly struck upon something which
 threw down and severely injured his horse, broke his sample case, and
 destroyed or greatly injured the gig: that these injuries arose in conse-
 quence of a chain having been stretched across the road, fastened at each
 end by two upright posts: that this obstruction to the public highway was
 placed, or was at least allowed to continue there, by the road trustees, or
 by their servants acting in their service: that no warning was given to
 the pursuers, or to the public, of this interruption to the highway: that
 the foresaid horse, gig, and sample case, belonged to the pursuers, and they
 were injured to the extent of about £56, 16s. 6d.: that besides this, the
 foresaid John Scales was hurt and alarmed; and the pursuers sustained
 considerable loss by his being prevented from continuing his journey:
 that for all these losses and injuries, they are entitled to reparation: and
 albeit the pursuers have often desired and required the said road trustees
 for the county of Dumfries to make such reparation; nevertheless they
 refuse, at least postpone and delay so to do: therefore the said road trus-
 tees for the said county of Dumfries, and Robert Threshie, junior, writer
 in Dumfries, their principal clerk, ought and should be decerned and or-
 dained, by decree of the Lords of our Council and Session, to make pay-
 ment to the pursuers, as the owners of the foresaid gig, horse, and sample.

No. 191. case, and as interested in the journey of the foresaid John Scales, of the sum of £150 sterling; and of the farther sum of £50 to the said John Scales, for his individual suffering on the foresaid occasion."

v. Threshie.

In the meanwhile, on the 1st June 1829, another statute had passed, repealing that of 1819. This was the 9th and 10th of Geo. IV. c. , bearing the same title as the former, but narrating that " it is expedient to extend the term, and to alter, amend, and enlarge the powers of the said first recited act." Accordingly it effected alterations and changes in the qualification for trusteeship, and the nomination of individual trustees, and contained clauses regulating the liability of the trustees under the new statute, for debts contracted under the former. It also provided, " that the clerks, and all other officers, excepting the treasurer, who had been appointed under, and employed in the execution of the said previous act," &c., should continue to exercise their offices under the new act, until displaced by the trustees; and accordingly Threshie was continued as principal clerk.

Defences were lodged in name of Threshie, as clerk to the trust, pleading, *inter alia*,

1. The proper parties have not been called. The pursuers were bound to have called the persons acting as trustees at the time when the accident libelled on occurred; and such of the present trustees as happen to be the same individuals, can only be individually cited, as the right to sue them by the former clerk fell when the act was repealed.

2. The defenders, as the present statutory trustees, are not responsible for any damage which may have arisen through the act of their predecessors, more especially where no claim or debt had been constituted on account of that damage, prior to the commencement of the defenders' administration.

The Lord Ordinary being of opinion that the summons was not relevantly drawn, allowed it and the defences to be amended. Having afterwards sustained the objections to the summons, and dismissed the action, the pursuers reclaimed; and the Court having expressed an opinion that the amendment rendered the summons less relevant and intelligible than before, they consented to withdraw it, and the Court thereupon " remitted to the Lord Ordinary to hear parties further upon the original summons," &c. His Lordship ultimately pronounced this interlocutor, adding the note* sub-

* " It appeared to the Lord Ordinary at the beginning, on considering the summons, that, as it then stood, it could not be sustained; and the pursuers were allowed to remedy its defects by an amendment of the libel. But, as the amendment was not satisfactory, he sustained the objections to the libel, even as amended, and dismissed the action. Upon a reclaiming note, the pursuers withdrew the third article of the amendment of the libel, which was the most important; and the Court, in consideration of that circumstance, remitted ' to the Lord Ordinary to hear parties further upon the original summons.' In these circumstances, and with the view of afford-

joined:—"Finds, that the only existing trust in relation to the turnpike-road, on which the action libelled is said to have happened, is that created by 9th and 10th Geo. IV. c. ; that the summons does not set forth with sufficient distinctness, either that the road-trustees under that act are the parties against whom the action is directed, or the grounds upon which

Feb. 18, 1832.
Coldstream, &c.
v. Threshie.

ing the pursuers an opportunity of explaining their case, the Lord Ordinary, on their application, allowed a record to be made up, reserving all objections. But, now that these explanations have been given, he thinks the objections remain in full force. The only existing trust relative to the road in question is that created by the 9th and 10th Geo. IV., intituled, an act for 'making and maintaining certain turnpike-roads within the county of Dumfries'; and although the same statute contains another appointment of trustees for managing the statute-labour of the whole county, it is confessedly against the trustees on the turnpike-roads only that the present action can be maintained, as the road in question is turnpike, and, besides, as it is only to trustees on turnpike-roads that the provision of the 4th Geo. IV., founded on by the pursuers, authorizing trustees to sue and to be sued in name of their clerk, can apply. Now, in the 1st place, the description in the summons of the 'Road Trustees of the county of Dumfries,' is not a sufficient designation of trustees appointed in a special statute for 'making and maintaining certain turnpike-roads in the county of Dumfries;' such description being unaccompanied by any reference to the statute creating the trust. 2dly, The particular circumstances of this case afford a complete illustration of the necessity of a more distinct description. The injury for which the pursuers seek redress was sustained in May 1829, during the operation of a prior statute, which statute was repealed in the same year, by that which is now in force, and which was passed before the action was brought. Now, it is very possible that the pursuers may be entitled to insist against the present trustees, in a ground of action emerging during the operation of the former statute. That is a question which is not distinctly raised either in the summons or in the record, and which the Lord Ordinary certainly does not mean to decide. The summons sets forth the injury as sustained on the 23d of May 1829, and that it arose from the misconduct or neglect of 'the road trustees.' It then proceeds, that although the pursuers have often desired 'the said road trustees of the county of Dumfries' to make such reparation, &c. ; and it concludes that the 'said road trustees,' and Robert Threshie, their clerk, ought and should be ordained to make payment, &c. It is nowhere distinctly stated that the defenders are the road trustees under the existing statute. On the contrary, looking at the summons alone, and connecting the expression 'the said road trustees' with the date of the injury, it would rather seem to follow that the trustees held to be liable are the trustees under the repealed statute; and to obviate the objection arising from this ambiguity, the pursuers are driven to maintain that the term 'Road Trustees of the county of Dumfries' is properly descriptive of a known and permanently existing public body, sufficiently described by that general designation, without reference to any special statute. Now, on looking at the statutes, it will be found that the former statute of the 5th Geo. III., in so far as regards the turnpike-roads, is expressly limited in its endurance; that that statute was expressly repealed by the existing statute of the 9th and 10th Geo. IV. ; and that this last statute differs from the former not only in the qualification for the trustees, but in various other important particulars. In these circumstances, the Lord Ordinary considers the alleged permanency and identity of the trust to be utterly untenable; and holds it to be indispensable that the particular trustees against whom the action is meant to be directed, should be distinctly set forth in the summons."

No. 191. the action is maintained against the said trustees; therefore, dismisses the action, and decerns; finds the pursuers liable in expenses."

Feb. 18, 1832.
Coldstream, &c.

v. Threahie. The pursuers again reclaimed, and pleaded, 1. That the action was correctly instituted against the trust, from which they were entitled to obtain reparation; and which, at the date of the injury, was under the management of the trustees appointed by the statute passed in 1819; but which management, they maintained, had been transferred to the trustees under the present statute. And, 2. That if the old trust was to be held as destroyed, it could no longer be doubtful what trustees were called, as the summons could only refer to the existing trustees. To this latter plea it was answered, that the word "said" trustees in the libel, effectively limited its application to the trustees under the former statute.

LORD CRINGLETIE.—I think the Lord Ordinary was quite right in dismissing this summons, and all that has been done and said in support of it, seems to me only to have made matters worse. This is an action resting upon an obligation against the trust ex delicto. Suppose it had been in a civil suit, could such a summons ever have been sustained? The question is not precisely as put, whether we have defenders specifically called; but whether we have defenders *quoad hoc*—that is the question, and I am clear, that neither the proper grounds or parties are sufficiently set forth in the summons.

LORD JUSTICE-CLERK.—I am of the same opinion. All that we have to decide upon is, whether the Lord Ordinary's interlocutor be sound, and I have no doubt that it is. There are just two considerations, first, is this summons drawn with sufficient precision in reference to the existing statute? and in the next place, does it set forth the circumstances of the case, and the parties defenders, in a way and manner which we can sustain as relevant? In no view of this summons do I think it possible for us to sustain it. It is not even set forth that the roads are within the county of Dumfries. How are we bound to know that the places mentioned have any thing to do with that county? The pursuers were bound to set forth fully and distinctly all the facts, and make their deductions therefrom carefully and correctly. Then as to the parties called under the statute, the words "said trustees" obviously limits the summons to the old trust; and that is expressly repealed by the last statute. At no period in the history of our forms of process, would such a libel have been sustained; far less under the act of Parliament.

LORD GLENLEE.—I agree with your Lordship. At no time would we have sustained such a summons, and certainly not now.

THE COURT accordingly adhered.

ANDREW SNODY, S. S. C.—WM. STEWART, W. S.—Agents.

EARL of HOPETOUN, Objector.—D. F. Hope.

No, 192.

Common Agent in Locality of Inverkeithing, Respondent.—Cullen.

Feb. 18, 1832.
Hopetoun v.
Common
Agent.

Teinds—Augmentation.—Two augmentations having been modified prior to the act 1808, but no final scheme of locality made up for several years after, Held that the rates of conversion for victual stipend were the fairs prices for the seven years preceding each augmentation respectively, and not those for the period subsequent thereto.

THE minister of Inverkeithing obtained three several augmentations, Feb. 18, 1832. in 1794, 1807, and 1823. These were for some time paid according to interim schemes; but in 1826 (the three processes of locality having been conjoined), a new scheme was prepared of the whole augmentations. To this scheme Lord Hopetoun objected, inter alia, that in converting into money the victual teind payable out of his lands, the rate had been taken of the average price from 1793 to 1805 for the augmentation of 1794, and from 1806 to 1822 for the augmentation of 1806; and he contended, that as to the first augmentation, the rate of conversion should be the old rate in use down to that period, viz. £100 Scots per chalder; and at all events, that both as to it and the second augmentation, the rate should be according to the average fair prices for the seven years preceding each augmentation respectively.

To this it was answered, that the old rate of £100 Scots, was given up as untenable when called in question, in the case of Ramsay Irvine, May 14, 1794 (15698); and although it was there decided, that when prospectively fixing a rate of conversion, the period for which the price was to be taken was the seven years preceding, yet when there were data, as in this case, for ascertaining what the average price really had been after the augmentation was granted, the real value should be taken, rather than an hypothetical estimate.

The Lord Ordinary having repelled the objection, the Earl of Hopetoun reclaimed, and the Court, after ordering a report from the teind clerk as to the practice, pronounced this interlocutor: “Recall the interlocutor reclaimed against, sustain the objection of Lord Hopetoun, and find that his Lordship’s victual teind ought to be converted by the rate of the average fairs prices for the county for the seven years preceding the different modifications of the pursuer’s stipend, reserving to the parties their claims inter se for over-payments during the interim localities.”

No. 193. DAME MARGARET PULTENEY and Others, Petitioners.—*G. Dundas.*Feb. 21, 1832.
Pulteney, &c.*Curator Bonis.*—Circumstances in which the Court appointed a curator bonis, with power to enter and receive vassals, and to grant charters and precepts of clare constat. *Miller v. Miller.*

Feb. 21, 1832. DAME MARGARET PULTENEY and Others, presented a petition for the nomination of a curator bonis to a lady, whose health incapacitated her from taking charge of her affairs. They set forth, that her estate consisted in great part of superiorities, and that some of the vassals required immediate entries; and they prayed that the curator might receive, besides the usual powers, authority “to enter and receive vassals in all and sundry lands and other heritages, holden, or to be holden, of Miss Stuart as superior, and to grant to them charters, precepts of clare constat, and all other writs and deeds necessary for that purpose,” &c.

The Court granted the petition.

Petitioners' Authorities.—Wemyss, March 2, 1829; Forrester, Nov. 26, 1825; Blaikie, Feb. 1, 1827, (*Ante, V. 268*); Baird, Jan. 13, 1741 (16346); Riddell, Nov. 11, 1746 (16350); *A. v. B.* July 30, 1736; (*No. 6, Eleb. Tut. and Cur.*)

J DUNDAS, W.S.—Agent.

No. 194. WILLIAM MILLER, Pursuer.—*Fergusson—Carlisle.*
HUGH MILLER, Defender.—*Shaw.*

Proving of the Tenor—Process.—In proving the tenor of a back bond, an allegation in the libel that the defender had privately obtained possession of it, and had destroyed or away put it, or that it had fallen aside and was lost—held a relevant *casus amissionis*.

Feb. 21, 1832. MILLER raised a proving of the tenor, in which he subsumed inter alia: That Howie, in 1793, had executed a conveyance, ex facie absolute, of a heritable subject in favour of Robertson, a creditor: That Millers (the pursuer and defender) became creditors of Howie in 1794, and executed inhibition against him in 1795: That Robertson, in 1799, granted a back bond to Howie, in regard to the ex facie absolute conveyance to him: That the defender, Hugh Miller, “who, on some pretext had on or about the month of January 1822, and in the town of Saltcoats, obtained permanent and private possession of the said back bond, directly in the face of the inhibition above mentioned, did, in or about the said month of January 1822, and in the said town, take or stipulate for a conveyance from the heirs of Robertson, in favour of himself alone, paying their debt, amounting with certain additions of interest to about £70, producing the back bond to satisfy them of his right to reconveyance, and then destroying, or otherwise away putting it, so as to make himself ap-

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pear an uninterested purchaser:" That the pursuer, after learning this; No. 194. brought an action before the Sheriff, in which he failed, "in consequence ^{Feb. 21, 1832.} of the destruction of the back bond by the said Hugh Miller," &c. : " That Miller v. ^{MILLER.} the said back bond having been destroyed by the said Hugh Miller, in ^{1st.} manner before mentioned, or at least having fallen aside and being lost, Gracie v. ^{FER-} cannot now be found, though all means have been used for the recovery ^{Ferguson.} of it."

A preliminary defence was pleaded, that no casus amissionis sufficiently specific, was libelled, and as a back bond was a document capable of extinction by cancellation, it was contended that the casus should have been libelled specially, in support of which the case of Kerr¹ was referred to.

The pursuer answered. The back bond was libelled as having been privately got hold of by the defender in January 1822, and he was charged with taking a conveyance from Robertson's heirs, "and then destroying, or otherwise away-putting the back bond," and it was subsumed that the back bond "having been destroyed by the said Hugh Miller, in manner before mentioned, or at least having fallen aside and being lost," it was necessary to prove the tenor. This was a relevant casus, because, if true, the deed was traced into the possession of the party who was charged with destroying or away-putting it, and the pursuer could not aver what precise method of doing such an act the defender might privately adopt.

LORD BALGRAY intimated that he had no doubt of the casus amissionis being relevantly libelled.

LORD CRAIGIE was understood to dissent, and to hold that no relevant casus was libelled.

THE COURT pronounced the usual interlocutor, sustaining the miniciles, and allowing a proof.

J. LIVINGSTON, W.S.—BOWIE and CAMPBELL, W.S.—Agents.

J. B. GRACIE.—Rutherford—Maidment.
GEORGE FERGUSON.—Skene.

No. 195.

Process—Reclaiming Note.—A reclaiming note, containing no prayer, is incompetent.

THE Lord Ordinary pronounced a judgment in a multiple poinding ^{Feb. 23, 1832.} raised by Dickson, against which Ferguson reclaimed. After quoting the judgment, the reclaiming note merely set forth that the Lord Ordinary ^{1st DIVISION.} had pronounced, "the prefixed interlocutor, which the defender begs to submit to the review of your Lordships. In respect whereof," &c. ^{Ld. Corehouse.} ^{D.}

Various objections were taken to the competency of entertaining the

No. 195. note, but chiefly, that it contained no prayer, and, as the reclaiming days
Feb. 23, 1832. were run, the defect was incurable.

Gracie v. Ferguson. Ferguson answered, that the Second Division had considered it improper to add a prayer to a reclaiming note; and that an interlocutor could not become final while expressly "submitted to review."

Wallace v. Taylor, &c.

LORD PRESIDENT.—A judgment is not effectually submitted to review, unless the Court are craved to alter it, in whole, or in part. It is now several years since the Judges of both Divisions, after consulting together, were satisfied that the course which had constantly been pursued in this Division, was the correct one, and that every reclaiming note must contain a prayer. Since that time the practice has been uniform in both Divisions. It is founded on sound principle, and we cannot hesitate to enforce it. We must refuse this note as incompetent.

Note refused accordingly.

J. B. GRACIE, W.S.—J. DUNDAS, W.S.—Agents.

No. 196.

WILLIAM WALLACE, Pursuer.—Jameson.
GEORGE TAYLOR and ALEXANDER MURDOCH, Defendants.—A. McNeill.

Trust.—Circumstances in which private trustees of a bankrupt, declared liable only for actual intromissions, were found not liable to account for part of the trust funds intromitted with by the bankrupt.

Feb. 23, 1832. STEWART having obtained a discharge of his debts under the Bankrupt 1st DIVISION. Act, on payment of a composition, conveyed his estates, including heritable property, to Taylor and Murdoch, in trust, for behoof and relief of Ld. Corehouse. D. his cautioners, declaring the trustees liable only for actual intromissions. They suffered Stewart to uplift the price of part of the heritable estate which was sold, his purpose being, as he alleged, to pay his composition. Wallace, having become a creditor of Stewart, obtained a decree of adjudication against the heritable estate in 1814, and in June 1828 he arrested in the hands of the trustees. He thereafter brought a process of declarator of expiry of the legal, and another of forthcoming, which were conjoined, and a remit made to an accountant to report on the intromissions of the trustees. He reported, that at the date when the arrestments were used, the trustees had no moveable funds of Stewart in their hands, but were largely in advance for him. Wallace objected to the report that the accountant had not debited the trustees with the price of the part of the heritage which had been sold. They answered, that Stewart had uplifted the price,—that they were only liable for their actual intromissions,—and they averred that Stewart had applied the price in payment of his composition. The Lord Ordinary found, "that the defenders, under the trust-deed executed by William Stewart, in their favour, are accountable for the price and rents of the subjects conveyed, only to the extent of their own intromissions: found it proved, by the documents produced, that, at

the date of the pursuer's arrestment, on 26th June, 1828, there were no funds in the hands of the defenders attachable by that diligence, but, on the contrary, that a large balance was due to the defenders by Stewart; and, to that effect, repelled the objections to the accountant's report: therefore, in the furthcoming sustained the defences, assoilzied the defenders, and decerned; and in the action of expiry of the legal, before answer, appointed parties to be farther heard, reserving all questions of expenses in the conjoined actions."

Feb. 23, 1832.
Wallace v.
Taylor, &c.

Forman v.
Nicholson, &c.

Wallace reclaimed, but the Court adhered.

W. WALLACE, W.S.—J. T. GORDON, W.S.—Agents.

ALEXANDER FORMAN.—*More.*
DANIEL NICHOLSON.—*Maidment.*
JAMES ROBERTS.—*Brownlee.*

No. 197.

Process—Adjudication—33 Geo. III. c. 74, § 10.—A first adjudication intimated, and a second led thereafter in terms of the statute, and decree in the first being indefinitely postponed, and the second adjudger having craved decree—Held that he could not take decree before the first adjudger, but was only entitled to be conjoined.

FORMAN raised a summons of adjudication against Roberts, and the Feb. 23, 1832. Lord Ordinary ordered intimation in common form. Nicholson thereafter raised a second adjudication against the same party. Forman enrolled his 2D DIVISION. Ld. Mackenzie. adjudication, for the purpose of getting decree, but Roberts, the defender, opposed his motion, and obtained an order for a condescendence. Nicholson, the second adjudger, contended, that as his adjudication had been led in terms of the statute, he was not bound to wait the issue of the first, but was entitled to obtain decree at once. Lord M'Kenzie reported the point.

LORD JUSTICE-CLERK.—I have no difficulty in this case. Intimation is ordered by the statute for the purpose of allowing the adjudications to be conjoined; but here a party endeavours to avail himself of this special provision, in order to take the lead as a first adjudger. This cannot be allowed, and was not contemplated by the clause of intimation.

LORD CRINGLETIE.—I quite agree, and can see no hardship in the case. If there were twenty adjudgers, they would just rank pari passu.

THE COURT concurred, and found the second adjudger not entitled to obtain decree under the circumstances.

JOHN FORMAN, W.S.—DAVID CLYNE, S.S.C.—Agents.

No. 198. DUKE of NORTHUMBERLAND and Others, Petitioners.—Keay—Shaw.
 ALEXANDER HARRIS, JOHN BELL, &c., Respondents.—Whigham.

Feb. 23, 1832.
 Duke of Northumberland,
 &c. v. Harris,
 &c.

Citation—Process—Interdict.—1. Where a petition and complaint was ordered on 9th July to be served, and answers lodged on the first box-day; and within four days box-day it was served, and the petitioners prorogated the time for lodging of the answers to the second box-day—held that the service was inept. 2. A petition for breach of interdict, with penal conclusions, inept, without the concourse of his Majesty's advocate.

Feb. 23, 1832.

2D DIVISION.
 Lt. Moncreiff.
 F.

THE petitioners, proprietors of salmon fisheries on the river Tay, had obtained, in the year 1812, a judgment of the Court in an action of declarator at their instance, prohibiting certain parties from erecting stake nets in these fisheries. An evasion of this judgment having been attempted by some of the lower heritors, an interdict was obtained in 1814, by which the parties complained of were prohibited from fishing with the evasive net, “ or by means of any other fixed machinery, or by any other mode of fishing than the ordinary way of net or coble.”

In like manner, the petitioners, at various times, down to the year 1829, obtained interdicts against parties attempting to evade the prohibition by means of peculiar nets, called pock-nets, and sole-nets. In 1829, they presented a bill of suspension and interdict against Harris, Bell, and others, tacksmen of some of the fisheries, as persisting in using both pock-nets and sole-nets. The Lord Ordinary ordered the bill to be answered, and, “ meantime, prohibits the use of any fixed machinery, or any fishing apparatus whatever, except net or coble.” The bill was afterwards passed, the interdict continued, and the letters expedited. Pending the preparation of the cause, the petitioners presented a petition and complaint to the Court, setting forth, that “ the petitioners have recently discovered that the said Alexander Harris and John Bell have, in breach of the interdict obtained against them, and in contempt of your Lordships' authority, resumed the use of sole-nets, or other fixed machinery, for the purpose of catching salmon, in the river or estuary of the Tay. In particular, in the months of May last and June curt., the said Alexander Harris has used sole-nets, or other fixed machinery or apparatus, different from the ordinary method of net and coble, for catching salmon upon the fishing stations belonging to Archibald Campbell Stewart, Esq. of St Fort, and in other parts of the river or estuary of the Tay; and in the course of the same period, the said John Bell has also used sole-nets, or other fixed machinery or apparatus, different from the ordinary method of net and coble, for catching salmon upon the fishing stations belonging to Robert Dalglisch, Esq., of Scotsraig, and in other parts of the river or estuary of the Tay. In these circumstances, the petitioners are in the course of proceeding with the above suspension and interdict against the persons complained of, with the view of getting the interdict declared

perpetual. But in the meantime, the petitioners are under the necessity of applying to your Lordships for redress against the breach of interdict, and highly aggravated contempt of Court, which has been committed by these parties." The petition proceeded to state, that in the circumstances of the case, a small sum in name of damages or expenses would have no effect; but that rigorous measures were requisite, in order to protect the rights of the parties, and vindicate the authority of the Court, and prayed their Lordships "to find that they (Alexander Harris and John Bell) have been guilty of a breach of the interdict pronounced by this Court, and to inflict such punishment by imprisonment, fine, or otherwise, on the said Alexander Harris and John Bell, as may be considered necessary; to find them liable, jointly and severally, in expenses, &c., reserving to the petitioners all claim of damages competent to them." When the petition was presented, the concourse of the Lord Advocate was set forth, but the Crown counsel having declined to give it as unnecessary, and having put the question to the Court when the petition was first moved on 9th July, their Lordships intimated an opinion, that this being a question as to a contempt of Court, concourse was not necessary, at least so far as related to the civil conclusion. The petitioners accordingly deleted the Lord Advocate's name, but retained the prayer in its original form.

The Court, at the same time, granted warrant of service, with an order for answers by the first box-day in the then ensuing vacation. The petitioners did not execute the warrant until the 27th of August, four days prior to the first box-day; but their agents minuted a consent to prorogate the period for lodging answers till the second box-day. The respondents availed themselves of this prorogation to give in answers, in which they urged these preliminary objections. 1. That the service was inept, not having been executed in due time, and that although the petitioners had prorogated the period for giving in answers, yet as this was an Inner House process, they could not, in terms of the Act of Sederunt, 19th November, 1829, do so. 2. That as the petition was in its nature a criminal libel, it was incompetent without the concourse of the Lord Advocate.

The Lord Ordinary reported these preliminary objections upon Cases to the Court.

LORD JUSTICE-CLERK.—I am clear, that this being an order of peremptory service, and not followed out for a length of time, the party was entirely without warrant or authority, and the prorogation could not have the effect of restoring it, nor was it competent for the petitioners to grant it. Upon that objection alone, I think the petition must fall to the ground. Then the prayer of this petition is highly penal. The petitioners struck out the concourse of the Lord Advocate, but they retained the prayer in its present terms, which are absolutely useless without the concourse of the Lord Advocate. On both objections, the petition must be dismissed.

Feb. 23, 1832.
Duke of Nor-
thumberland,
&c. v. Harris,
&c.

No. 198.

LORD CRINGLETIE.—I think so too.

LORD GLENLEE concurred.

Feb. 23, 1832.
Duke of Nor-
thumberland,
&c. v. Harris,
&c.

THE COURT accordingly dismissed the petition and complaint, with expenses.

Petitioners' Authorities.—Brown's Synopsis, p. 530; Writers to the Signet, July 9, 1824

Inglis v. Lane, (ante, III. 237); Walker, Dec. 10, 1825 (ante, IV. 302); Gray, July 4, 1826 (ante, IV. 785); Robertson, Jan. 16, 1829 (ante, VII. 272); Henderson, Dec. 10, 1824 (ante, III. 384); Act of Sederunt, July 11, 1828.

Respondents' Authorities.—Act of Sederunt, Nov. 19, 1829; M'Auley, Nov. 28, 1830 (ante, IX. 49.)

BOWIS and CAMPBELL, W.S.—WILLIAM MARTIN, S.S.C.—Agents.

No. 199.

JAMES INGLIS, Pursuer.—D. F. Hope—Forsyth.
WILLIAM LANE and Co., Defenders.—Skene—Marshall.

Process—Ship—Statute 6 Geo. IV. c. 110.—A summons and relative condescendence held to be irrelevant to sustain a claim for the price of a vessel, in respect that the missives of sale libelled did not recite the certificate of registration in terms of the statute 6 Geo. IV. c. 10, and the conclusion for the price was disconform to the narrative of the circumstances; but a remit made as to whether the summons could be sustained to the effect of entertaining an alternative conclusion of count and reckoning.

Feb. 23, 1832. INGLIS and Company, bankers in Edinburgh, raised an action in the Admiralty Court, setting forth, that James Inglis, the sole or leading partner of Inglis and Co., was registered owner of the schooner Dolphin; that on the 9th of September 1826, the vessel "was exposed to public sale under warrant of your Lordship (the Judge Admiral), and purchased by Patrick O'Hara, merchant in Leith, for and on account of William Lane and Company, merchants there, for £270; and, to enable them to pay up the price, the complainers advanced to the said William Lane and Company the sum of £200; in security of which, it was agreed that the decree of sale should be taken out in the name of the said James Inglis, and that he, on the other hand, should be taken bound by an obligation under his hand to convey the vessel to the said William Lane and Company, who paid the balance of the price, and for whose ultimate behoof she was to be held by him. That the said decree of sale was taken out in the name of the said James Inglis accordingly, and the defenders, in order to protect their own interest, procured from the said James Inglis the following obligation in the form of a minute of sale, that is to say, that, by missive of sale entered into between the complainers and William Lane and Company, merchants in Leith, dated the 15th and 16th days of September last, the complainers sold to the said William Lane and Company the schooner Dolphin of Leith, for the sum of £301: That in implement

2D DIVISION.
Lord Medwyn.
F.

the said missives, the said William Lane and Company, upon the said No. 199.
 15th day of September last, paid to the complainers the sum of £401, Feb. 23, 1832.
Inglis v. Lane,
sc.
 and for the balance of the price of said vessel, granted their acceptance to
 the complainers for £200, at four months' date : That when the said bill
 for £200 fell due on the 18th day of January last, the said William Lane
 and Company did not retire the same, but granted their promissory-note
 to the complainers in lieu thereof, dated the said 18th day of January last,
 payable two months after date, for £200, being the balance due by the
 said William Lane and Company, for the said schooner Dolphin, as the
 said missives and promissory-note more fully bear : That when the said
 promissory-note fell due on the 21st March last, it was dishonoured, and
 now lies under protest for non-payment of the contents, interest, damages,
 and expenses : That the said William Lane and Company did, in the
 beginning of September last, take possession of said schooner Dolphin,
 put a master into her, fitted her out for sea, sent her on a voyage, and
 continued in possession till the 1st day of April last : That upon the 30th
 day of April last, the complainers executed a vendition of said schooner
 in favour of the said William Lane and Company, and offered, under form
 of protest, to deliver the same to them, and to put them in possession of
 said vessel, on their retiring the said promissory-note, with the interest
 and expenses due thereon ; and they having refused to pay the said pro-
 missory-note, and to accept of the said vendition in terms and implement
 of the missives of sale above mentioned, the complainers protested against
 the said William Lane and Company, and all others whom it doth or may
 concern, for breach of the said missives of sale, and for all damage, loss,
 and prejudice already suffered, or which may be suffered and sustained
 by the complainers, in consequence of the said William Lane and Com-
 pany having taken possession of the said vessel as aforesaid, and for all
 loss and damage they have sustained, or may sustain, by reason of the
 said promissory-note not being retired when the same became due, and for
 all other damage for which the complainers ought to protest, to recover
 the same, in time and place convenient, as the said vendition and instru-
 ment of protest herewith produced more fully bears."

The summons concluded, that "the said William Lane and Company,
 and Timothy Lane and William Lane, the individual partners thereof,
 ought and should be decerned and ordained to make payment to the com-
 plainers of the foresaid sum of £200 sterling, and interest due thereon,
 since the same fell due, and till paid, contained in, and due by, the pro-
 missory-note above mentioned ; and also, to free and relieve the com-
 plainers of all claims and demands which have been, or may be made
 against them, or the said James Inglis, as registered owner of said vessel,
 by any person employed by the said William Lane and Company, or the
 said Timothy Lane and William Lane, the individual partners of said
 Company, or their master, whom they placed in charge of said vessel, to
 make furnishings or repairs to the said vessel, or who have made advances

No. 199. of money to their said master, on account of the said ship; and in the event of the said William Lane and Company, and Timothy Lane and William Lane failing, in the course of this process, to free and relieve the complainers of all loss and damage incurred by the said James Inglis remaining registered owner of the said vessel as aforesaid, the said William Lane and Company, and Timothy Lane and William Lane, the individual partners of the said company, ought and should be decerned and ordained further to make payment to the complainers of the sum of £500 sterling, or such other sum as shall be ascertained, in the course of this process, to be the amount of the claims made against them, and of the loss and damage sustained by them in consequence of the said William Lane and Company taking possession of the said vessel, as aforesaid, and all other loss and damage which the complainers have sustained, or may sustain, in consequence of the said William Lane and Company having taken possession of the vessel as aforesaid, and having failed to implement the said missives of sale."

These missives did not recite, nor make any allusion to, the certificate of the vessel's registry. The condescendence for Inglis was to the effect of averring, that, though registered owner, he only held the vessel in trust for Lane and Company, and in security for the advance of £200, on payment of which he was ready to grant a regular vendition, and put Lane and Company in possession.

Lane and Company disputed the relevancy of the summons and condescendence, and the Lord Ordinary ordered Cases to the Court.

Pleaded for Lane and Company—

On the pursuer's own statement, he is the registered owner of the vessel; and the allegation that he merely holds the vessel in security for repayment of the advance of £200, is inconsistent with the terms of his libel, which sets forth an absolute sale originally to himself, a subsequent transaction of sale betwixt him and Lane and Company, with the offer of a regular deed of vendition, upon payment by Lane and Company of £200 as the balance of the price: and therefore the action is for the price of the vessel. But the missives of sale libelled on do not recite the certificate of registry; consequently, the action cannot, in terms of the 31st, 37th, and 38th sections of the 6th Geo. IV. c. 110, be sustained.*

* The clauses are in these terms:—"That when, and so often as the property in any ship or vessel, or any part thereof, belonging to any of his Majesty's subjects, shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual, for any purpose whatever, either in law or in equity,—provided always, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry, instead of the existing certificate, provided the identity of the ship or vessel therein intended be effectually proved thereby."

Pledged for Inglis and Company—

No. 199.

The claim has no connexion with the form of transferring property in ships; the action concludes for payment of a bill accepted by Lane and Inglis v. Lane, Company, in favour of Inglis and Company, and for relief of advances. Feb. 23, 1832.
Inglis v. Lane,
&c.
Inglis was simply a trustee for the purchaser, and was in pari casu with a seller of land who retains the titles till the price be paid. The registry statute does not touch the case. The existing statute, 6th Geo. IV. c. 110, was passed for the purpose of amending and relaxing the previous British registry acts, which enacted, "that no transfer, contract, or agreement for transfer of property in any ship," &c. should be valid for any purpose in law or equity, unless made by an instrument in writing, containing a recital of the certificate of registry. But the existing statute has relaxed this rule.

LORD CRINGLETIE.—I see the parties disagree in point of fact, as to whether there was a sale to Inglis or not; this is an essential point. The defenders' story is, that a decree of sale did go out in the name of Inglis. That is stated in his *descendence*, and the pursuer adopts the very statement in his amended libel, and we must hold that to be the fact. Now, what does the libel say?—"That the said decree of sale was taken out in name of the said James Inglis accordingly, and the defenders, in order to protect their own interest, procured from the said James Inglis the following obligation in the form of a minute of sale, that is to say, that by missives of sale entered into between the complainers and William Lane and Company, &c. the complainers sold to the said William Lane, &c. the schooner *Dolphin*, of Leith, for the sum of £901." Here is an express allega-

And again, by section 37, it is enacted, "That no bill of sale, or other instrument in writing, shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale, or other instrument in writing, shall have been produced to the collector and comptroller of the port at which such ship or vessel is registered, or to the collector and comptroller of any other port at which she is about to be registered *de novo*, as the case may be, nor until such collector and comptroller respectively shall have entered in the book of registry, or in the book of intended registry of such ship or vessel, as the case may be, (and which they are respectively hereby required to do upon the production of the bill of sale, or other instrument for that purpose,) the name, residence, and description, of the vendor or mortgager, or of each vendor or mortgager, if more than one, the number of shares transferred, the name, residence, and description, of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale, or other instrument, and of the production of it."

And by the following section (38) it is enacted, "That when, and so soon as, the particulars of any bill of sale, or other instrument by which any ship or vessel, or any share or shares thereof, shall be so transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale, or other instrument, shall be valid and effectual to pass the property thereby intended to be transferred, as against all and every person and persons whatever, and to all intents and purposes, except as against such subsequent purchasers and mortgagors who shall first procure the endorsement to be made upon the certificate of registry of such ship or vessel in manner hereinafter mentioned."

No. 199. *tion of sale, upon which the pursuer now wishes to put the construction of merely an agreement to sell; but we must take the summons as it stands, and in that Feb. 23, 1832. Inglis v. Lane, view the registry act clearly applies.* One conclusion of the summons is for payment of £200, as the balance of the price, and I cannot doubt the irrelevancy &c.

of that conclusion. But the other part of the summons may be relevant after the rejection of the former. It narrates that Lane and Company did take possession of the schooner, put a master into her, fitted her out for sea, sent her on a voyage, and continued in possession, and there is a conclusion for the consequent expenses. If that part of the summons which concludes against Lane for the price as the actual owner be departed from, I think the rest may be sustained, for it depends upon no statute but the common law; for under such circumstances the charterer, and not the owner, of the vessel becomes liable.

LORD JUSTICE-CLERK.—I cannot exactly arrive at the same conclusion, that the latter part of the summons becomes relevant by the rejection of the former, and, as the plea is not in the record, I do not think it can raise matter for our determination. But I am decidedly of opinion that the first conclusion of the summons cannot be sustained; it rests upon no basis. I can find nothing in the narrative to support it, and the pursuer's averments are not relevant to support his amended summons. I confess it does not appear to me that the pursuers have been able to meet the argument upon the 37th section of the statute of Geo. IV. I cannot get over the broad words of that clause, and upon the whole I am of opinion that there is nothing here to support the conclusions of this action.

LORD GLENLEE.—As matters now stand, I think the first conclusion totally inapplicable. The pursuer has actually sold the vessel to Lane and Company, and offers a regular deed of vendition, so the conclusion for payment of the £200 is just extinguished by the narrative, and it is impossible for us to decern in terms of it. But there is still an important question, namely, how far this case resolves into a count and reckoning. I do not think that the registry acts will interfere with that question, though there may be a difficulty as to the *termisi habiles*. I own there appears to me a separate and independent conclusion in the summons, to the effect that the defenders failing to relieve the pursuers of loss and damage incurred by Inglis remaining registered owner of the vessel shall be decerned to pay £500, &c. I would therefore propose that we sustain the objections, and assoilzie, in so far as regards the first conclusion of the summons, and remit to the Lord Ordinary to try any conclusion of count and reckoning that can come under this summons, before further answer.

THE COURT pronounced this interlocutor: “Sustain the objection to the action in so far as relates to the first conclusion of the summons, and decern and remit to the Lord Ordinary to hear parties farther as to the other conclusions thereof for count and reckoning, and decide thereon, in so far as he may find the same competent under the summons of this action, reserving also to his Lordship to decide as to all questions of expenses.”

Pursuers' Authorities.—26 Geo. III. c. 60, § 17; 34 Geo. III. c. 60, § 14; 6 Geo. IV. c. 110, § 1, 31, and 37; Abbot on Shipping, p. 50; Carmalt, Feb. 11, 1823, (*ante*, III. 199); Calder, Nov. 12, 1824 (*ante*, III. 353); Wilson's Trustees, Dec. 2, 1808 (F. C.); M'Lauchlan, June 28, 1817; Kerleau, Feb. 6, 1807; 8 East. 281; M'Donald, Sept. 21, 1831; H. of L. (*ante*, IX. Ap. p. 11).

Defenders' Authorities.—*Registry Acts, ut supra; Ewing's Trustees, Feb. 25, 1829 (ante, No. 199. VII. 464); Holt, 155-6; Carmalt, ut supra; Calder, ut supra; Ted, March 5, 1825 (ante, III. 622).*

JOHN RYMER, W.S.—JOHN HARVEY—Agents.

Feb. 23, 1832.
Inglis, v. Lane,
&c.

ARCHIBALD CAMPBELL, Advocator.—*Whigham.*
MRS CAMPBELL or THOMSON, Respondent.

Campbell v.
Campbell.

No. 200.

Process—Stat. 1 Wm. IV. c. 69—Jurisdiction—Husband and Wife.—1. After a proof had been allowed in an action of divorce by the commissioners, prior to the statute 1 Wm. IV. c. 69, the process having fallen asleep, and a summons of wakening being brought before them, after the statute was passed—held that they had jurisdiction to waken the process, and proceed with the proof. 2. Where the defendant in an action of divorce lived in America, and had received personal intimation under the original process, held not necessary to repeat personal intimation under the summons of wakening.

By 1 Will. IV. c. 69, § 33, (July 23, 1830,) it is provided, “that all actions of declarator of marriage and of nullity of marriage, and all actions of declarator of legitimacy and of bastardy, and all actions of divorce, and all actions of separation a mensa et thoro, shall be competent to be brought and insisted in, only before the Court of Session.” It is farther provided by § 34, “that all such actions which shall be depending before the Commissary Court at the commencement of this act, shall be transmitted to the Lord President of the Court of Session; provided always, that, where a proof shall have been allowed by the said Court of the Commissioners previously to the commencement of this act, such proof shall be concluded, before such action shall be transmitted as herein directed.”

1st Division.
Bill-Chamber.
Ld. Moncreiff.

In 1827 Campbell raised an action of divorce, before the Commissioners, against his wife, then resident in America. The Commissioners, in respect she was edictally cited only, ordered a copy of the libel and condescendence to be intimated to her personally. This was done on 10th June, 1830, conform to notarial instrument, and on 6th August, 1830, the Commissioners allowed a proof. The process having afterwards fallen asleep, Campbell brought a summons of wakening in the Commissary Court. In the meantime the statute of 1 Will. IV. c. 69, was passed. The Commissioners, on advising the summons of wakening, with the previous proceedings, “found that they have no jurisdiction to awaken the action. Therefore dismissed the libel as incompetent,” and issued the subjoined note of their opinion.*

* “*Note.*—In this case, it appears that the defender is resident in America. Accordingly, upon 2d May, 1828, the Commissioners, in respect the defender had been edictally cited only, appointed a copy of the libel and condescendence to be intimated to her personally, or left for her at her place of residence. The process was allowed to fall asleep; and a summons of wakening was raised, which, with the original libel and condescendence, were notarially intimated to the defender. The process was

No. 200. Campbell presented a bill of advocation, which the Lord Ordinary "ordered to be printed, &c., in order to be reported."†

Feb. 24, 1832.
Campbell v.
Campbell.

then wakened, and on 6th August, 1830, a proof was allowed. The process was again allowed to sleep, and a new libel of wakening has been raised and executed edictally against the defendant; but no other intimation appears to have been given to her. If, therefore, the Commissaries had now even the competent jurisdiction, the present summons of wakening should, in the first place, be of new appointed to be intimated to the defendant personally. But it is thought that, under the late Judicature Act, the Commissaries have now no jurisdiction to make such order, far less to pronounce decree in the process of wakening. It is true, no doubt, that there is a power reserved to them, in the act, to conclude proofs (before transmission of the action to the Court of Session) in those cases in which they themselves had previously appointed proofs to be taken before the passing of the act. But they apprehend, nevertheless, that this reserved power of concluding proofs cannot be extended to the act of entertaining a summons of wakening, or of pronouncing a decree therein. On these grounds they have deemed it proper to dismiss the present action as incompetent."

+ "Note.—The Lord Ordinary has reported this bill in the first instance, because he is very much at a loss to determine what order should be made on it. If it were simply an advocation of an interlocutory judgment of the Commissaries in a cause which, by the late statute, still remained with them for concluding a proof previously allowed, he would of course have appointed the bill to be answered, and afterwards disposed of the case according to his view of the point raised. But here there is no party in Court, and properly no process, except a mere summons of wakening executed edictally. To appoint intimation in such circumstances would answer no purpose; and the competency of it must depend on the view taken as to the competency of advocation at all, on the merits of the ulterior point as to the competency of the summons of wakening in the Commissary Court. Though there may be a defect in the statute in not providing for this case of a process falling asleep while a proof is in dependence, the Lord Ordinary thinks that it must be implied in the provision as to all causes in which a proof has been allowed, but not concluded, that all the powers and jurisdiction of the Commissaries, necessary for enabling them to bring the proof to a conclusion, and to bring the process into that state which is necessary to enable and require them to transmit it to the Court of Session, must remain as they were before; for otherwise it is evident that the party would be left without any remedy. He therefore thinks, that, construing the 33d and 34th sections of the statute reasonably, and in connexion with one another, it cannot be held that a summons of wakening, in a cause in which there was a depending proof at the date of the act, is rendered incompetent under the general words evidently applicable only to new or original actions of marriage, nullity of marriage, legitimacy, bastardy, divorce and separation. He thinks, therefore, that the judgment of the Commissaries is wrong, and that there should be a remit to alter it, and waken the process. Perhaps it may be thought that there should first be an order to answer, and an edictal intimation. But there is no imperative rule as to receiving an answer.

"As to the necessity of the summons of wakening being personally intimated, the Lord Ordinary cannot think that there is such a necessity. For, the personal intimation in the original proceeding is not required as a necessary form, but as matter of justice, that the party may know of the action brought. But when that notice has been given, and no appearance made, and the case is under proof, it would be stretching the rule very far to require a like notice of a summons of wakening.

"But the case is altogether so peculiar, that it seems proper that the Court should dispose of it."

On considering the report of the Lord Ordinary, the Court instructed his Lordship to remit to the Commissaries to alter their judgment, and waken and proceed in the cause. No. 200.

Feb. 24, 1832.
Campbell v.
Campbell.

LORD BALGRAY.—I am satisfied, that, in point of form, edictal citation is enough, *Scott v. Gregory's Trustees*. personal intimation was given ob majorem cautelam ; the Court highly approved of the proceeding, as a matter of fairness and justice to the defender, but they, at the same time, expressly declared that they did not hold it necessary ; the edictal citation being enough. I concur with the Lord Ordinary in thinking there is no cause for repeating the personal intimation here. I have no doubt that, in the circumstances, the Commissaries have jurisdiction to waken the process, and conclude the proof.

The other Judges concurred.

J. MACANDREW, S.S.C.—Agent.

DAVID SCOTT, Pursuer.—*Wilson.*
GREGORY'S TRUSTEES, Defenders.—*More.*

No. 201.

Triennial Prescription—Agent and Client.—The triennial prescription applies to the “commission charges for payment of money,” as well as to the other articles of business in a law agent’s account.

SCOTT, W.S., in 1829, raised an action against the trustees of the late Dr James Gregory, R.N., for payment of a business account commencing in 1814, and ending in 1822. In this were included charges as commission for payments of money, besides those for agency. The trustees pleaded the triennial prescription, and the Lord Ordinary “sustained the defence of the triennial prescription to all the articles of business stated in the accounts pursued on, including commission charges for payment of money,” &c.

Scott reclaimed ; but the Court unanimously adhered.

D. Scott, W.S.—R. W. JAMESON, W.S.—Agents.

JANET M'LELLAN and HUSBAND, Petitioners.—

No. 202.

Thomson.

CHALMERS' TRUSTEES, Respondents.—*Sol.-Gen. Cochburn—Maitland.*

Judicial Factor.—Circumstances in which the Court refused an application, at the instance of a husband and wife, for a judicial factor, and a curator bonis, with special powers to bring an action of denuding against trustees.

THIS was an application by Janet M'Lellan, and her husband Henderson, stating, that she had been formerly married to one Chalmers ; that, by an ante-nuptial contract, she had right to his whole effects ; that, in

Feb. 25, 1832.
2d Division.
F.

No. 202. 1826, they executed jointly a deed, in favour of trustees, for the purpose of setting aside a former trust executed by him, for payment of his debts, and for applying the free residue in terms of the contract of marriage; that the trustees had succeeded in setting aside the former trust; and that Chalmers died in 1826; that a competition then occurred betwixt a third party and Chalmers' trustees, under the deed 1826, and the petitioner Janet M'Lellan; that in 1830 she married Henderson, and at the same time executed a trust-deed, referring to an ante-nuptial contract, in favour of the trustees named under that of 1826, and certain other persons; and that she now intended, for reasons personal to the trustees, to bring an action of denuding against them; but that in the mean time it was necessary to appoint some person to attend to the interest of the petitioners, with power to call the trustees to account, and to bring the action, if found to be advisable; and that this was the more necessary, as the interests of the petitioners were adverse. They accordingly prayed that Peter Crooks, W.S., should be appointed "judicial factor as aforesaid, for behoof of both petitioners, or curator bonis for the petitioner, Mrs Henderson, and judicial factor for behoof of the petitioner, John Henderson, with all the usual powers; and in either case, with power to call the said trustees to account, and to bring an action for denuding them of the foresaid trusts," &c. The acting trustees opposed the petition, on the ground that the application was improper and unnecessary; that they did not object to the appointment of a curator bonis, or judicial factor, in common form; but they denied the allegations as to their own conduct, and maintained that no extension of the usual powers of a curator or factor, if any such appointment were to be made, should be granted.

The Court refused the petition, with expenses.

LORD JUSTICE-CLERK.—There are two points for consideration; first, as to the propriety or necessity of appointing a curator bonis at all under the circumstances; and, in the next place, as to this demand for an appointment with extraordinary power. I am not satisfied of the necessity of appointing a curator bonis, and upon the other point, I am clear that any such appointment can only be made with the ordinary powers.

LORD GLENLEE.—I quite agree. Mrs Henderson may have a *curator ad litem* appointed, if her interests and her husband's are adverse; but all that we can do with this petition, is to refuse it *simpliciter*.

Petitioner's Authority.—Wotherspoon, Dec. 15, 1775 (M. 7450.)

GEORGE F. URE, W.S.—EDWARD M'MILLAN, S.S.C.—Agents.

J. KIRKLAND and J. F. SHARP, Petitioners.—*D. F. Hope—Cunninghame.* No. 203.

WILSON'S CREDITORS, Respondents.—*More—Keir—Rutherford—Thomson—Christison—G. G. Bell—Anderson—Patton.*

Feb. 25, 1832.
Kirkland, &c.
v. Wilson's
Creditors.

Process—Execution Pending Appeal.—A party having succeeded in an action against a trustee on a sequestrated estate, and obtained execution pending appeal against him qua trustee for expenses, but not as to the principal sum—a supplementary petition, praying for execution for the principal, interest, and expenses, against creditors on the estate as the trustee's constituents, dismissed as incompetent.

An appeal having been taken from the judgment, (reported ante, IX. Feb. 25, 1832. 596,) in favour of the petitioners, Kirkland and Sharp, by Gibson, trustee on the sequestrated estates of Wilson and Sons, the defenders in that action, Kirkland and Sharp, presented a petition for interim execution against Gibson, qua trustee. Gibson having stated that he had no trust funds in his hands, Kirkland and Sharp craved leave to amend the prayer of their original petition, so as to demand execution against Gibson personally, for the expenses of process which had been awarded. This, however, the Court (ante, 168) refused to allow, considering a new petition necessary; and they granted execution against Gibson, simply qua trustee. Kirkland and Sharp further presented a supplementary petition for interim execution as to principal, interest, and expenses, against Gibson and the creditors on the sequestrated estate, as Gibson's constituents, and as having sanctioned his proceedings. This petition was opposed by the creditors, and separate answers were given in for a great many of them, who entered largely into the previous details of the process, and stated a variety of pleas against their liability, unnecessary to be noticed.

LORD JUSTICE-CLERK.—By our interlocutor of 20th December 1831, we are functi at all events as to Gibson.

LORD CRINGLETIE.—And besides, the petition is properly against the creditors; not one word is said as to the personal liability of the trustee.

LORD MEADOWBANK.—I do not see how it is possible in point of form to grant this application, which I think is quite unwarrantable.

LORD JUSTICE-CLERK.—I am clear, on looking at the terms of our former judgment, that it would be inconsistent to grant interim decree for the principal sum. We cannot, in point of form, go back upon that judgment, and take up an after statement. I am also decidedly of opinion that it is impossible for us to entertain the question of the liability of these creditors—which might involve inextricable discussions—in a summary application of this nature.

LORD CRINGLETIE.—I quite agree. We lately pronounced a judgment which laid the foundation for an action of count and reckoning, and now the case comes back to us, per saltum, from no interlocutor whatever.

LORD MEADOWBANK.—I never knew a more preposterous application.

No. 203. **LORD JUSTICE-CLERK.**—As to the expenses there may be some difficulty: Was it necessary for all these creditors to multiply proceedings, by giving in separate answers? We must refuse the application, with expenses, but order the Feb. 25, 1832. **Kirklan^d, &c.
v. Wilson's Creditors.** auditor to give in a special report.

**Kay, &c. v.
Magistrates of
Dundee.**

THE COURT accordingly refused the petition.

**GREIG and MORTON, W.S.—MOWBRAY and HOWDEN, W.S.—JOHN BROWN—JOSEPH GRANT,
W.S.—JOHN KERMACK, W.S.—WILLIAM DUNCAN, jun. W.S.—JOHN WIGHT, W.S.—
CRANSTOUN and ANDERSON, W.S.—Agents.**

No. 204. **A. KAY and J. MORTON, Complainers.—Jameson.
MAGISTRATES of DUNDEE, Respondents.—Forsyth.**

Expenses—Auditor.—Circumstances in which the auditor having disallowed the expense of a search in a burgh record as not necessary to the decision of a cause, the Court sustained the claim, and directed him to tax the items.

Feb. 25, 1832. **THIS was the sequel of the case reported ante, VIII. 688, and affirmed 17th March 1831, (ante, IX. Ap. p. 4.) It involved two points relative to an election of a Dean of Guild, the one depending on the right of a certain class of burgesses to be elected to the office; and the other, whether, assuming the right, the election had been made according to law. In preparing the record, and in contemplation of the possibility of a jury trial as to the usage with reference to the first point, an extensive investigation was made into the records of the burgh; but the case was decided on the latter point, so that the question of practice was superseded. The complainers having been found entitled to expenses, claimed those of the search; but the auditor “would not allow any of the charges connected with this investigation, upon the ground (as stated in the objections) that no material alteration was made in consequence thereof upon the condescendence, the word ‘immemorial’ having been only added in article 7th, and that the investigation would, in his opinion, have been in sufficient time when the Court remitted the case to a jury.” The complainers objected to this; and the respondents, besides supporting the auditor’s report, maintained that the sums charged were excessive.**

LORD JUSTICE-CLERK.—The items charged may or may not be admissible, but I cannot agree with the principle of the auditor’s rejection. The complainers had made certain averments, which might have come to an issue. The search was necessary to support them, and the party was bound to do so; but though I cannot approve of the principle of the rejection, I would, before farther answer, remit to the auditor to consider the merits of the item.

The other Judges concurred, and

THE COURT accordingly, "before answer, remitted to the auditor to hear parties on the grounds of objection to the modification of the quantum of the complainers' expenses, and to report." No. 204.

Brown and Miller, W.S.—J. Yule, W.S.—W. Ivory, W.S.—Agents.

Feb. 25, 1832.
Kay, &c. v.
Magistrates of
Dundee.

GEORGE DOUGLAS, Pursuer.—M^cNeill.
JOHN JONES, Defender.—More—A. M^cNeill.

Douglas v.
Jones.
No. 205.

Process—Expenses.—Under a summons concluding for payment of rent, in terms of a lease, and pending the discussion of which the Court ordained the subjects to be let, found competent to allow an account of expenses incurred in letting them, to be deducted from the new rents before the defender could impute them to the extinction of the claim against him.

THIS was a branch of the case decided 18th December 1829, and 30th Feb. 25, 1832. June 1831, and reported vols. VIII. 274, and IX. 856, which see. It was ^{2d Division.} an action by Douglas, for payment of the rent of certain premises in Glas-^{Lord Medwyn.} T. gow, alleged to have been let by him to Douglas. Jones denied that he was bound by the lease; and pending the discussion, the Court remitted to the Sheriff to let the premises.

Thereafter the Court decided against Jones; and before decree was extracted, Douglas moved that the expenses incurred in letting the subjects, which were chiefly for repairs and alterations, should form a deduction from the rents so obtained, and to be placed to the credit of Jones for the rents under the lease. Jones opposed this motion, on the ground that the summons concluded only for the rent of the premises and expenses of process, and this was a demand beyond it, and therefore incompetent; but the Lord Ordinary found "the present application competent, in respect that the process in which it is made is unextracted, and, therefore, still in Court; that the objection, that there is no conclusion in the summons against the defender but for the rent of the premises in question and expenses of process, is not sufficient to cut off the claim for the expenses incurred in letting the subjects during the discussion of the question between the parties, in respect that there is no occasion for any decree against the defender for the amount, but merely a finding that the rents recovered from those to whom the premises had been let, shall not be imputed against the rents concluded and decerned for, till after deduction of the expenses so incurred; that the proposition that the premises should be let was a judicious one, and was made by the defender, and it was in consequence of a report from the Sheriff-clerk-depute, to whom the letting of the premises had been entrusted, that they could not be let unless power was given to make alterations on the premises, which was accordingly given, in order to insure their letting; and that although the defender opposed this, he must be liable for all such judicious alterations as were necessary to secure said object, as he has so materially benefited thereby,

No. 205. and therefore appointed the cause to be called, that the defendant may state any objections he may have to the items of said account."

Feb. 25, 1832.

Douglas v.
Jones.

Thorburn v.
Ranken.

Jones reclaimed, but the Court adhered, "it being understood that parties shall still be heard as to the due or undue application of the interlocutor of 18th December 1829, in the proceedings that have taken place under it, reserving to the Lord Ordinary all questions of expenses."

D. Brown, W.S.—John Campbell, W.S.—Agents.

No. 206.

THOMAS THORBURN, Objector.—M'Neil.

THOMAS RANKEN, Respondent.—Whigham.

Ranking and Sale—Tutor and Curator.

1. An objection to a vote at an election of a common agent in a ranking and sale, that it was given by one of two acting tutors as being the "sole acting, accepting, and surviving tutor and curator,"—sustained.

2. Another objection, that the oath of verity as to a debt due to a chartered bank was taken by a party designating himself teller in the bank per procuration of the treasurer, but that neither the bank charter nor procuration were produced, and that the treasurer could not so delegate his powers—repelled, it not being denied that the party was a sworn officer of the bank.

Feb. 25, 1832. In a process of ranking and sale at the instance of Duncan's trustees against Smith, a meeting was held for the purpose of electing a common agent. A variety of creditors appeared by their procurators. Mr Thomas

T.

Ld. Mackenzie. Ranken, S.S.C., was proposed by one party, and Mr Thomas Thorburn, W.S., by another. On the votes, the amount of interests preponderated in favour of Thorburn. Mutual objections were lodged for the parties, but it is only necessary to notice two:—One, by Ranken, was to the vote of Mr Hoggan for Thorburn—viz. that he voted as sole tutor and curator for minors, while there was another acting tutor who did not concur with him. The other objection was by Thorburn to a vote for Ranken, on behalf of the Bank of Scotland, which holds a charter confirmed by Act of Parliament—that "the oath of verity bears to be taken by Mr Henry Goodsir, teller in the bank, per procuration of William Cadell, Esq. treasurer. But neither the bank's charter, nor any procuration by Mr Cadell, is produced; nor is any such procuration referred to as of any particular date; and at any rate, the bank's treasurer could not grant such a procuration, nor delegate his powers either to Mr Goodsir or to any other person." The Lord Ordinary sustained the objection to Hoggan's vote, but repelled that to the vote of the Bank of Scotland, it not being disputed that the teller was a sworn officer of the bank.

Thorburn reclaimed, but the Court adhered.

LORD JUSTICE-CLERK.—Goodsir was a sworn officer of the bank. If we were to sustain this objection, it would virtually decide that the Court of Justiciary have done the greatest injustice. Again and again, in cases where the lives of indi-

viduals were at stake, we have there sanctioned the production of bank notes No. 206. signed by procaration. As to the objection to Hoggan's vote, I think that was properly sustained. There is evidence in process that Smith was an acting tutor along with him.

Feb. 25, 1832.
Thorburn v.
Ranken.

M'Neill.—He has withdrawn.

LORD MEADOWBANK.—I doubt if a tutor has any power to withdraw from his responsibility. I know it was the opinion of the late President Blair that he could not.

Fyffe v. Fraser.

LORD JUSTICE-CLERK.—It is perfectly clear that there was another acting tutor.

JOHN THORBURN, S.S.C.—M. N. MACDONALD, W.S.—Agents.

ALEXANDER FYFFE, Suspender.—*D. F. Hope—Neaves.*

No. 207.

JAMES JOHN FRASER, Charger.—*Skene—Buchanan.*

Process—Reclaiming Note—Bill-Chamber.—Where a bill of suspension was refused on 31st January, and the Lord Ordinary, on 6th February, prohibited the certificate from being issued for fourteen days, in order to enable the party to reclaim; and a note was lodged within fourteen days from the 6th of February, but beyond that time from 31st January—found that the note was incompetent.

THE Act of Sederunt of 11th July, 1828, provides, by § 13, that, for Feb. 28, 1832. forty-eight hours after the refusal of a bill of suspension, the clerk to the bills shall not grant a certificate of refusal; by § 14, that an interlocutor refusing a bill shall take effect as soon as the clerk issues the certificate; “but the Lord Ordinary on the bills may, either by the interlocutor itself, or subsequently, on cause shown by a note for the party, prohibit the issue of the certificate, during such time as he may judge reasonable for enabling the party to obtain a review of the interlocutor.” And by § 15, it is provided, that during the last ten days of the recess, or in session time, a reclaiming note to the Court, shall be duly marked and boxed within fourteen days from the date of the interlocutor reclaimed against, and “that such reclaiming note shall not hinder the clerk to the bills from issuing the certificate of refusal, or the interlocutor submitted to review from being carried into effect by the opposite party, unless the Lord Ordinary on the bills shall have stayed proceedings by prohibiting the issue of the certificate, as provided for in § 14.”

1st Division.
Bill-Chamber.
Ld. Moncreiff.
B.

Fyffe presented a bill of suspension, which the Lord Ordinary refused, with expenses, on 31st January, 1832. He then applied by a note to the Lord Ordinary, referring to § 14 of the Act of Sederunt, for a delay of three weeks to reclaim. The Lord Ordinary, on 6th February, 1832, “prohibited the clerk from issuing the certificate of refusal of the bill for fourteen days, in order that the complainant may reclaim to the Court, if so advised.” After the lapse of fourteen days from the date of the interlocutor, but within fourteen days from the 6th February, Fyffe lodged a reclaiming note. To this it was objected, that as more than fourteen days

No. 207. had elapsed from the date of the interlocutor of 31st January, the note was incompetent; for although it was in his Lordship's power to suspend *Fyffe v. Fraser.* the issuing of a certificate of refusal for such time as he might think reasonable, yet he could not prolong the reclaiming days beyond the period specified in the Act of Sederunt.

Feb. 28, 1832.
Greig v.
M'Farlane.

Fyffe answered, that in practice it was understood that the Lord Ordinary had power to prorogate the reclaiming days; and as his Lordship, on 6th February, had prohibited the issue of a certificate for fourteen days thereafter, "in order that the complainant might reclaim to the Court," and as that judgment was acquiesced in, and the note was lodged within that time, it was competently presented.

LORD BALGRAY.—I think the note incompetent. Prior to the Act of Sederunt, a reclaiming note against a judgment refusing a bill, was competent before a certificate of refusal was taken out. But after that act, the number of reclaiming days, in session time, was fixed to fourteen. A discretionary power was still left to the Lord Ordinary, to prohibit the issuing of a certificate of refusal "during such time as he may judge reasonable, for enabling the party to obtain a review of the interlocutor;" but no power was left to him to prorogate the days within which a reclaiming note must be presented, beyond the number of fourteen. Had such power been left, this branch of the form of process would have been thrown quite loose, and one Judge might have allowed three weeks, another four weeks, to reclaim, and so forth. This was never intended by the Act of Sederunt; and it was not done by it. This note is therefore incompetent.

The other Judges concurred.

THE COURT therefore refused the note as incompetent, with expenses.

A. P. HENDERSON—J. J. FRASER, W.S.—Agents.

No. 208.

ROBERT GREIG, Petitioner.—*D. F. Hope—Cowan.*
ALEXANDER M'FARLANE, Respondent.—*Neaves.*

Inhibition—Bankrupt.—An inhibition against a trustee on a sequestrated estate, in virtue of an ordinary action against him and the bankrupt for a debt prior to the sequestration, is incompetent. But it being alleged that the bankrupt held an heritable bond without value, and that the trustee had taken infestment, the Court interdicted the trustee from conveying it away till the issue of an action of reduction of the bond.

Feb. 28, 1832.
1st DIVISION.
B.

M'FARLANE granted an heritable bond for £600 to Burns, with whom he had a variety of cash and bill transactions. The estates of Burns were afterwards sequestrated. Greig, having been appointed trustee, took infestment in virtue of the bond. M'Farlane then raised an action of count and reckoning against Burns and Greig, on the dependence of which he used inhibition against Greig as trustee. He also raised a reduction of the heritable bond, as having been granted without value. Greig presented a petition for recall of the inhibition, on the ground that it was

incompetent, because, supposing M'Farlane to be a creditor of Burns, he could not inhibit the trustee under the sequestration. M'Farlane answered, that his object in using inhibition, was to prevent Greig as trustee from onerously conveying away the heritable bond to any bona fide third party, who, if he acquired it, trusting to the record, might enforce payment of it; that as soon as his summons of reduction of the bond was called in Court, so as to render the subject litigious, he would discharge his inhibition; and that he had already offered to restrict it to the heritable bond alone.

Feb. 28, 1832.
Greig v.
M'Farlane.

Forth & Clyde
Canal Co. v.
Tennant, &c.

LORD PRESIDENT.—The inhibition does not proceed on the dependence of the reduction, but on the action of count and reckoning, and we must recall it. But as the trustee had taken infestation on the heritable bond, and might prejudice the interests of M'Farlane, by onerously conveying it away, I am inclined to suggest the propriety of interdicting him from doing so till the issue of the reduction.

LORD GILLIES.—The inhibition was clearly irregular, and must be recalled. It is raised in virtue of the action of count and reckoning, which could not warrant the use of that diligence against the trustee on a sequestered estate.

The other Judges concurred.

THE COURT recalled the inhibition, and found M'Farlane liable in expenses; but at the same time granted interdict against Greig's conveying away the bond till the issue of the reduction.

W. DOUGLAS, W.S.—R. JAMIESON, Jun. W.S.—Agents.

FORTH and CLYDE CANAL COMPANY, Petitioners.—*Monteith.*
CHARLES TENNANT and COMPANY, Suspenders.—*Anderson.*

No. 209.

Process.—An application to discuss a suspension and interdict on the bill, after the letters had been expedite, refused as incompetent.

TENNANT and Company brought a bill of suspension and interdict Feb. 28, 1832. against the Forth and Clyde Canal Company, to prevent their exacting certain dues on the canal. The Lord Ordinary passed the bill, but refused the interdict. After some delay, Tennant and Company acquiesced in this interlocutor, and the Canal Company presented an application to the Court, stating that there had been delay; that the matter required an immediate decision; and therefore craving an order to prevent the letters being expedite, or even, in the event of their being already expedite, “to grant warrant for discussing the reasons summarily on the bill, and answers, in lieu of the expedite letters.” Tennant and Company opposed this motion, and stated that the letters were expedite.

2d Division.

Ld. Moncreiff.

T.

LORD JUSTICE-CLERK.—It is absolutely impossible to grant this application after the letters are expedite.

No. 209. THE COURT accordingly refused the petition, with expenses.

Feb. 28, 1833. *Petitioners' Authorities.*—4 Ersk. 3, 19; A.S. July 3, 1677; A.S. Jan. 24, 1679; Bevans, *Forth & Clyde Canal Co. v. Tredige*, Forms of Process, p. 219; Treatise on Bill-Chamber, p. 98.
Tenant, &c.

Shand v. Shand.

THOMAS GRAHAME, W.S.—STEWART and SPROT, W.S.—Agents.

No. 210.

DR SHAND, Pursuer.—*Buchanan.*

MRS SHAND, Defender.—*Neaves.*

Husband and Wife—Process.—1. Where a husband and wife entered into a deed of separation and relative submission, and the husband, pending the submission, intimated his revocation, and the wife insisted upon the separation, and the arbiters pronounced decree for alimony, &c. quantum valeat—Held in a reduction of the decree, and an action of adherence, that a separation bona gratia is not revocable if proceeding upon grounds sufficient to have sustained a judicial separation; and that the wife is entitled, in support of such a plea, to lead a proof, embracing the whole period of her married life, notwithstanding intervals of apparent reconciliation. 2. A record having been closed in one process, the Court conjoined these with a relative process advocated ob contingentiam, in which no record had been prepared, and allowed a record to be made up therein.

Feb. 28, 1832. **DR ROBERT SHAND**, a surgeon in the Royal Navy, retired at the conclusion of the late war to the Cape of Good Hope, where he prosecuted **2d DIVISION.** his profession. During his residence there, he wrote to Scotland soliciting in marriage Miss Margaret Millar, a daughter of Mr Alexander Millar, watchmaker in Montrose. She accepted, and went out to the Cape, accompanied by one of her sisters, where she was married to Dr Shand on the 12th March, 1819. The parties returned to Great Britain in 1826, and after spending some time in London, came to Edinburgh in 1827. They resided for some time in Dean Terrace, but towards the end of 1828 they removed to Lothian Street. In the meanwhile disputes had arisen between them; in February 1829 he went to Liverpool; and in March she raised an action of alimony, on the ground of desertion. Thereafter, in April, a deed of separation a mensa et toro, was executed, and at the same time, and by the same deed, a submission was entered into to Mr John Hope, and Mr Patrick Robertson, advocates, to determine the amount of alimony that should be paid to Mrs Shand during the separation, and certain other points. The submission continued in dependence for upwards of a year. When the period to which it was limited was about to expire, Dr Shand, (for causes variously assigned by the parties,) stated on the record of the proceedings, and also by letters to his wife, that he wished to revoke the contract of separation, and to terminate the submission, and intimated, under protest, a formal deed of revocation. Mrs Shand refused to accede, and the arbiters determined to give decree quantum valeat. They accordingly issued a decree-arbitral, by which they fixed the amount of alimony, and pronounced various

findings upon other matters, unnecessary to be here detailed. Thereafter No. 210. Dr Shand raised an action of reduction of the decree arbitral, on the ground that the powers of the arbiters being derived solely from the contract of separation, had ceased by the revocation, and their decree was therefore null and void. He also concluded to have it found, that the contract of separation being revoked, and the state of separation terminated, the decree arbitral, which bore ex facie to be in force only pending the separation, had become ineffectual and inoperative, and that he should be declared free and unaffected by it in all time coming.

Mrs Shand pleaded in defence that the separation was not voluntary, but occasioned by such maltreatment of her by Dr Shand, as would have supported a legal claim for judicial separation.

A record was made up and closed, in which averments were made, and a great many letters were produced, and founded upon by both parties, relating to the whole period of their married life, by means of which Mrs Shand endeavoured to establish a case of constant maltreatment by Dr Shand; while he, on the other hand, referred to letters from Mrs Shand, as proving that her averment of constant and unmitigated maltreatment down to the date of separation, was inconsistent with the facts, and her own previous statement of them. The Lord Ordinary ordered Cases, with which he made avizandum to the Court, accompanied by the subjoined note.*

* "NOTE.—As it does not appear to the Lord Ordinary that there are sufficient grounds on which to decide the cause, and as there are evident difficulties as to the mode of procedure, he thinks that it can only be effectually disposed of by the Court. On the merits, he makes the following remarks:—

"1. A contract of separation, bona gratia, is revocable by either party declaring his or her will to live again in family. This power may be exercised unfairly, if it is done pending a negotiation for settling the terms of a separation already agreed on. But though no one can approve of such conduct, any objection to it, in a legal view, can be of little avail,—seeing that, after the contract has been finally settled, whether by decree-arbitral or otherwise, it may be revoked at any time. In this case, the arbiters seem to have done right in pronouncing their decree, *valeat quantum*. But the effect of it, after the pursuer's protest and revocation, remains for consideration.

"2. If the contract of separation proceeded on grounds which would have warranted a decree of separation, *a mensa et toro*, it cannot be revoked.

"3. Previous to the submission, the defender had raised a summons of aliment in this Court. That summons appears to the Lord Ordinary to be of some importance in the cause, though the defender, in her case, has passed it over without notice. She did not then claim a separation *a mensa et toro*; and though she did allege maltreatment, the averment was limited to the period posterior to the removal of the parties from Dean Terrace to Lothian Street, in the end of the year 1828, and is joined to a statement that the pursuer had left the kingdom, and 'refuses to return, or to receive his wife into family with him'; and the conclusion is for aliment during her life, 'or, at all events, during the time of their separation.' This summons was,

No. 210. Pending the reduction, Dr Shand raised a separate process of adherence against Mrs Shand, before the commissioners of Edinburgh. To that action

Feb. 28, 1832.
Shandy v. Shand.

of course, executed after the rupture between the parties had become open. The submission proceeds on the simple narrative, that the parties had agreed to live separately in all time coming, and, with this view, to enter into a contract of separation, to be adjusted by the arbiters; and they submit 'all demands, claims, disputes, questions, and differences, depending and subsisting between them, upon any account, occasion, or transaction whatever, in the premises.' In these circumstances, whatever might be competent to the defendant in a proper action of separation a mensa et toro, and though she may be entitled, in this action, to prove whatever was averred in the depending summons, it may be doubted whether she can support the contract of separation and decree-arbitral, by averments of ill-treatment at the Cape many years before, which formed no part of the grounds of that contract.

" 3. The Lord Ordinary must confess, also, that he has doubts, in point of legal principle, founded in the strongest reasons of moral expediency, whether, where parties have lived together for a long course of years without complaint, and an open difference at last arises, it be competent to go into an enquiry as to circumstances of a remote date, in order to prove a case of maltreatment. If there is ill-treatment of a late date, it will be enough: if there is not, will the Court allow a proof of old facts, taking place in another country? Even the worst offence of all, adultery, is held to be forgiven by subsequent cohabitation: but to allow an enquiry into every altercation or hasty word which may have passed between a man and his wife eight, ten, or twelve years ago, seems to the Lord Ordinary to be a proceeding of some danger to the wellbeing of society.

" 4. If the proceeding is competent, the Lord Ordinary thinks that the statement ought to be more specific than it is in the condescension; and some idea should be given of the sort of proof proposed to be adduced. For the very statement of the defendant is, that the most material facts were known only to herself, and were concealed by her; and unless there be a probability of some fair untainted evidence being obtained, there seem to be obvious reasons for not allowing so wide a proof.

" 5. The pursuer pleads, that the letters of the defendant and her sister produced, are sufficient to disprove the averments as to ill-treatment at the Cape. The Lord Ordinary is of opinion, that, if the enquiry be otherwise admissible, those letters are not sufficient to exclude other proof. They are, indeed, very strong as to a certain period, and that the period to which the most particular averments apply. It is not that the defendant was silent as to her alleged wrongs: Both she and her sister are unnecessarily writing positive assertions of the pursuer's uniform kindness to her; and to attempt to get over this, by saying that the pursuer forced them so to write, when not one letter of a contrary strain is produced, and it is known that Dr Shand was constantly absent on his professional duty, is surely but a very unsatisfactory explanation of the total repugnance of those letters to the defendant's present statements: One letter, indeed, by the defendant, is dated at the Cape from a friend's house, and bears that the pursuer was not then living there, and had only been once there since the defendant left her country residence some time before. The Lord Ordinary must farther take notice of what he thinks a most extraordinary blank in this part of the case. Why are no letters by the defendant or Miss Millar to their own mother or sister produced? They were examined as havers, and called on to produce all such letters referring to the pursuer's conduct; and they answer, that they have none. But is this by construction of the terms, and of the nature of any letters written? Or does the defendant mean that no letters were written by her to her

Mrs Shand put in defences, contending, that the commissaries had no jurisdiction, and that it was inexpedient to proceed with a separate action of adherence there, while the whole merits were involved in the reduction pending in the Court of Session, which had now the consistorial jurisdiction conferred upon it. Dr Shand then brought an advocation of the process of adherence, ob contingentiam, and the Lord Ordinary, without having a record prepared, made avizandum with it to the Court.

Feb. 28, 1832.
Shand v. Shand.

LORD GLENLEE.—I think there must be further investigation. A voluntary contract of separation may be put an end to by either party ; but always with this exception, that if the party seeking a separation could instruct grounds sufficient to support a decree of separation, a contract to the same effect is not revocable by the other party. I would like to see more as to that.

mother and sister ? Mrs Millar's letters produced seem to imply, that there were such letters, and that they did speak of her husband, and her own condition,—as every one must suppose they naturally would. If they existed, and have been destroyed, that should be stated. But the Lord Ordinary must own, that at present this matter is left in a very unsatisfactory state. Such letters ought to be by far the most important evidence in the cause.

"But still the Lord Ordinary could not shut the door merely on the letters already produced. His own belief is, that the unhappiness of the parties did begin before they left the Cape, but posterior to all the letters written from thence which are produced ; and if the averment were so shaped, they afford no evidence against it. The pursuer's late letters import this ; though they by no means admit that he was ever deficient in kindness.

"6. If the defender's case were rested on the recent facts in this country, it would be easily reached ; and the Lord Ordinary thinks that, *prima facie*, it is very strong. For he thinks it a fair question, whether the pursuer's conduct and treatment of the defender on the occasion of his going to Liverpool, does not itself make a case of ill-treatment to entitle her to a legal separation. The whole of that proceeding, as proved by the documents produced (the pursuer having agreed to admit copies of the two letters improperly destroyed), appears to the Lord Ordinary to have been, in a high degree, injurious and improper. Whether it could be justified or explained by other evidence, he will not presume to say. But it would be enough, in his mind, when joined with the averments of other ill usage during the residence in Lothian Street, to make a relevant case. The defender, however, will not so plead her case, but demands a proof of all facts since the constitution of the marriage.

"7. In this state of the cause, the difficulties are in these two points : 1. To what extent a proof should be allowed ; and, 2. In what manner it should be allowed. The cause is in its nature consistorial, though not so brought. The Lord Ordinary has no doubt of the competency of defending the decree by offering such proof in this action. But he thinks, from the nature of the case, that the proof should be taken by commission, and not by a verdict, according to the spirit of the statutory rule in all consistorial causes.

"The defender asks a judicial examination of the pursuer. If any such proceeding were thought expedient, the Lord Ordinary thinks that both parties must be examined. But in so far as the averments may relate to facts of which there can be no evidence but the oath of the party, he doubts the competency of allowing the examination, as well as the expediency of such a measure generally."

No. 210. **LORD MEADOWBANK.**—I am entirely of opinion with Lord Glenlee in the view he has expressed ; but then the question still remains, into what sort of investigation are we to admit parties ? I confess I cannot accede to the proposition contained in the third head of the Lord Ordinary's note. It appears to me that the correct view is almost the converse. A very considerable degree of forbearance is to be expected and assumed betwixt married persons. It is for the wellbeing of society and the married state, that such natural and necessary forbearance should not be held to exclude parties from leading a proof of former delinquencies, when the conduct of the party complained of becomes at last so outrageous as to be bearable no longer. Therefore, I am for admitting this lady to the proof she claims. She distinctly avers a continuance of maltreatment. *Ex facie* of the letters, there was great forbearance on her part in communicating her wrongs, and I do not think the gentleman's letters can obtain for him the benefit of a favourable opinion.

LORD CRINGLETIE.—I also agree with Lord Glenlee on the point of law, and would like to see further into the case. But I do not think this lady's averments, as they stand, relevant to go to proof. Wherever her averments are distinct, they seem to me contradicted by her letters. She complains of her personal safety being endangered, yet she condescends upon no personal violence. If there was no personal violence offered, how can a question of personal safety arise ? In going over the whole condescendence I can find no act of personal violence alleged, unless the story of the Doctor flourishing his pistols amount to such an allegation, which I do not think it does. As to the lady's assertion of "ungovernable passion and violence," what is meant by that ? These are vague phrases, and seem to me to be disproved by the rest of her statements. Can the passion be called ungovernable, or the violence, where no violence was offered ? (His Lordship here went into the details of the letters, to show that the facts were at variance, on Mrs Shand's own showing, with her general averments of ill-treatment.) It has been well observed, and I concur, that if there were any grounds of legal separation, then the decree-arbitral must subsist, but it does not appear to me that any such are relevantly stated. It seems to me that Dr Shand was a man not likely to commit violence, though of a peculiar temperament ; and, under the whole circumstances, I think a woman of sense would not have cast him off for the extravagancies stated. I am of opinion, however, that the arbiters did their duty ; there were certain points fairly before them, and I think they were right to disregard the revocation by Dr Shand, and to pronounce their decree quantum valeat ; but I doubt if there are legal grounds for a separation in this case, or that the statements are relevant to support the proof offered by Mrs Shand.

LORD JUSTICE-CLERK.—I cannot arrive at the conclusion that we are warranted, *hoc statu*, to repel the reasons of reduction, or sustain this decree-arbitral ; and I never dreamt that we were now to go into all this mass of correspondence. We are not in a concluded cause. No proof has been yet allowed ; and in the meantime I shall reserve my opinion upon the merits and bearings of the evidence, into which I will not enter at present. But I never can accede to the proposition, that the only legal ground of matrimonial separation must rest on personal violence. That is not the law of the country,—and I will venture to say, it is not the law of any civilized land. A train of maltreatment may occur in the married state—to be viewed and weighed according to the status of the parties in society—perfectly sufficient to found a claim of judicial separation, without an approach to personal violence. When I look at the correspondence,—the fact of the submission for the

purpose of separation, in which Dr Shand is so conspicuous,—I cannot doubt the relevancy of this lady's averments. I also say that she is not precluded from going back in her proof to the very commencement of her married life. It would be a most dangerous abstract proposition to sanction, as Lord Meadowbank has well observed, that because a woman has used that forbearance, and concealment of bad treatment, natural to and laudable in the married state, she is to be precluded from her entire proof when the treatment becomes unbearable. Although the record is closed in the reduction, I think we have still the means of doing what is necessary here. There is a process of adherence before us on avizandum. In that process we are entitled to have a regular record made up; and I beg to make this observation, that when the new condescendences are put in, we shall expect to find them purified from much of what is in the former. But my opinion is, that this lady is not precluded from any part of her proof; and I agree with the Lord Ordinary that this is a case for proof on commission, and not an issue to a jury.

LORD CRINGLETIE.—I agree with what your Lordship proposes. I did not mean to treat this as a concluded cause, nor did I maintain that nothing but personal violence could make a relevant case of separation. What I said was, that nothing relevant was stated here, and that the general allegations were inconsistent with the absence of personal violence. I think your Lordship's view just confirms mine.

THE COURT accordingly remitted to the Lord Ordinary to conjoin the actions, and to make up a record in the process of adherence.

HUGH M'QUEEN, W.S.—JAMES ARNOTT, W.S.—Agents.

HECTOR KEMP, Petitioner.—*Robertson—W. Bell.*
ALEXANDER M'KENZIE, Respondent.—*G. G. Bell.*

No. 211.

Bankrupt—Sequestration—Trustee.—A trustee on a sequestered estate having, without objection by the bankrupt, failed to report the acceptance of a meeting of creditors of an offer of composition, and having also, without objection by the bankrupt, devolved the management of the estate upon the cautioners, a petition and complaint by the bankrupt against the trustee, alleging delay and mismanagement, refused in so far as penal, but sustained to the effect of requiring the trustee to take the statutory steps.

KEMP's estates were sequestered under the bankrupt act, and M'Kenzie elected trustee in January 1827. On the 3d September 1827, a meeting of creditors unanimously agreed to accept an offer, made by the bankrupt, of 5s. 6d. in the pound on the whole debts due, and directed the trustee to present the usual application to the Court for discharge and exoneration. Kemp, along with two cautioners, M'Kenzie of Millbank, and M'Kenzie of Contin, executed a bond and lodged it with the trustee, and it was admitted that more than nine-tenths of the creditors in number and value had agreed to accept the composition. The trustee did not report the proceedings in terms of the 59th section of the bankrupt act, but it ap-

No. 210.
Feb. 28, 1832.
Shand v. Shand.
Kemp v. MacKenzie.

Feb. 28, 1832.
2d Division.
Ld. Moncreiff.
F.

No. 211.

Feb. 28, 1832.
Kemp v. Mac-
kenzie.

peared that he had not been called upon to do so by any requisition from Kemp. While the composition still remained unapproved of by the Court, the trustee allowed the cautioners to intrumit with and manage the bankrupt estate ; but this was done with the knowledge, and apparently with the consent, of Kemp. Four years after the date of the sequestration, and while he still remained undischarged, Kemp presented a petition and complaint against the trustee, stating that he had failed to take steps in terms of the statute to get the composition carried into effect, and that he had unwarrantably delegated the management of the estate to the cautioners. He therefore prayed their Lordships "to ordain the said Alexander Mackenzie, trustee foresaid, forthwith to take the necessary steps for obtaining your Lordships' approval of the foresaid composition ; or failing thereof, or in the event of the said arrangement, by reason of the foresaid irregularities or otherwise, proving abortive, then to ordain the said Alexander Mackenzie immediately to proceed in realizing and distributing the sequestered estate, in so far as that is now practicable, in terms of the statute ; without prejudice to the petitioner's claim of damages against the said Alexander Mackenzie, trustee foresaid, William Mackenzie, late of Contin, now residing in Ferrintosh, and Alexander Mackenzie, Millbank, on account of the illegal, unwarrantable, and injurious proceedings above set forth, and also without prejudice to the claims of the petitioner's creditors against the said parties, or any of them ; as also, to find the said Alexander Mackenzie, trustee foresaid, liable to the petitioner in the expenses of this application, and of the procedure to follow hereon." None of the creditors concurred in this complaint.

The Lord Ordinary pronounced this interlocutor : " In respect of the decision of the Court in the case of Pentland v. Paterson, December 8th, 1827, finds, that it was the duty of the respondent, under the statute, forthwith to report the proceedings of the meeting of the creditors, held on the 3d September 1827, at which, it is admitted, that more than nine-tenths of the creditors in number and value agreed to accept of the composition which had been offered at the preceding meeting. But in respect of the same decision, and of the practice previous to the date of it, and farther, that it does not appear that the complainer made any requisition to the respondent, calling upon him to present such a report, finds, that it cannot be held, that in not doing so, he committed any wrong sufficient to warrant a petition and complaint against him, at the instance of the bankrupt himself : finds, that it was the duty of the respondent, under the statute, in regard to the interest of the creditors and all concerned, not to surrender the possession of the bankrupt estate, as long as the contract of composition had not been approved of and confirmed by the Court : finds, therefore, that the respondent acted incorrectly in giving up the management and possession of the estate to other persons, as admitted in the record ; but in respect that it is admitted by the complainer that the possession was given to Alexander Mackenzie of Millbank, and William

Mackenzie, the two persons who, along with the complainer, had subscribed No. 211. the bond of caution for payment of the composition,—finds that, though the complainer denies the respondent's statement, that the possession was given to the complainer himself, in conjunction with the cautioners, he does not allege that the fact of their having been so allowed to take possession was unknown to him, and that the Lord Ordinary is satisfied that it must have taken place with his consent, express or implied; that no complaint, judicial or extrajudicial, appears to have been made by him on the subject, during nearly four years which elapsed previous to the bankruptcy of Alexander Mackenzie; and further, in respect that none of the creditors complain of the proceedings, finds that the complainer is not now entitled, under this complaint, to insist on any penal conclusions against the respondent on that account; but ordains the respondent forthwith to report the proceedings of the said meeting of the creditors, on the 3d September, 1827; and, in the event of the composition not being approved of, to proceed to recover the estate, in so far as it may be still in existence; and, in the meantime, to take such measures as the circumstances may admit of for the safety of all concerned: finds no expenses due to either party, and decerns."

Kemp reclaimed, in so far as the Lord Ordinary found, that the trustee committed no wrong to warrant a petition and complaint; that no requisition was made on the trustee, or a delegation of his management sanctioned; and did not reserve the claim of damages, and find him entitled to expenses.

LORD JUSTICE-CLERK.—The Lord Ordinary ordains the trustee to report the proceedings, and take the necessary measures, and repels the penal conclusions of the complaint. Under the circumstances, and particularly considering the knowledge which Kemp had of what was going on, I agree with his Lordship.

LORD GLENLEE.—Certainly the trustee ought to report the meeting of creditors, and so the Lord Ordinary has found; but the prayer of Kemp's petition was altogether absurd. He does not directly pray that the trustee should be ordained to report and proceed in proper form. He seems to devolve upon the trustee an alternate duty. As for taking the necessary steps towards the discharge, that properly belongs to the bankrupt and his friends. The Lord Ordinary has done much better; he has at once ordained the trustee to lodge his report, and in the event of the composition not being approved of, to proceed to recover the estate.

THE COURT adhered.

JOHN M'KENZIE, W.S.—JOHN R. ROBERTSON, W.S.—Agents.

No. 212. JAMES STEWART and CURATORS, Pursuers.—*D. F. Hope—Henderson.*

Feb. 29, 1832.
Stewart, &c. v.
Baikie, &c.

JAMES BAIKIE, Defender.—*Shene—Marshall.*

ALEXANDER SCOT, Defender.—*Rutherford—Sandford.*

Cautioner—Tutor—Factor.—1. Where the Crown appointed three tutors dative, and the Court had found that the tutory subsisted, notwithstanding the death of one of them—held that the bond of caution granted for the tutors when the gift was obtained, subsisted also, and covered the whole intromissions of the surviving tutors or their factor. 2. Two out of three tutors dative, having subscribed a deed of factory in favour of the third, and he having accepted, found caution, and acted, and one of the two subscribers having died before the end of the tutory—held that the factory did not fall by his death; that the cautioner for the factor remained liable, and that he was bound to relieve the cautioner for the tutors as to all the acts and intromissions of the factor.

Feb. 29, 1832. JAMES STEWART of Brugh died intestate in March 1811, leaving the pursuer, an only child, in infancy, and without tutors or curators. On the 2d of June 1814, a gift of tutory was obtained from Exchequer, in favour of Mrs Stewart, the pursuer's mother, Thomas Strong, merchant in Leith, and Alexander Stevenson, writer in Edinburgh. The gift was in

1st DIVISION.
Lord Eldin,
Fullerton, and
Moncreiff.

B.

these terms: “ Nos fecimus, constituimus, et ordinamus dilectos nostros Magistram Marionam Stewart, Thomam Strong, et Alexandrum Stevenson, tutores dativos dicti Jacobi Stewart, ac administratores omnium et singularum terrarum suarum, hereditatum, possessionum, bonorumque omnium, mobilium et immobilium, usque ad ejus legitimam etatem pervernit, proviso tamen quod dicta Magistra Marionia Stewart, Thomas Strong, et Alexander Stevenson, faciant et perimplant dicto Jacobo Stewart omnia et singula quae tutor dativus de jure, seu regni nostri consuetudine, facere et perimplere tenetur. Et cum ad ipsius legitimam etatem pervernit, sibi et propinquioribus suis amicis, de dictis terris, firmis, redditibus, et bonis fidelem computum et ratiocinium reddant.”

A bond of caution was granted at the same time, by the tutors and by Baikie, in these terms: “ We, Mrs Marion Stewart, otherwise Strong, relict of the deceased James Stewart, last of Brugh, Thomas Strong, merchant in Leith, and Alexander Stevenson, writer in Edinburgh, as principals, and with and for us, James Baikie, Esq. of Tankerness, as cautioner in manner and to the effect after mentioned, considering that his Majesty, with the advice and consent of the Right Honourable the Barons of his Court of Exchequer in Scotland, hath by gift, &c. : Wit ye us, therefore, to be bound and obliged, as we the said Mrs Marion Stewart, otherwise Strong, Thomas Strong, and Alexander Stevenson, as principals, and I, the said James Baikie, as cautioner, bind and oblige ourselves, conjunctly and severally, and our heirs, executors, and successors, to make just compt, reckoning, and payment to the said pupil, when he shall arrive at the age prescribed by law, of all intromissions,

omissions, commissions, and acts of management, had by us, the said No. 212. tutors, under, and by virtue of the said gift as accords of the law; and that we, the said tutors, shall give up inventories of the said pupil, his whole means and effects, both heritable and moveable, conform to and in terms of the Act of Parliament made thereanent, and that under the penalty of £200 sterling, over and above performance. And we, the said tutors, bind and oblige us, and our foresaids, jointly and severally, to free and relieve the said James Baikie, and his foresaids, of his cautionary for us in the premises, and of all damages and expenses he may sustain there through, in any manner of way whatsoever."

Feb. 29, 1832.
Stewart, &c. v.
Baikie, &c.

The management of the estate was intrusted to Stevenson, who intromitted till 1819, without having any written deed of factory. On the 12th of April of that year, a factory was granted to him in these terms: " We, Mrs Marion Strong, otherwise Stewart, and Thomas Strong, merchant in Leith, two of the tutors-dative of James Stewart, now of Brugh, only son and heir of entail of the deceased James Stewart, Esq. last of Brugh, conform to gift of tutory in favour of us and Alexander Stevenson, writer in Edinburgh, dated the 2d day of June, 1814 years, considering that the said Alexander Stevenson has hitherto acted as our commissioner, factor, and cashier, in the management of the said pupil's affairs, and that it is necessary for us to confirm his appointment by a regular commission, with the usual powers, and having full confidence in the integrity and ability of the said Alexander Stevenson for that purpose; therefore we do, by these presents, nominate, constitute, and appoint the said Alexander Stevenson to be our commissioner, factor, cashier, and agent, for the purposes after mentioned, giving, granting, and committing to him full power, warrant, and commission, for us and in our names, to manage, transact, and conduct all the affairs and concerns of the said James Stewart, our pupil, as fully, freely, and completely, in all respects, as any other commissioner, factor, cashier, or agent, named with the most ample powers, could do in the like cases; and particularly, without prejudice to this general commission, with full power to our said commissioner to superintend the management of the whole affairs and concerns of the estates in Orkney and Shetland, belonging to the said James Stewart, and of any other lands or heritages which he may acquire or succeed to in time coming; as also, with power to sell and dispose of the whole kelp," &c.; " as also, for us and in our name, as tutors fore-said, to demand, uplift, receive, and, if necessary, pursue for all debts and sums of money (exclusive of principal sums lent out on bond) due or to become due to the said James Stewart, now of Brugh, or to us as his tutors, by any person or persons, receipts, discharges, and acquittances therefor, or conveyances thereof, to grant, which shall be equally effectual as if subscribed by ourselves; as also, with power to disburse and lay out such sum or sums of money as may be found necessary for the aliment, education, or expenses of the said pupil, or in the management of his

No. 212. estate and affairs ; as also, with power to settle and clear accounts with
 Feb. 29, 1832. Mr George Turnbull, present factor on the estate of Brugh, or with any
 Stewart, &c. v. other factor or factors to be employed by us in Orkney in the manage-
 Baikie, &c. ment of the lands and estate belonging to the said pupil, or in any part
 of the affairs of the said James Stewart connected therewith, and to dis-
 charge the said factor or factors of their intromissions and management,
 upon receiving payment of the balances that may be found due by them ;
 as also, with power to our said commissioner to pursue in our names, as
 tutors foresaid, all such actions as may be judged necessary in the manage-
 ment and execution of the said pupil's affairs, and to defend us and him
 in all actions that may be brought against us as tutors foresaid, or against
 the said pupil, and in general to do every thing in execution of the powers
 hereby committed to him that we could do ourselves if personally present ;
 ratifying hereby and confirming all and whatsoever acts and deeds our
 said commissioner shall lawfully do or cause to be done in the premises :
 but providing always, as it is hereby specially provided and declared, that
 the said Alexander Stevenson shall, by acceptance hereof, be bound and
 obliged to hold just compt, reckoning, and payment to us or our quorum,
 for his whole intromissions, by virtue hereof, after deduction always of his
 necessary disbursements, charges, and expenses in the execution hereof,
 with a reasonable gratification for his own trouble therein ; declaring the
 said Alexander Stevenson's acceptance hereof shall not hurt or prejudge
 his right as one of the tutors of the said James Stewart, and that this com-
 mission shall subsist until recalled in proper form."

On the same day, a bond of caution was granted by Stevenson, and Alex.
 Scot, W.S. his partner in business, which, after narrating that Mrs Stewart
 and Mr Strong, "tutors-dative of James Stewart," &c. had appointed
 Stevenson to be their commissioner, factor, &c. proceeded thus : "Therefore I, the said Alexander Stevenson, as principal, and Alexander Scot,
 writer to the signet, as cautioner and surety with and for me, do hereby
 bind and oblige ourselves, conjunctly and severally, and our heirs, executors,
 and successors whomsoever, that I, the said Alexander Stevenson,
 shall hold just compt and reckoning with the said tutors, or any person
 appointed by them, not only for my whole actings, management, and intro-
 missions whatsoever already had by me, with the estate, funds, and effects
 of the said James Stewart, as one of, and as acting for the other tutors-
 dative since the date of the said gift of tutory-dative, but also for my whole
 actings, management, and intromissions whatsoever, to be had by me, in
 virtue of the before-mentioned commission and factory, or as their factor,
 cashier, or agent, in any manner or way, and that I shall submit to the
 said tutors, for their examination and satisfaction, my accounts, yearly, or
 so often as I shall be required by them so to do ; and that I, the said Alex-
 ander Stevenson, shall make payment to the said tutors of all sums of
 money which I shall uplift and receive in virtue of the said factory and
 commission, or the balance that may remain due thereon at the time, and

that under the penalty of £100 sterling, over and above payment and performance; and I, the said Alexander Stevenson, bind and oblige myself and my foresaids to free and relieve, and harmless keep the said Alexander Scot and his foresaids from his cautionary obligation above written, and of all costs, skaith, damage, and expenses which he may any ways sustain or be put to by his becoming caution for me, in manner foresaid."

No. 212.
Feb. 29, 1823.
Baikie, &c.

Strong died in August 1820; and Stevenson continued to intromit as formerly. Baikie, the cautioner for the tutors, raised an action in 1823, before this Court, against Mrs Stewart and Stevenson, the representatives of Strong, and against the pupil, and his tutors and curators generally, concluding for exoneration from the bond of caution.*

Stevenson and Mrs Stewart lodged defences. Decree was pronounced, the extract of which was of the following tenor: "After sundry steps of procedure had taken place in said action before the Lord Cringletie, Ordinary thereto, his Lordship, upon the 3d day of June 1823, found that the pursuer's bond of caution ceased, and was at an end at the death of Mr Thomas Strong, in August 1820, and ordained the defenders to give in a state of their accounts up to Mr Strong's death, and that against the then next calling." The extract farther bore, that after a remit to an accountant, who made a report in January 1826, finding that a balance was due to Stevenson at the death of Strong, the Lord Ordinary, and by him, the Court, "exonerated and discharged, and hereby exoner and discharge the pursuer, James Baikie of Tankerness, of the cautionary obligation undertaken by him for the defender." The balance due to Stevenson, as in August, 1820, was said to exceed £300.

Stevenson continued to act as formerly, and it was alleged, that between the latter period and February 1825, he had intromitted to an extent which left him indebted to the estate in upwards of £2000. On the 23d of that month, the popularity of the pursuer terminated; and having chosen curators, he, along with them, raised an action against Baikie, concluding for reduction of the decree of exoneration, and that Baikie should, as cautioner, be ordained to count and reckon for the intromissions of the tutors, from the date of the gift till February 1825.

In defence, Baikie maintained, inter alia, that the tutory fell by the death of Strong, and that, consequently, the bond of caution fell with it. The Court, on January 28, 1829, found "that the tutory in question did not fall by the death of Mr Strong, and decerned in the reduction accordingly, and appointed parties to debate on the consequences to follow from this judgment."¹ The cause was then remitted to the Lord Ordinary.

* Before raising it, he stated that he had presented a petition to the Court of Exchequer to have his bond delivered up; but, on finding it was not the practice to deliver up such bonds, he raised his action in the Court of Session, and, in order to obviate an objection stated to that action, he withdrew his application in the Court of Exchequer.

¹ Ante, VII. 280.

No. 212. In the meanwhile, the pursuer and his curators, founding on the deed of
 factory and the relative bond of caution, raised an action against Steven-
 Feb. 29, 1832. Stewart, &c. v. son (who had now become bankrupt), and also against his cautioner Scot,
 Baikie, &c. concluding for an account of the whole intromissions of Stevenson, from
 the commencement of the tutoy till the expiry of the pupilarity, and for
 decree against Scot, as jointly and severally liable with Stevenson for any
 balance remaining due.

In this action, Lord Eldin, on June 29, 1827, "found the defender Alex. Scot liable for the balance of the intromissions of Alex. Stevenson, under the factory in question," &c.; but Scot having reclaimed, and before his reclaiming note was advised the Court having pronounced the judgment already quoted in the relative action against Baikie, remitted this cause also to the Lord Ordinary; "ob contingentiam, with power to hear parties as to the consequences which ought to follow from the judgment pronounced by the Court, in the case at the instance of Stewart v. Baikie, and to proceed farther," &c. The case against Stevenson and Scot having been argued before Lord Fullerton, he appointed the parties to give in Cases to himself, and issued the subjoined note.*

* "NOTE.—After the full discussion which the case has received, it is with great reluctance that the Lord Ordinary issues the above order. But, upon a full consideration of the whole circumstances, he foresees the possibility of great inconvenience, and even injustice, in separating entirely the present case from that depending between the same pursuers and Mr Baikie, the cautioner for the tutors, which has not been argued before him, and which must now, in all probability, fall to be decided by another Judge.

"It is due to the parties, however, to state the view entertained by him on the points in dispute. If the factory had been granted to a third party by two tutors in their tutorial character, with the implied sanction of the remaining tutor, and had thus been a proper tutorial act, the judgment of the Court, holding the tutoy not to have fallen on the death of Mr Strong, would have been conclusive against the cautioner for such factor. But here there is the peculiarity, that the factory or commission is granted by two individual tutors in favour of a third, Mr Stevenson, and Mr Scot is cautioner for Mr Stevenson's intromissions, 'in virtue of the before-mentioned commission and factory, or as their factor, cashier, or agent, in any manner of way.' This specialty gives rise to two questions. First, Whether the factory, not being a proper official act of the whole tutorial body, did not fall by the death of one of the individuals who had granted it; and, Secondly, What is the extent to which the cautioner is bound?

"In regard to the first of these points, the Lord Ordinary, though with some hesitation, inclines to the opinion, that the commission may be held in consequence of the peculiar nature of the appointment of the tutors, as ascertained by the judgment of the Court, to have been granted by the two tutors and the survivor of them, and therefore did not fall by the death of Mr Strong. The second question is attended perhaps with still more difficulty. The cautioner is bound for Mr Stevenson's intromissions, in virtue of the commission and factory, or as the factor, cashier, or agent of the two tutors who granted the factory. But Mr Stevenson being also a tutor himself, and whose power in that character was expressly saved in that commission and factory, had a right to intromit as tutor, which circumstances raise the question,

The Cases having come before Lord Moncreiff, he reported them, and No. 212. also Cases in the question with Baikie, to the Court, and at the same time issued the subjoined note.*

Feb. 29, 1832.
Stewart, &c. v.
Baikie, &c.

whether any, or which of his intromissions are to be held as intromissions in virtue of the factory, for which intromissions alone the cautioner was bound? This again seems to lead to an enquiry into the true character and effect of the commission or factory; whether it should be treated as a commission to a third party, whose whole intromissions must be imputed to it alone, or as a mere devolution on one tutor by the other two, of the whole powers previously shared by them all? Now, it appears to the Lord Ordinary, that this is a point in which Mr Baikie, the cautioner for the tutors, may have a material interest, and which does not admit of being separated altogether from this case; as, according to the first view, Mr Baikie would, in all probability, have the benefit of Mr Scot's cautionary obligation, while, according to the second, that obligation might possibly be construed as merely protecting the two individual tutors who granted the commission, and as not available to Mr Baikie in regard to Mr Stevenson's intromissions, which intromissions might be held to be properly imputable, not to the factory or commission, but to his inherent powers as tutor, for the due exercise of which Mr Baikie was unquestionably bound. Accordingly, Mr Baikie's fourth plea in law seems to involve a question of this kind, and besides, the remit of the Court in the present case is expressly granted *ob contingentiam*, meaning, as it is presumed, the contingency of the case with that in which the Court had pronounced judgment, being the case of Mr Baikie."

* "NOT.—The Lord Ordinary regrets that, in this very difficult cause, he has not had the benefit of a debate. It had been fully heard, and the cases had been ordered by Lord Fullerton, before it devolved on the present Lord Ordinary; and after he had considered the cases, he found it necessary to make some orders in the relative action of Stewart v. Baikie, in order that both causes might be disposed of at the same time, according to the intention of the Court. Both causes being now fully prepared, he thinks it expedient to report them. They have not been conjoined, the interests and pleas in each being in a great measure distinct, though so materially connected that they ought to be decided together.

"The points in the case of Baikie are these —

"1. Is the judgment of the Court, reducing the decree of exoneration to the effect of finding that the tutory did not fall by Mr Strong's death, conclusive against its operation as a release to Mr Baikie?

"2. If it is not, is that decree res judicata as to the termination of Mr Baikie's obligation as cautioner, either at the death of Mr Strong, or at the date of the summons? The Lord Ordinary thinks that it is not res judicata. 1st, Because the judgment may have depended on the point on which the Court has already reduced it; and 2d, Because, though, by that decision, it is settled that the pupil was not without tutors, those tutors were the very persons for whom Mr Baikie was cautioner; and therefore a tutor *ad litem* was indispensable.

"3. Did Mr Baikie's obligation fall by the death of Mr Strong? The Lord Ordinary thinks that there is much greater difficulty in this point than the pursuer is willing to allow. It is finally settled that the tutory did not fall. But the very peculiar terms of the bond of caution do certainly leave a question of importance open, whether the cautioner is liable for the acts of two of the tutors, after the death of one has removed his superintendence, and put an end to his obligation of relief. There is great difficulty in holding that the tutory was so framed as to subsist, and the bond of caution so expressed as to fall. It could not be so intend-

No. 212. *Pleaded by Baikie—*

Feb. 29, 1832. 1. Though the Court has found the tutoy not to fall by the death of Stewart, &c. v. Strong, and in so far decreed in the reduction of the decree of exonerating Baikie, &c.

ed: But whether it was, that the bond was framed on a different view of the effect of the tutoy, or from what other cause, the terms of the bond are such as to render it very difficult, under the common rules as to cautionary obligations, to obviate Mr Baikie's plea. The Lord Ordinary does not mean to say, that he has formed a decided opinion that it is good; but at present the only answer made by Mr Stewart is not satisfactory to him.

" 4. Supposing that the cautioner's obligation did not fall, is Mr Baikie liable for the intromissions of Mr Stevenson as factor? The Lord Ordinary thinks that he is; because, though Mr Stevenson received the money as factor, yet, being tutor also, as soon as he had it in his hands, he was bound, both as tutor and factor, to account for it, and pay it to the minor.

" If it should be found that Mr Baikie is released, the action against Mr Scot will be of great importance to Mr Stewart. But if Mr Baikie should be found still liable, the interest will lie chiefly between him and Mr Scot. The Lord Ordinary, therefore, allowed Mr Baikie to see Mr Scot's paper, and to put in an argument in that view.

" The points in Stewart v. Scot are these:—

" 1. Whether the pursuer has a title to found upon Mr Scot's bond of caution? The Lord Ordinary thinks that there is nothing in the objection that this was not stated as preliminary, because it is equally a defence on the merits. But he is of opinion that the plea is not well founded. He apprehends, that where tutors or trustees have power to grant factories, and they do grant a factory, and take a bond of caution for the factor's intromissions, the bond is available to the minor or constituent, and that it can make no difference that the tutor had previously found caution. He has no idea that Mr Scot's bond was only taken as a protection to Mr Stewart and Mr Strong. The question, to what it binds Mr Scot, is very different.

" 2. Whether the factory fell by Mr Strong's death?

" This is a question of difficulty, and not absolutely resolved by the judgment finding the tutoy to subsist; for the factory being to one of the tutors, it cannot be held that it was so a tutorial act that it must have subsisted as long as the tutoy. If Mrs Stewart had died, it could not have stood,—the factor being himself sole tutor. The question therefore is, whether, as a mandate (clearly different from contracts of lease, loan, &c.), it fell by the death of one of the grantors necessary to its constitution, or, as a tutorial act, subsisted as long as the nature of the tutoy admitted of it. The point is far from being clear. But the Lord Ordinary is inclined to think that it did subsist.

" 3. Whether, if the factory fell, Mr Scot is liable for Mr Stevenson's intromissions, either as tutor or agent? The question whether he would be liable on the ground of Mr Stevenson having acted as agent, is not precisely argued by the defendant, and is not clear. But the Lord Ordinary is of opinion, that there are no words in the bond which could make him liable for intromissions as tutor; and is inclined to think, that notwithstanding the words as to the character of agent, the true spirit and purpose of the bond made it dependent on the subsistence of the factory.

" 4. Supposing that the factory did not fall, did Mr Scot's obligation as cautioner fall by Mr Strong's death?

" This seems to be the most important question in the cause, and it is certainly attended with difficulty. There is nothing in the bond to settle it. Mr Scot, though bound conjunctly and severally with Mr Stevenson, is so bound expressly as ca-

tion, yet, as the summons of exoneration was not rested on the sole medium that the tutory had fallen by his death, the decree of exoneration is not absolutely reduced. The defender was entitled to have pursued a summons of exoneration, even had Strong remained alive; and it is open to him still to maintain that the decree of exoneration is well founded, even though the tutory had not fallen.¹ It is not a decree against a minor indefensus, and it being now fixed that the tutory still subsists, such decree cannot now be challenged.²

Feb. 29, 1832.
Stewart, &c. v.
Baikie, &c.

2. Supposing that the tutory did not fall, still the bond of caution terminated by the death of Strong. It was granted in reference to the intromissions of three tutors, each of whom was bound jointly and severally to the pupil, and jointly and severally to relieve the defender of his bond for the whole. By the death of any one of the three, the defender was liberated, because his obligation was changed, and because he no longer possessed the same relief which he originally held against the liability to which the actings of the survivors might expose him.

3. At the time when Stevenson was appointed factor, he was habite and repute responsible, and caution for his intromissions was taken. The appointment was a competent act on the part of the tutors, and they themselves were not liable, after using the precautions now mentioned, for any deficiency subsequently arising in the factor's accounts. But still less was the defender, as cautioner for the tutors, liable for such deficiency.

Answered by Stewart—

1. The decree of exoneration was reduced without qualification. But,

tioner; and it is no solution of the point to say, that, if Stevenson was liable, Scot is liable: Stevenson must have been liable in every event. But the question, whether the cautioner's obligations subsisted to cover intromissions, had after the death of one of those to whom it was given, must depend on other principles. The cases quoted by the defender are evidently of importance, and some of them come very near to the point. And again, it would be difficult, or impossible, to say that the cautioner would have continued bound, if Stevenson had become the sole tutor. On the other side, if the tutory and the factory both subsisted, and if the bond of caution be held to have been taken for the pupil's benefit, and to be available to Mr Baikie, it is not easy to hold the tutorial act of taking it as having become ineffectual de futuro, by the death of one of the tutors. The Lord Ordinary has not a very decided opinion on this question. He has not been able to get over the general rules applicable to cautioners, as recognised both in the Scotch and in the English cases; but he sees much difficulty in applying them.

" 5. Whether, if the factory subsisted, all the intromissions of Mr Stevenson must be considered as falling under it? If special facts to the contrary were condescended on, this might raise such a difficulty as that suggested by Lord Fullerton. But the Lord Ordinary does not think that it could be maintained as matter of presumption, that money uplifted by the factor was not uplifted in that character, but as one of two tutors."

¹ Bell, 280; Welsh, Feb. 14, 1778 (16873).

² Purves, Feb. 6, 1696 (4. Suppt. 307); Cuby, Nov. 7, 1699 (9017); Oakry, Jan. 23, 1705 (9019); Badenoch, Feb. 10, 1769 (Hailes, 276.)

No. 212. were it open for discussion, the decree is well founded, because no tutor ad litem was appointed, and the only parties called as defenders in the Feb. 29, 1832. Stewart, &c. v. exoneration, besides the pupil, were the two tutors for whom Baikie was Baikie, &c. cautioner.

2. As it is res judicata that the tutoiy did not fall by the death of Strong, it necessarily follows that Baikie's bond of caution also subsists. It was only on finding caution that the gift of tutoiy was granted. The object was, the protection of the pupil's interest; and it was therefore clear that the caution required was corelative with the duration of the tutoiy, to which the pupil and his estate were confided on the faith of that caution.

3. Baikie is liable for all intromissions by the tutors, whether these were had immediately by one or more of themselves, or through the medium of their factor.

Pleased by Scot—

1. The tutoiy fell by the death of Strong;¹ the factory of course fell with it, and the bond of caution for the factor fell also.

2. The defender granted his bond of caution, not to the effect that Stevenson should account to the pursuer, but to the two tutors, Strong and Mrs Stewart. The pupil was amply secured by Baikie's bond; and therefore he was not entitled to found on the defender's bond, and call on the defender to account to him.

3. The factory was a joint mandate by Strong and Mrs Stewart, and came to an end by the death of Strong.² The tutoiy indeed subsisted after that date; but that was because the tutoiy was different in its constitution from a factory under a joint mandate.

4. Even though the factory was held to subsist, yet the bond of caution for the factor fell. The death of Strong deprived the cautioner of one of the parties to whom the factor was made accountable, and whose power of controlling the factor might be one of the chief safeguards which the cautioner relied on at the time of signing the bond. The general principle was the stronger in the circumstances of this case, as no tutor was left except Mrs Stewart, and Stevenson, the factor, himself.³

5. Even if the factory subsisted after Strong's death, it does not follow that all, or any, of Stevenson's intromissions were in the character of factor, rather than that of tutor. But it was only for his intromissions, subsequent to the deed of factory, so far as these were properly factorial, that Scot was liable.

Answered by Stewart—

1. It was decided in the action against Baikie, that the tutoiy did not

¹ Bradshaw, June 15, 1826. Russell's Rep.

² Dig. 17. 1. 238; 3 Eesk. 3. 40; 1 St. 10. 6; 1 Bankt. 18. 17.

³ Philip, Feb. 21, 1809; Ellon Hamond, June 24, 1812; Fell on Guar. 125, 127.



fall by the death of Strong. Though that judgment was not res judicata in this action, it was of sufficient authority to supersede argument.¹

2. The bond of caution by the factor was granted substantially for the benefit of the pupil, who had therefore a right to found upon it. The tutors, after choosing a factor, habit and repute solvent, and causing him to find caution, were not personally liable for his intromissions. But the pupil was secured against these by the factor's bond of caution, in which he had the radical interest, as much as any trustee in a trust estate.²

3. The factory was a proper tutorial act, and its terms bore that it should subsist until recalled. It was granted by Strong and Mrs Stewart, and the act was fully ratified and homologated, though unsigned, by Stevenson, the third tutor, since he had accepted the factory, and found caution.³ It was therefore the act of the whole tutors, though the factory was in favour of one of themselves, with power to act as freely "as any other commissioner, factor, cashier, or agent," &c. This was consistent with universal practice, and equally well founded in principle and authority.⁴ Such a deed did not fall by the death of a single tutor.

4. The bond of caution contained a joint and several obligation, and bore that Stevenson should account for his "whole actings, management, and intromissions whatsoever, to be had by him, in virtue of the before-mentioned commission and factory, or as their factor, cashier, or agent in any manner or way," &c. Therefore the bond of caution covered all Stevenson's intromissions, and rendered Scot liable for the whole.⁵ Whether Scot undertook this extent of liability from being Stevenson's partner, and having a greater check over his proceedings, or a greater interest in his emoluments, it was enough for the pursuer that he did undertake a cautionary obligation, the tenor of which was to cover all intromissions under the factory.

5. Stevenson's intromissions, both prior and posterior to the deed of factory, was in the character of factor, or agent for the tutors. The factory proceeded on a narrative that he had so acted prior to its date, and it gave him the most ample powers for the future. A constant course of acting followed; and in so far as these fell within the powers of factor or agent, they were clearly factorial intromissions. Accordingly the accounts made up by Stevenson bore to be factorial in their title, and contained a charge for salary, which no tutor could make.

When the Cases came to be advised,

Rutherford for Scot, craved leave to put in an additional report, or at

¹ 1 St. 6. 14; 1 Ersk. 7. § 9, 30 and 34.

² Corsbie, Dec. 20, 1627 (5 Supp. 238); Ruthvens, July 13, 1688 (16330); 1 St. 13.

³ Marquess of Abercorn, June 26, 1817 (F. C.); Riddle, Dec. 20, 1728 (5681.)

⁴ Lady Montgomery, June 4, 1822. (Ante, I. 433.)

⁵ 1 St. 17. § 4 and 12.

Feb. 29, 1832.
Stewart. &c. v.
Baikie, &c.

No. 212. least to minute a farther statement, relative to the practice of the Court of Exchequer as to gifts of tutory, when one of the tutors died during Feb. 29, 1832.
Stewart, &c. v. the minor's pupilarity.

Baikie, &c.

D. F. Hope for the pursuer, opposed this as irregular, and too late.

LORD GILLIES.—I conceive that we cannot accede to this proposal. The case comes before us on a closed record, and cases elaborately prepared, and unless this motion be prefaced by an offer to pay the whole expenses already incurred, I think we cannot entertain it.

LORD PRESIDENT and **BALGRAY** concurred.

LORD CRAIGIE dissented.

Rutherford then craved the Court to pronounce an order disposing of the motion.

LORD GILLIES.—That is unnecessary; it is not regularly before us, being incompetently made.

LORD BALGRAY.—In regard to the merits of the case, I at first experienced considerable difficulty in discovering any clear principle to guide me in any conclusions. But I became satisfied that our existing judgment in the case of Baikie, when duly attended to, went a great way towards the disposal of the different points now raised. By that judgment, it is fixed that the tutory did not fall by the death of Strong. The tutory remained in precisely the same legal force till the end of Stewart's pupilarity, as if Strong had lived during the whole period. What then is to be said regarding the pupil's right to call on the cautioners to account in terms of their respective obligations? I own it appears to me that the answer is obvious. Look to the nature of Mr Baikie's cautionary obligation. It is true, that a cautionary bond must be strictly interpreted; but then it is a legal obligation, to which fair effect must be given according to its true import. What then was the obligation fairly in the contemplation of the cautioner at granting his bond, and truly undertaken by him as naturally arising under it? He is the cautioner, on the faith of whose bond the tutory-dative was granted by the Crown, involving in it the power of administering the pupil's affairs and estate during the subsistence of the tutory. The Crown never allow the warrant, on which tutors-dative act, to go out, until caution be found. The object of requiring this, is the protection of the pupil's interests; the gift of tutory is made for the benefit of the pupil, and the caution required is taken for protection. The whole transaction is of the nature of a contract with the pupil, or his representatives, and the cautionary obligation is to the effect that the tutors shall protect the minor's estate. It covers *omissa et commissa*. The cautioner becomes truly the superintendent of the tutors; the Crown trusts to this; and the cautioner sustains no hardship thereby, except that of fulfilling a legal obligation, because if he finds himself exposed to risk which he had not contemplated, as by the death of a tutor, like Strong, on whom he might rely, he may go to Exchequer, and insist on the tutors being called to account for the intromissions, and declare that he shall be no longer bound. I think I have known repeated instances of such procedure in practice, and I have no doubt of his right. But so long as the tutory subsists, and the bond of caution is unrecalled, the cautioner continues liable for all the intromissions of the tutors, and that equally whether they intromit directly, or through the medium of a factor. Had Mr Baikie considered that the tutory fell by Strong's death, and that his own obligation was at an end, he should have gone to the proper Court whence the tutor's authority was derived, and, having represented the death of Strong, he should have

craved to get up his bond of caution, and if the tutory had fallen, new tutors No. 212. would have been named upon new caution being found. But instead of this, the pupil's affairs are allowed to remain in the hands of the former administrators, no Feb. 29, 1832. objection being made to them. Baikie's decree of exoneration is reduced, and I Stewart, &c. v. Baikie, &c. think he remains liable for the acts of the tutors.

In regard to the factory to Stevenson, I am satisfied that it did not fall by the death of Strong. He was one of three tutors, and his death did not effect the subsistence of the tutory. The factory was a tutorial act, in the fair and proper exercise of tutorial powers, by a quorum of the tutors; and it subsisted notwithstanding the death of one of them. Suppose there had been twenty tutors, the act of a quorum is the act of the body—it is the act of the whole. I have no difficulty, therefore, in holding that the factory subsisted, and that the relative bond of caution, having in view the fair meaning of parties, and the principles already adverted to on this subject, subsisted along with it.

LORD CRAIGIE concurred, and thought that both the cautionary obligation of Baikie, and of Scot, remained in full force during the pupilarity; but that Scot was liable in relief of Baikie.

LORD GILLIES concurred, and considered that it would be mischievous to parties for whose relief cautionary obligations are in good faith given and taken, if the grounds of liberation pleaded by either cautioner were to be allowed to loose them from their bonds.

LORD PRESIDENT.—My opinion is the same. In thus constraining the cautionary obligations, we are not losing sight of the necessity which exists for their being strictly interpreted; we are only combining that principle with another which is equally just, that every obligation must be fairly construed according to its true import. Mr Baikie remained a cautioner till the last. Had his faith been pinned to Strong, he might have withdrawn upon Strong's death; but he did not. So long as a tutor survived, or, in other words, so long as the tutory subsisted, Mr Baikie remained liable.

I am also of opinion that the factory subsisted after the death of Strong. And, in addition to what has been said by Lord Balgray, I would observe, that the deed granting the factory, though executed in form by only two tutors, was substantially consented to, and concurred in by the third tutor Stevenson. His acceptance of it, his finding caution, and his actings as factor, both before and after the date of the written document of factory, all establish this by conclusive evidence. The grant of factory, therefore, was an act of the whole tutors; it was a proper tutorial act, in the fair exercise of their powers; and I hold it did not fall by the death of Strong.

THE COURT then, in *Stewart v. Baikie*, "Found the defender liable as cautioner for the tutors-dative of the pursuer, for the whole intromissions of the said tutors, and their factor Alexander Stevenson; but found the defender, James Baikie, in so far as he may be made liable for the intromissions of the said Alexander Stevenson, as factor named for the said tutors, entitled to relief against Alexander Scot, who became bound as cautioner for the said factor's intromissions; and remitted the cause to the Lord Ordinary to proceed farther, &c.; found the pursuers entitled to expenses," &c.

In *Stewart v. Scot*, the Court "found the defender Alexander Scot liable as cautioner for Alexander Stevenson, factor appointed by the tutors-dative of

No. 212.

Feb. 29, 1832.
Stewart, &c. v.
Baikie, &c.

Edinburgh and
Leith Shipping
Co. v. Gillon.

the pursuer, for all the acts and intromissions of the said Alexander Stevenson, as factor foresaid; found him also bound to relieve James Baikie, the cautioner for the tutors-dative, of all responsibility falling upon him on account of the said factor's intromissions, and remitted to the Lord Ordinary to proceed farther, &c.; found the pursuers entitled to expenses," &c.

J. M'COOK, W.S.—PRIN and PITCAIRN, W.S.—D. FISHER, S.S.C.—Agents.

No. 213. EDINBURGH and LEITH SHIPPING COMPANY, Pursuers.—D. F. Hope—
L'Amy.

WILLIAM DOWNE GILLON, Defender.—Sol.-Gen. Cockburn—Shene.

Process—Partnership.—Where, pending an action against certain partners of a company for a debt, a supplementary action was raised to ascertain the liability of a latent partner, which was ultimately decided against him; and in the meanwhile decree was taken, in terms of an accountant's report in the original action, against the other partners—held that this decree did not preclude the latent partner from being heard on objections to the accountant's report and the decree.

Feb. 29, 1832. THE late Edinburgh and Leith Shipping Company raised an action in 1814 against the company of Downe, Bell, and Mitchell, wharfingers at Downe's Wharf, London, and Bell, Mitchell, Read, and Atkins, whom

T.

they then understood to be the only partners, for payment of a balance arising under a contract between them. In the course of the proceedings, they discovered grounds for holding that the late Colonel Gillon of Wallhouse was also a partner, and they therefore raised a supplementary action against that gentleman, since his death transferred against his son, the present defender. The defence was, that Colonel Gillon had not been a partner of the company, but the Court decided that he had (ante, IX. p. 90); and the decision was affirmed on appeal (22d September, 1831, ante, IX. App. 12.) Pending this supplementary case, the Shipping Company proceeded with the original action, which resolved into a count and reckoning, and after a report by an accountant, which was fully discussed, obtained decree for £843. When it was ultimately decided that Colonel Gillon was a partner, the Shipping Company insisted for decree against his son, in terms of the decerniture in the original action. The Lord Ordinary accordingly decerned against him, with interest from the date of the decerniture against the other partners, and for expenses. The defender reclaimed, and contended that the original decree could not at once be made applicable to him; that it had proceeded upon an accountant's report, to which the other partners had had an opportunity of stating objections, but which had not been afforded to him, and that he was entitled to see and object.

The Court sustained this plea, recalled the interlocutor *hoc statu*, and remitted to the Lord Ordinary to proceed accordingly.

LORD MEADOWBANK.—I am quite clear that the case is not exhausted against No. 213. the defender.

LORD JUSTICE-CLERK.—The whole difficulty has been occasioned by the mode Edinburgh and in which the Shipping Company chose to proceed. They went on in the action, Leith Shipping and took decree against the other partners, without waiting the result of the supplementary action. There is no decision against Colonel Gillon, beyond fixing the fact *Mercer v. Gillon.* that he was a partner of the company. He or his representative is entitled now to Peddie, &c. canvass the accountant's report.

LORD GLENLEE.—I am quite of that opinion. I can see nothing in the former process, where the Shipping Company brought matters to an issue with the other partners, which can affect the plea of this defender.

LORD CRINGLETIE.—My only difficulty was this. Can a latent partner, after a sum has been liquidated and decreed for against the other partners, insist upon opening up the proceedings to the effect of canvassing that very sum?

PHILIP AND Pritchard, W.S.—J. LAVIN, W.S.—Agents.

ROBERT MERCER, Pursuer.—*D. F. Hope—Shene.*

No. 214.

W. PEDDIE and F. ALEXANDER, Defenders.—*Forsyth—Monro.*

Partnership.—A company, consisting of two individuals, having assumed four partners, without any stipulation or entries in the books to instruct a distinction betwixt the old and new firms, or to separate their claims and liabilities,—held, in a question of accounting among the partners, that the four assumed partners were not entitled, under the circumstances, to charge the two original partners with the whole loss arising out of a transaction which commenced with the original firm.

PEDDIE and Alexander carried on business as leather-merchants in Feb. 29, 1832. Edinburgh, under the firm of William Peddie and Company, down to the first of January, 1809, when they assumed as partners, Braidwood, ^{2d Division.} Lord Medwyn. R. Braidwood junior, Patison, and James Mercer. When the four new partners joined, there was no stipulation that the transactions were to be separated, or that the original partners were to be alone responsible for the engagements of the original concern. The books were kept as if no change had taken place; and the stock-in-trade, and claims of the old company, were considered as belonging to the existing firm, who continued to deal with the former customers. One of those customers was John Brown, shoemaker, against whom a large claim stood in the books of the company, which had commenced with the old company, and continued with the new one to the date of its dissolution, on the 31st of December 1810. Thereafter, a dispute arose among the partners as to the principle of imputing certain payments made by Brown to the reduction of the debt incurred by him to both companies. The question was submitted to arbitration, and the referees decided that the whole of Brown's debt, as it then stood, fell to be equally divided among the partners of the new company, excepting a small balance, which they threw upon the partners of the old company. Another dispute then occurred betwixt

No. 214. Brown and the company as to the amount of the debt. This was submitted to William Scott Moncrieff, accountant, upon a condition stipulated by Brown, that the arbiter should not include in his decision interest on the debt prior to the dissolution of the company, and that, in the event of a balance being ultimately found due by Brown, it was to be taken payment of by a composition of four-fifths of the actual amount. The company, on the other hand, stipulated that the prior interest should be made the subject of a separate submission. By decree-arbitral, dated 17th November 1824, the arbiter found, 1. That Brown, at the date thereof, stood indebted to Peddie and Company in the sum of £2268, 12s. 3d., which included the whole accumulated interest on the account current with him down to the date of the decree-arbitral. 2. That of this sum the prior interest amounted to £782, which, as stipulated, was reserved for separate arbitration; and in a report which accompanied his decree, the arbiter calculated £508 of the prior interest on the account with the old company, and the remaining £274 on the account with the new; and 3. That after deducting, *in hoc statu*, the above sum of £782 of interest, four-fifths of the balance fell to be paid by Brown to the company; and he decreed accordingly against him and his cautioners, who implemented the same.

Before the second submission as to the prior interest could be adjusted, Brown became bankrupt, and his estates were sequestrated. Peddie and Company lodged a claim with the trustee, for the amount of interest prior to the date of the decree-arbitral, with accumulation. This claim was admitted, and Brown's sequestration was wound up by his creditors (including Peddie and Company) agreeing to accept of a composition of five shillings in the pound.

Brown's debt to the company had been in the shape of bills accepted by him, and kept up by repeated renewals. The four assumed partners of Peddie and Alexander advanced five-sixth parts of the funds for retiring these bills—being their own and Alexander's proportions. Peddie paid the remaining sixth-part, being his own share. The assumed partners ceded their rights to Robert Mercer, who raised an action against Peddie and Alexander, the partners of the original company. In this he chiefly endeavoured to establish, that the question as to the interest (the amount of which had been ascertained by the arbiter in his report and decree-arbitral, and which was to have formed the subject of a separate submission) fell under a different principle of accounting from that which had regulated the principal sum decreed for by the decree-arbitral.

Viewing the proportion of prior interest calculated by the arbiter upon the transactions of the old firm, as an outstanding claim of the original firm of Peddie and Alexander, and that they were bound to relieve the assumed partners of all loss upon it, he raised an action, and concluded accordingly against the two individuals, Peddie and Alexander. They resisted that principle of accounting as inconsistent with the understanding of

Feb. 29, 1832.
Mercer v.
Peddie, &c.

the increased partnership, and with the agreements and submissions of the partners. The Lord Ordinary disposed of the case by the following interlocutor :—“ Finds, that at 1st January 1809, the four cedents of the pursuer were assumed as partners of the company of William Peddie and Company, which had previously consisted of the two defenders; and the new company continued for two years to carry on the business under the original firm, when they agreed to dissolve the company: finds, that when the four new partners entered into the company, there was no stipulation that the transactions of the two companies were to be kept separate, or that, for the concerns of the old company, the original partners were alone to be responsible; but, on the contrary, the transactions of the new company are entered in the books used by the old company, as if no change of partners had taken place, and the stock-in-trade belonging to the old company is held as now the stock of the new one, with all the claims due to the said old company, by any of their customers; and farther, the new company continued to deal with the customers of the old company, as if no change had taken place: finds, that one of those customers was John Brown, shoemaker; that a large claim against him stood in the books of the company; and that a dispute having arisen with him, after the dissolution of the new company, as to the amount of said claim, a submission was entered into, to an arbiter, as to the amount of the principal sum due, expressly excluding the interest from the said submission: finds, that by the decree-arbitral pronounced, the principal sum has been ascertained, and decree given for four-fifths thereof, payable by certain instalments, in terms of an agreement between the parties: finds it admitted in the summons, that parties have settled on the footing of each bearing an equal share of the debt due by Brown, as each has drawn one-sixth of the composition payable by him, and it is admitted that the present dispute relates entirely to the interest that was excepted from said submission: finds no reason for holding, that the old company was to relieve the new company of any of the claims competent to them, if they should turn out bad, or that a different rule should be adopted as to liability for the interest, from what has been applied by the parties themselves as to the principal: Therefore, decerns against the defender, Alexander, for the sum of £378, 2s., being the sixth part of the sums of £2268, 12s. 3d. advanced and paid by the cedents of the pursuer, as the amount of the debt due by John Brown, with interest of the first sum from 17th November 1824, till payment; assuizes the defenders, Forrest Alexander and William Peddie, from the other conclusions of the summons, and decerns; finds no expenses due.”

Robert Mercer reclaimed, and Peddie and Alexander on the point of expenses. The Court unanimously adhered.

No. 215.

Feb. 29, 1832.
Barr v. Clyne.J. G. BARR, Pursuer.—*Cunninghame.*
DAVID CLYNE, Defender.—*D. F. Hope—Boswell—Maidment.*

Poor's Roll.—Circumstances in which one of the agents for the poor was found entitled to charge only for the business performed by him; and that another agent who was not authorized to act for the poor, but was the actual agent, was entitled to all the other charges.

Mar. 1, 1832.

1ST DIVISION.
Lord Newton.

DAVIDSON employed Clyne, S.S.C., to raise an action of damages against Lord Duffus, which he did, and thereafter Davidson obtained the benefit of the poor's roll, and J. G. Barr, one of the agents for the poor, was appointed his agent. The whole subsequent procedure was carried on in Barr's name as agent, but Clyne made all the disbursements, and was either partly, or solely, the true agent throughout. Shortly before the cause came to trial in the Jury Court, Lord Duffus made a motion to have the action dismissed, in respect of its being contrary to the act of sederunt, that any other than the agent named by the Court should conduct it. This motion was dismissed. A verdict finding damages due to Davidson was returned, and he was allowed his expenses. These were taxed to £344, 18s. 6d., including, inter alia, £150, 15s. 6d. as the cost of bringing witnesses to the Court, and decree for these was extracted in the name of Barr. Clyne sent letters of diligence, in Barr's name, to a messenger, to be executed against Lord Duffus, who, after a bill of suspension at his instance against Barr had been refused, paid the amount. The messenger granted a discharge as "for J. G. Barr."

Lord Duffus afterwards raised an action of damages against Barr, Clyne, and Davidson, for the nimious and oppressive use of diligence. After defences were lodged, Lord Duffus granted a discharge of the action to Barr, on the narrative that "from his defences he had no share, or took any part in the proceeding in said action, whereof I claimed damages." Barr was eventually adduced by Lord Duffus as a witness at the trial of the case, against Clyne and Davidson, which issued in a verdict for the defenders.

In the meanwhile, Clyne had acted as agent in conducting an Admiralty process for Barr, and when he rendered his account a dispute took place, which resulted in an action at Clyne's instance for payment of this account, and one by Barr against Clyne, to account to him for the sum recovered under the decree in Davidson's action against Lord Duffus, deducting all disbursements which Clyne could instruct to have made. In defence Clyne pleaded, 1. that he was truly the agent throughout; had made every disbursement; and conducted every step in the cause, in evidence of which, he referred to the discharge by Lord Duffus in favour of Barr; and, 2. that Barr could not avail himself of an objection founded

on the act of sederunt relative to the poor's roll, as he was a party to the arrangement under which the case was conducted. No. 215.

The Lord Ordinary "found the pursuer (Barr) entitled to the different charges for agency in the account of expenses, and state of debt libelled on, and remitted to the auditor to ascertain the amount thereof, and report," &c.

Mar. 1, 1832.
Barr v. Clyne

Clyne reclaimed.

At the advising, the parties were at issue regarding the grounds on which the Jury Court had refused the motion of Lord Duffus to dismiss Davidson's action. Barr alleged that it was refused, only in consequence of his personally appearing and avowing himself the responsible agent, and that Clyne was a party to this proceeding. Clyne denied that the motion had been refused on any such ground.

LORD PRESIDENT.—In this case, very considerable disbursement was necessary on the part of Davidson's agent in the action against Lord Duffus, in order to enable Davidson to bring down his witnesses to the Jury Court, and to carry through the trial. Although, therefore, there was an irregularity in Clyne acting as agent for Davidson, who was on the poor's roll, without obtaining the sanction of the Court, I feel inclined to deal leniently with it. The agents for the poor are often amongst the youngest practitioners, and it may be both inconvenient and imprudent for them to make advances in conducting a case. Where considerable disbursement is required, it is then an arrangement may be most beneficial to the poor party, if an agent can be found who is willing to take the disbursements on himself; and where this is done with the consent of the agent for the poor, it is the more free from objection. In these circumstances, I would propose to alter the interlocutor of the Lord Ordinary, and to hold that Clyne was entitled to the sum contained in the decree against Lord Duffus, except in so far as it shall appear that Barr acted as agent.

LORD CRAIGIE dissented, and thought that the Act of Sederunt relative to the poor's roll should be strictly enforced; that Barr being the agent recognised by the Court, as agent for Davidson on the poor's roll, and having got decree in his own name, and payment having been made to the messenger, as for him, he was to be considered legally entitled to the sum under the decree, so far at least as it was due for agency; and that Clyne, having no claim for agency, except by founding on an irregular agreement, which the Court could not recognise, was not entitled to retain any part of the sum, on account of agency.

LORD BALGRAY concurred with the Lord President.

LORD GILLIES also concurred, after expressing considerable hesitation on account of the motion in the Jury Court by Lord Duffus, to have the action dismissed in respect of Barr's non-agency. His Lordship at first inclined to hold that it would be necessary to expiate the grounds on which that motion was dismissed; and whether Barr was then obliged to come forward and avow himself as the responsible agent, and was suffered to do so without objection. But, eventually, his Lordship concurred with the Lord President.

THE COURT "altered, &c., found the pursuer entitled only to such articles of the account of expenses as shall appear to apply to acts of agency perform-

No. 215.Mar. 1, 1832.
Barr v. Clyne.Ralston v. Farquharson, &c.Forbes v. Hume.**No. 216.**

ed by the pursuer, or which he assisted in performing or conducting; and remitted to the Lord Ordinary, &c. reserving all questions of expenses to the final issue of the cause."

J. G. BARR, S.S.C.—D. CLYNE, S.S.C.—Agents.

JOHN RALSTON, Pursuer.—Jameson—Anderson.

ROBERT FARQUHARSON and Others, Defenders.—D. F. Hope—
A. McNeill.

Mar. 1, 1832. *Expenses.*—Sequel of the case reported, Ante, VIII. 927. The sole point now related to expenses. The Lord Ordinary found none due, and Ld. Corehouse. the Court adhered.
D.

W. MUIR,—A. NAIKANZ,—Agents.

No. 217.JOHN FORBES, Suspender.—Sol.-Gen. Cockburn—Cuninghame.
JOHN HUME, Charger.—Small Keir.

Parent and Child—Mandatory.—A party, employed by the concealed parent of a child, having come under an obligation to pay aliment to a nurse, with whom the child was placed; and, after paying it up to a certain date, having demanded delivery of the child from the nurse, who refused to give it up to any one without authority from the mother—held, in an action founded on the obligation for the subsequent aliment, that the party was not liable.

Mar. 2, 1832.

2d Division. Ld. Fullerton. T. HUME, a shoemaker in Perth, raised an action before the Sheriff of the county against Dr Forbes, setting forth in the summons, “that, upon the 21st day of May 1823, the pursuer’s wife was induced to undertake the nursing and alimentering of a female child, belonging to a lady who was delivered in the lodgings in George Street belonging to Mrs Elgin: that Dr John Stewart, in Perth, attended the said child during the nursing, and regularly paid the aliment: that John Forbes, surgeon, now residing at Donavourd House, by Dunkeld, succeeded him in the charge; and by a letter, of date the 13th day of March 1824, herewith produced, agreed to pay the pursuer, subsequent to that date, £7 sterling per year, for alimentering said child, to be payable half-yearly, per advance,—which was accepted by the said pursuer, who has continued to keep the said child ever since: that, on the 21st of September last (1829), the said John Forbes was owing the said pursuer the sum of £7 sterling, for the year’s aliment immediately preceding; and upon the 21st of March current (1830), the said defender was farther due the pursuer the sum of £3, 10s. sterling, being the aliment for the half-year preceding that date.” He therefore concluded that Forbes should be decerned in payment of these sums. The letter libelled was in these terms:—“ Cupar, 13th March

1824. Dear Sir,—I saw little Mary's parent a few days ago, and I am No. 217: authorized to conclude a bargain with you relative to keeping her, at the rate of £7 sterling a-year, including every thing—the half-yearly allowance to be always paid in advance; to which if you agree, let me know by a letter under your own hand, and I shall remit the money to you on the 21st instant; and should you not agree to this proposition, have the goodness to let me know as soon as possible. I cannot get him to advance a single farthing more than £7, including clothes. (Signed) Jno. Forbes."

Forbes admitted the letter, but stated in defence, that in September 1828, he demanded the custody of the child, and, upon refusal, intimated that he would not be liable for further aliment. Hume admitted that this was true, but alleged, that although he did not know who were the parents of the child, "it was intrusted to his wife's care, when not more than two days old, by its mother," who had expressly instructed her to give the child up to no person but herself, or a person authorized by a writing under her hand, and as Forbes produced no such authority, he had declined to give up the child. He, however, contended, that the letter was binding on Forbes during the period for which the father of the child was bound to aliment it.

The Sheriff, after granting diligence for calling the mother and Dr John Stewart, from whom the pursuer received the child, neither of whom appeared, pronounced this interlocutor:—"Found it admitted by the defender, Forbes, that it was Dr John Stewart who originally agreed with the pursuer's wife as to the nursing and clothing of the child in question; found, that Dr John Stewart has not appeared as a party to the process, nor has the defender availed himself of the leave granted to him by the interlocutor of the 14th of July last, of making the mother of the child a party to the process for her interest; found, that without the express consent, either of Dr Stewart, or the mother of the child, the defender is not entitled to withdraw the same from the pursuer's custody, and therefore repelled the defences, with expenses."

Forbes having brought a suspension, the Lord Ordinary suspended the letters simpliciter, and found Hume liable in expenses, both in this and the Inferior Court, and accompanied his interlocutor with the note below.*

* "If the custody of the child had formed the proper question at issue, the present impression of the Lord Ordinary is, that it must have been decided in favour of the suspender. He is the person ostensively intrusted by the parents, whose names are concealed, with the management of the child, an implication fairly arising from the disbursement of the sums necessary for its maintenance; and it seems impossible, in opposition to this reasonable implication, to listen to the incredible, or rather unintelligible averment of the charger, that his wife received the child from the mother, with an express instruction not to give up the child but to the lady, 'or some one authorized by a writing under her own hand to receive it,' it being at the very same time admitted by the charger, that the name of the mother was concealed both from him and his wife. If a pretence of this kind were listened to, and required to be

Mar. 2, 1832.
Forbes v.
Hume.

No. 217. Hume reclaimed, but the Court unanimously adhered.

Mar. 2, 1832.
Forbes v.
Hume.

LORD GLENLEE.—I would be very sorry to think it possible to disturb this interlocutor. Only observe the nature of the libel,—there is not one word in it about the alleged mode in which the child came into Hume's possession; it is entirely laid upon the letter from Forbes. Now, Forbes was only known to the parties as mandatory, and only in that character can they object to his proceedings. But as mandatory, he was quite entitled to say, I do not choose you to keep the child any longer. Assuming the story of the interference of the mother, I am by no means satisfied that a father paying for the aliment, may not say, I choose to have my child educated after another fashion. Certainly there is no action against Forbes under the circumstances.

LORD MEADOWBANK.—Hume and his wife ought to have been very thankful for the offer of being relieved of the child.

LORD JUSTICE-CLERK.—I think so too; they say they are ignorant who are the parents of the child; they had no right to know.

LORD CRINGLETIE concurred.

Rod. M'KENZIE, W.S.—John Brown,—Agents.

obviated in the way pointed out by the Sheriff, viz., by calling the mother into Court, the consequence would be, that a trust of this kind never could be effectually exercised, as it would always be in the power of persons actuated either by curiosity or some more interested motive, to deny the power of the ostensible guardian, until that very disclosure was made which it was the object of his employment to prevent.

“But there is here, properly, no question as to the custody of the child. The only question is, the liability of the suspender for the aliment for the year and a half current, from September 1828 to March 1830; and the claim for the charge is founded, in the original summons, on a written obligation, of date the 18th of March 1824. That is, a letter to the charger from the suspender, acting on behalf of the father (whose name is not mentioned), and clearly imports nothing more than an employment by the suspender as so authorized, of the charger, to keep the child on receiving £7 a-year per advance. Now it is admitted that, in September 1828, and before the aliment pursued for became due, the suspender demanded the delivery of the child, and was refused, and, upon such refusal, intimated that he would not be liable for the further aliment. The Lord Ordinary considers that, by this intimation, the employment by the suspender was withdrawn, and that, therefore, no claim can lie upon that letter against the suspender. If the charger means to found upon an employment by Dr Stewart, the person who first took the management of the child, or by the mother, he must take steps against those parties; and if, as seems to be implied in some parts of the pleadings in the Inferior Court, he means to assert his right as mandatory of the mother (whose name is unknown to him), to insist in her claims of aliment against the father, and the present suspender as acting for the father, it is clear that that rather unusual ground of action does not admit of being discussed in the present process.”

No. 218.

ALEXANDER WILLIAMSON, &c., Pursuer.—W. Bell.
WILLIAM GOLDFIE and Others, Defenders.—Skene—Forbes.

Mar. 2, 1832.
 Williamson, &c.
 v. Goldie, &c.

Title to Pursue—Road Act.—The provision in the turnpike act, that the road trustees may legally sue or be sued in name of their clerk, is not applicable to district clerks, but only to the clerk under the general trust.

By the 16th section of the general road act, (1st and 2d William IV., Mar. 2, 1832. c. 43), it is enacted, “ That the trustees of every turnpike road may pursue, and be pursued, in all actions or processes in the name of their clerk or treasurer for the time being, and that no action or process brought or commenced by or against any trustees of any turnpike road, by virtue of this or any other act of Parliament, in the name of their clerk or treasurer, shall cease by the death or removal of such clerk or treasurer, or by the act of such clerk or treasurer, without the consent of the said trustees, but that the clerk or treasurer for the time to the said trustees shall always be deemed to be the pursuer or defender (as the case may be) in every such action or process : Provided always, that all expenses of process or proceedings so incurred by such clerk or treasurer, shall be reimbursed and paid out of the trust-funds of the turnpike-road for which he shall act.”

In May, 1830, a local act was passed applicable to Peebles-shire, previous to which the county was divided into two districts, called the eastern and western. By that act, the whole county was divided into six districts, the former western district being divided into two, called the first and second districts. The pursuer Williamson was clerk of the trustees generally, and also of those of the second district. The defender Goldie was clerk of the trustees for the first district. Under a provision in the statute, for the allocation of the county road debt, a reference was made to the Sheriff of Edinburgh, who allotted a greater share of the debt to the second district than their proportion according to the toll revenues. Under another provision of the statute, the general trustees of the county assigned their whole right over the first district, in favour of the trustees of that district, on their undertaking to make certain roads within it. In the course of their operations, they placed a toll upon a new line of road in the first district, at which a pass-ticket was given for another toll in the second district, which suffered diminution accordingly. Williamson, designing himself “ clerk to the general meetings of turnpike-road trustees for Peebles-shire, and also clerk to the second district of turnpike-road for said county of Peebles, and as such representing the trustees in the said second district, pursuer,” raised an action against Goldie, as clerk to the trustees of the first district, narrating the above circumstances, complaining of the diminution of the revenue of the second district, by the toll established in the first ; and concluding to have the erection of the

No. 218. toll, at least to the effect of giving pass-tickets, found to be illegal. Various preliminary defences were pleaded, but the only one necessary to be noticed was, that as Williamson pursued as clerk of the second district, and for behoof of the trustees of that district, and the action was directed against Goldie, as clerk of the first district, it was inept, seeing that no authority was given to district clerks to sue or defend.

Mar. 2, 1832.
Williamson, &c.
v. Goldie, &c.
M'Intyre v.
Lamb.

The Lord Ordinary "sustained the dilatory defences against the title of the pursuer, Alexander Williamson, to pursue this action." And the Court unanimously adhered.

LORD JUSTICE-CLERK.—I agree with the Lord Ordinary. There is not a syllable in the statute which countenances the idea of the county being frittered down into the separate jurisdictions of these districts. Each district is not entitled to have a clerk in the sense here contended for; there is one general clerk, in whose name the trustees may sue or be sued, and if one district has a claim against another, the parties must just sue in their own name—it is a total misconception of the statute to construe the provision, in reference to a general clerk, as applicable to a petty clerk in every district.

LORD MEADOWBANK.—It would have been an extraordinary and dangerous power for the legislature to have conferred. I have experience enough in such matters to know that. If the parties go to law under this statute, they must do so in terms of it, or sue in their own name.

The other Judges concurred.

Defenders' Authorities.—Alexander, Dec. 2, 1828 (Ante, VII. 117); Mill, June 25, 1827; House of Lords (Wilson and Shaw, II. 642); Goldie (Dow, II. 534); Calder, Jan. 27, 1831 (Ante, IX. 342.)

DICKSON and STEWART, W.S.—JAMES GOLDFIE, W.S.—Agents.

No. 219.

DUGALD M'INTYRE, Suspender.—*Robertson.*
 ROBERT LAMB, Charger.—*Sol.-Gen. Cockburn—More.*

Jurisdiction—Admiralty.—The jurisdiction of the Admiral-depute, Leith, sustained over Edinburgh and Canongate.

Mar. 2, 1832. LAMB raised an action against M'Intyre, who resided in the north-back of the Canongate, Edinburgh, before the Admiral-depute of Leith, for the price of wood sold and delivered to him. Decree was pronounced against M'Intyre, who suspended a charge upon the ground of no jurisdiction. Lord Eldin, (6th December 1824,) having refused the bill with expenses, M'Intyre reclaimed; and when his petition came to be advised, the Court, "in respect of the depending case between the officers of state and the magistrates of Edinburgh and others, superseded advising this cause." That case, which involved the same question, was decided in favour of the Admiralty jurisdiction, on the 18th November, 1831, (Ante, X. 25.) M'Intyre had also attempted to found a specialty on the circum-

2d Division.
Lord Eldin.
R.

stance that he resided in the Canongate, which was met by the case of No. 219. Craig v. Jameson; and when the Court resumed his reclaiming petition, they unanimously refused it, in conformity with those two previous decisions.

Mar. 2, 1832.
M'Intyre v.
Lamb.

LORD JUSTICE-CLERK.—The case of Craig v. Jameson, which decided this question of jurisdiction, is now authoritatively confirmed.

LORD GLENLEE.—The case of Craig and Jameson, was admitted on the part of the Crown in the late case.

The other Judges concurred.

W. POLLOCK, S.S.C.—A. SNOOK, S.S.C.—Agents.

W. A. TURNER, (Tait's Trustee,) Advocate.—*Cuninghame.*
Mrs BALLADENE and HUSBAND, Respondents.—*Jameson—Russell.*

No. 220.

Property—Coal.—Where a party who had a reserved right of coal in an estate, carried an existing level under the bed of a stream into adjoining lands, (to the coal of which he had also right,) so as to drain the coal of these lands,—brought the water thereof within the estate, by means of a steam-engine, and there raised it and threw it on part of the surface of the estate,—found that he was not entitled to do so.

THE stream of Kellyburn divides part of Mar. 3, 1832.
Perthshire from part of Clackmannanshire. The lands of Wester Pitgorbar, the property of Mrs Ballandene, lie on the Perthshire bank; the lands belonging to Mathie, to the westward, on the Clackmannanshire bank; and the lands belonging to Pattons and Mr Craufurd Tait, lie contiguously, but farther to the westward than Mathie's. Of all these lands, the Kellyburn is the natural drain for their surface water; and the whole formerly belonged to the Duke of Argyle. When the lands of Wester Pitgorbar were disposed, the Duke (who retained the superiority) inserted this clause,— “Reserving always to his Grace, and his heirs and successors, the coals and coal-heughs in the said lands, with the liberty of digging coal and coal-heughs on any part of the said lands; but if his Grace and his fore-saids should make a new level which had not been formerly made, then and in that case they should be obliged to pay to the said John Ballandene and his before written, the damages which he or they should sustain thereby,” &c. Mathie and Pattons acquired right to the coal, in the lands disposed to them. Mr Tait eventually became proprietor of the reserved coal and coal-heughs in Wester Pitgorbar, as well as of estates containing other coal which lay in the neighbourhood.

Part of the lands of Wester Pitgorbar, called Kellybank, was disposed some years ago to a Mr Brown. A steam-engine was erected at a coal-pit on Kellybank, by means of which a quantity of water was pumped up from what was called the rough-coal level, and being raised to the

1st Division.
Ld. Corehouse.
B.

No. 220. height of seven fathoms, was poured into a higher level, called the day-level, which, however, was under ground at the place where it received Mar. 3, 1832.
Turner v. the water. This day-level formed a tunnel, passing under ground from Ballandene, &c. Kellybank into the lands of Wester Pitgorbar, and the mouth of the tunnel was in these lands. The water being carried through this tunnel, and discharged at its mouth, passed over the surface of the lands of Wester Pitgorbar, for a distance of 1065 yards, till it fell into the river Devon. In March 1826, Mr Tait having got a lease of the coal in Mathie's lands, pushed the deeper, or rough-coal level, in the lands of Kellybank, westward under the bed of the Kellyburn into the lands of Mathie. The water was thus drawn from Mathie's coal, passed under the bed of the Kellyburn to the engine-pit on the Kellybank lands, was there pumped up by the steam-engine into the day-level, and discharged through the lands of Wester Pitgorbar into the Devon. By a subsequent agreement with Pattons, the same rough-coal level was carried into their lands in 1829, and the water so carried off was discharged by the same channel. The same level was then pushed forward under the feus of Dollar, belonging to Tait, and the water of these lands was likewise discharged along with the rest.

Mrs Ballandene and husband, as proprietors of the lands of Wester Pitgorbar, presented a petition to the Sheriff of Perthshire, craving an interdict against Mr Tait and Turner, the trustee on his sequestrated estate, "from pumping up the water arising from the said coal-works respectively, by the engines erected on the lands of Kellybank, in the county of Perth, or by any other opus manufactum, to the height of the higher level in the said lands, or at least from sending down or discharging any portion thereof through the level, under ground, in the petitioner's lands, from which the said water is made to discharge itself upon the surface of the petitioner's lands, to their great damage," &c.

In support of this they contended, that the above reserved clause did not entitle the superior, or any one in his right, to use the level in the lands of Wester Pitgorbar, for the purpose of working any coal except that within the lands; and, at all events, that their land could not be subjected to the burden of carrying off a large quantity of water from lands in the neighbouring county, which was only thrown to the height requisite to carry it upon their property, by means of a steam-engine.

Turner answered, that the superior's reserved right in the coal, implied a reservation of all right necessary for the beneficial working of the coal; that all the coal which he was now draining had belonged to the superior, who, in reserving the coal and coal-heughs, and plainly contemplating the working of the coal, had only made himself liable in damages, in the event of his making a new level; and that he (Turner) was merely exercising fairly the right reserved by the superior, and in the mode intended by him. It was of no moment that part of the coal had now got into separate hands, as they all concurred in authorizing the acts in question.

The Sheriff appointed an engineer to inspect the operations complained of, and to report "whether, by these operations, an additional quantity of water is thrown upon the surface of the pursuer's said lands, to what arises from the working of the coal within the same; and if so, the way and manner in which that is accomplished, and the quarter from which the additional quantity of water proceeds, and the time when the operations were made."

Mar. 3, 1832.
Turner v.
Ballandene, &c.

The report of the engineer established the facts already narrated, and the Sheriff found "that by means of a steam-engine erected on the lands of Kellybank, an additional quantity of water to that arising from the pursuers' lands is thrown upon their surface, and passes over the same, a distance of one thousand and sixty-five yards, and then falls into the river Devon, which steam-engine pumps up the water seven fathoms from the mine and levels of the rough coal, and delivers it into the day-level, along which it passes to its mouth or outlet, where it is discharged on the surface of the pursuers' lands: that the said additional quantity of water is brought from the coal-workings in the lands of the defenders, John Mathie, Jean and Anne Patton, and the coal under the feus of Dollar, belonging to the defender, Mr Turner, along with the water arising from Kellybank coal: that under the reservation in the pursuers' title-deeds, specified in the interlocutor of 15th of October last, the defender, Mr Turner, was not entitled, by the foresaid opus manufactum, to throw the said additional water on the pursuers' grounds; and no attempt appears to have been made to do so previous to the spring of 1826: Therefore interdicted the defender from bringing to the surface of the pursuers' grounds any of the water arising from the workings of the foresaid coal in time coming; and decerned, with expenses," &c.

Turner brought an advocation. The Lord Ordinary found, "in terms of the Sheriff's interlocutor, that by means of a steam-engine erected on the lands of Kellybank, an additional quantity of water to that arising from the pursuers' lands, is thrown upon their surface, and passes over the same, a distance of one thousand and sixty-five yards, and then falls into the river Devon, which steam-engine pumps up the water seven fathoms from the mine and levels of the rough coal, and delivers it into the day-level along which it passes to its mouth or outlet, where it is discharged on the surface of the purquer's lands: that the said additional quantity of water is brought from the coal-workings in the lands of John Mathie, Jean and Ann Patton (the other defenders in the Inferior Court), and the coal under the feus of Dollar, belonging to the advicator, along with the water arising from Kellybank coal: and therefore remitted the cause simpliciter to the Sheriff, and decerned: found the advicator liable in expenses, both in this and in the Inferior Court," &c.

Turner reclaimed, but the Court adhered.

LORD CRAIGIE expressed doubts of the judgment. His Lordship considered,

No. 220. that, under the clause of reservation, a question of damage might arise in consequence of the operations of Turner, if they were injurious to the ground. The interest which the superior reserved in the coal, was not of the nature of a servitude, but of a right of property; and the reservation was made in reference to the great body of coal then belonging to him in several contiguous lands. His Lordship doubted whether it was competent to interdict as craved.

Mar. 3, 1832.
Turner v.
Bollandene, &c.

Broughton v.
Fraser.

The other Judges concurred with the Lord Ordinary.

R. Rutherford, W. S.—Wortherson and Mack, W. S.—Agents.

No. 221. HUGH BROUGHTON, Pursuer.—More—J. Paterson.
SIMON FRASER, (Cameron's Trustee,) Defender.—Greenshields—Shaw.

Trust—Adjudication—Service.—Where a trustor under a decree-arbitral executed a disposition of his property in favour of trustees, providing, *inter alia*, an annuity to his eldest son, (who was a party to the submission,) during the trustor's life, but to lapse thereafter, and the son in lieu thereof to be put in possession of certain farms rent free—and the trust-deed contained a clause, that when the son or other heir of the trustor should require the trustees to denude, he or that other heir was to exonerate the trustees, but did not contain any clause, binding the trustees to denude—and after the trustor died, a creditor of the son got a decree in absence, adjudging all right and interest which he had under the trust; and the son died shortly thereafter, without any steps being taken to vest him, independently of the terms of the deed, in his rights under the trust—Held in a question between the creditor and the trustees;

1. That nothing had vested in the son, which an adjudication could carry without a service; and,
2. That an adjudication was not a competent mode of attaching arrears of rent or of the annuity.

Mar. 3, 1832. THE late George Cameron of Letterfinlay executed an antenuptial contract with Mrs Isabella Fraser, under which marriage and contract Gordon Cameron was presumptive heir. In January 1783, George Cameron conveyed his estates in trust to Sir Ewan Cameron and others and being then of a facile disposition, executed a bond of interdiction in their favour. Thereafter, in 1807, George Cameron, with consent of his trustees, executed a deed of entail and settlement of his properties with relative trust in favour of Sir Ewan Cameron and others. In 1811 and 1812, Gordon Cameron, as presumptive heir of the marriage, raised actions against George Cameron and his trustees, for payment of certain sums—for the removal of the trustees—and for reduction of the deed of entail, as inconsistent with the contract of marriage, &c. These actions were submitted to the late Lord Repton, and Mr George Joseph Bell, advocate, with full powers to cause a new trust of George Cameron's estates and whole property to be executed. Under their orders, George Cameron, in the year 1817, executed a trust-deed, conveying the lands of Letterfinlay and others to certain trustees, of whom Gol

2d Division.
Ld. Fullerton.
T.

don Cameron was named one. The purposes of the trust were, 1st, No. 221. for payment of the truster's debts; 2d, for payment of an annuity to him-
 self; 3dly, for "payment to the said Gordon Cameron, my said son, Broughton v.
 until the succession to my said lands and estates shall open to him by
 my death, of the sum of £100 sterling, at the term of Martinmas yearly," with powers to the trustee to increase the same. After a variety of
 provisions for the rest of the truster's family, it was provided, that, "as
 the annuity granted to the said Captain Gordon Cameron is only meant to
 continue during the lifetime of me the said George Cameron, it is hereby
 declared, that the same shall cease at my death accordingly; and, in lieu
 thereof, the said trustees are hereby directed to put and continue him in
 possession of the farms of Mucomer and Tarness, free of all rent, under
 the burden, during his mother's lifetime, of her provisions," and upon the
 death of Gordon Cameron, "if such should happen before the purposes
 of this trust are carried into execution, to put the heir or heirs entitled to
 succeed to my said lands and estate in their order, in possession of these
 farms, and that free of rent," under the like burden. The trustees were
 empowered to make up titles in their own persons, and to borrow money
 for fulfilling the purposes of the trust; but there was no express clause
 divesting the truster of all right during his lifetime, and the trustees were
 named executors, "in the event of the decease of me" (George Cameron)
 "during the subsistence of this trust." Neither did the trust-deed contain
 the usual clause, that the trustees, upon the termination of the trust, should
 denude in favour of Gordon Cameron nominatum, or generally in favour
 of the heirs of the truster; it merely provided that the trust should subsist
 and endure until the heritable debts were paid, or the creditors consented
 that it should cease and determine; and there followed a clause, providing
 that, "before my trustees or trustee for the time, shall be called upon to
 denude, &c., in favour of the said Gordon Cameron, my eldest son and
 presumptive heir, succeeding to me in the event of my death, or other
 heir succeeding to me, he or such other heir" were to exonerate the
 trustees.

The truster died in June 1829; and in November of that year, an action, libelling on the trust-deed of 1817, was raised by the pursuer, Broughton, against Gordon Cameron, for adjudication of Gordon Cameron's right and interest in the lands under trust, in payment of certain debts due by Gordon Cameron to Broughton; and concluding also against the trustees, that upon the adjudication being decreed, it ought to be declared that the trustees were bound, on payment and discharge of the heritable and other debts mentioned in the trust-deed, to denude and divest themselves of the whole of the said lands and estate in favour of Broughton, for satisfaction of the debt due to him. Decree of adjudication in absence of Gordon Cameron was pronounced, in terms of the libel, on the 27th of May, 1830. Gordon Cameron died in September of that year,

Mar. 3, 1832.
 Fraser.

No. 221. without any steps having been taken, by service or charge, to enter him heir to George Cameron, or otherwise to vest in him a right to the lands, independently of the trust-deed. In the meanwhile Broughton raised a supplementary action (which was called two months after the death of Gordon Cameron) against George Cameron's trustees, (of whom the defender, Mr Fraser, was the sole acting survivor,) libelling on the decree of adjudication, and concluding for arrears of annuity alleged to be due to Gordon Cameron prior to his father's death, for putting Broughton, as in right of Gordon Cameron, in possession of the farms of Muccomer and Tarness, and also for the rents of those farms from the death of the father, and during the life of Gordon Cameron.

Mar. 3, 1832.
Broughton v. Fraser.

In the first action, the Lord Ordinary, with reference to the declaratory conclusions against the trustees, found "that no steps were taken during the lifetime of the said Gordon Cameron, either by service or charge to enter heir, or otherwise to vest in him a right to the said lands independently of the trust-deed; and that consequently the effect of theforesaid adjudication is necessarily confined to such right as may have been actually vested in Gordon Cameron by the said trust-deed; but finds, That the terms of the said trust-deed were not such as either to divest the trustor, George Cameron, from the date of its execution, or even to create on his death any vested right in relation to the said lands in the person of the late Gordon Cameron, his apparent heir; and therefore finds, That the adjudication obtained against the said Gordon Cameron was ineffectual in regard to the said lands, and cannot support the declaratory conclusions of this libel against the defenders, the trustees; and therefore assizes the defender, now the sole surviving trustee, from the conclusions of the action : Finds no expenses due to either party."*

In the supplementary action his Lordship found as follows :—"In re-

" NOTE.—The terms of this trust-deed are rather unusual. In the first place, however probable it may be from the circumstances leading to its execution, that it was intended to divest the grantor of all right during his lifetime, it contains no clause sufficient for that purpose. There is, confessedly, no express declaration to that effect; and though the endurance of the trust beyond the period of the trustor's lifetime is clearly contemplated, the purposes of it are not such as to be absolutely incompatible with its extinction during his lifetime. Indeed, in one clause—that appointing the trustees his executors—the existence of the trust at his death is evidently considered only as a contingency. It names the trustees his executors, 'in the event of the decease of me the said George M'Martin, otherwise Cameron, during the subsistence of this trust.' 2dly, The trust-deed, though providing that the trust shall subsist and endure until the heritable debts are paid, or the creditors consent that it shall cease and determine, does nowhere provide, as is usually done, that the trustees, upon the termination of the trust, shall convey the lands in favour of Gordon Cameron nominatim, or even generally in favour of the heirs of the grantor. In these circumstances the Lord Ordinary does not think either that the grantor was divested by the execution of the deed, or that any right was instantly

spect that the arrears of annuity concluded for do not competently form No. 221. the subject of adjudication, sustains the objection to the title in regard to the conclusion for the arrears of annuity of £100, prior to Whitsunday Mar. 3, 1832.
 Broughton v. Fraser.
 1829; and in regard to the conclusion for putting and continuing the pursuer (the adjudger) in possession of the farms of Muccomer and Tarness, finds, That the clause in the trust-deed on which that conclusion rests was applicable, personally, to the late Gordon Cameron, as the heir entitled to succeed to the lands of Letterfinlay; that the right of possession, after his death, devolved, by the terms of the trust-deed, on the next heir, and therefore was not attachable by Gordon Cameron's creditors: Therefore assuizes the defenders from the above-mentioned two conclusions of the action, and decerns. And in regard to the conclusion for the rents of these farms of Muccomer and Tarness, from the death of the truster, and during the lifetime of Gordon Cameron, appoints the case to be enrolled, with a view to the disposal of the question of fact at issue between the parties, whether the late Gordon Cameron was or was not in possession of the said farms from the death of his father until his own death."

Broughton reclaimed, and pleaded—

1. In the action of adjudication and declarator, Gordon Cameron's right under the trust deed having been attached by adjudication, is now vested in the pursuer for payment of the sums contained in the decree of adjudication, who is thereby entitled to call upon George Cameron's trustees to denude as libelled. If the truster was not divested, and Gordon Cameron vested, certainly no use can be made of the adjudication. But George Cameron was completely divested by the terms and construction of his deed. Under the species facti, Gordon Cameron could expedite no service, nor was there any necessity for his doing so. The case of Gordon's trustees and Harper, is in point; and there it was found that a party who had such a *jus crediti* as gave him an equitable right to call upon trustees to denude in his favour, without any service, was entitled to trans-

created by it in favour of Gordon Cameron on his father's death. After the execution of the deed, the fee still remained in the truster, burdened with the trust. The trustees, were no doubt liable to be called on to denude, and to quit the possession on the extinction of the trust; but, in the opinion of the Lord Ordinary, the right to enforce that liability was attached to the right of fee remaining in the truster, and consequently required to be taken up on his death by service or some equivalent form, before it could be effectually attached by adjudication. Of course, these observations apply only to that general demand for the whole trust-estate which is made in the present summons. It contains no conclusion as to the right to possess the farms of Muccomer and Tarness—a right which does not seem properly to arise under the trust, but which is made the subject of a separate action by the pursuer."

No. 222. mit that *jus crediti*, though he died without making up titles.¹ Now
 Mar. 3, 1832. Gordon Cameron had a vested right even before the death of the grantor,
 Broughton v. George Cameron.

Fraser.

2. In the supplementary action, which contained a subordinate point, the Lord Ordinary seemed to hold that adjudication was not a competent diligence to attach personal property; but though not a usual mode, it was nowhere decided to be incompetent; and upon the second point of the possession of the lands of Tarness, &c., there was nothing in the terms of the grant which made that personal to Gordon Cameron.

Pleaded for Cameron's Trustees—

1. In the action of adjudication and declarator, there was no vested right in the person of Gordon Cameron which could be carried by adjudication; and though there had been, the decree of adjudication libelled was not competent to carry that right. The only clause in the trust-deed by which it could be pretended that a right had been vested in Gordon Cameron, was one declaring that before the trustees could be called upon to denude in favour of Gordon Cameron, or any other heir succeeding in the event of the grantor's decease, he or they should ratify the acts of the trustees, and discharge them and their heirs. But this was not a clause in favour of Gordon Cameron, or to the effect of vesting him, but was simply for security and exoneration of the trustees.

2. As to the questions under the supplementary action, the arrears of annuity attempted to be carried by adjudication were moveable, and not attachable by adjudication.

LORD GLENLEE.—On looking at the terms of the trust-deed, it does not appear to me that they are such as to divest George Cameron, or to give Gordon Cameron any vested right. What rights Gordon Cameron might have had under the ante-nuptial contract, and the submission, is a question with which, under this summons, we have nothing to do. It is quite plain that we can only attend to what were his rights under this trust-deed. Now, that Gordon Cameron might have called upon the trustees to denude in his favour is very possible, but that would not have been in terms, or by virtue of the trust deed—that deed contains no such obligation in his favour, and if he had claimed a divestiture, it must have been on some other grounds. But if the right was not vested in him by the terms of the deed, clearly he required to make up a title; and I agree with the Lord Ordinary, that the adjudication obtained against Gordon Cameron, was ineffectual to support the declaratory conclusions for what was not vested in him. With regard to the supplementary action, I am also inclined to agree with the Lord Ordinary. The right to be put in possession of the farms, and the arrears of annuity, were merely personal to Gordon Cameron. I do not think there was any thing which an adjudication by his creditors could competently carry.

LORD CRINGLETIE.—The difficulty which I had in the case was this: There is

¹ Dec. 4, 1821, (*ante*, I. 185.)

certainly no express clause in the deed requiring the trustees to denude, but then No. 222.
 there is an implied obligation to that effect, which can be distinctly gathered from
 its terms. When I look at those terms, which acknowledge Gordon Cameron as Mar. 3, 1832.
 the son and heir of the marriage, and clearly point at a divestiture in his favour, I Fraser.
 cannot help thinking that we must take for granted the clause to denude, just as if Trotter, &c. v.
 it had been expressed. Suppose he had paid all the burdens and obligations of the Farnie, &c.
 trust, might he not have called upon the trustees to denude, and could he not have
 taken without service ?

LORD JUSTICE-CLERK.—My opinion coincides generally with that expressed by Lord Glenlee ; but I must say, that I have a difficulty in adopting that part of the Lord Ordinary's interlocutor where he finds, that George Cameron was not divested by the terms of his trust. I do not think, however, that it is at all necessary to decide that point. The finding that no right vested in Gordon Cameron, or had been vested at the time of his death, is quite sufficient for the decision of the cause. Now, that nothing vested in Gordon Cameron by the deed, I am satisfied by the terms of that very clause which Lord Cringletie alluded to, as inferring an obligation to denude in favour of Gordon Cameron ; for that clause does not refer alone to him, it expressly contemplates other heirs succeeding to the grantee. Suppose that Gordon Cameron had died at a much earlier period than he did, leaving a son, grandson to the trustee, could that grandson have taken without a service ? Certainly not ; but the argument is equally applicable to him. On the other case, I also agree with Lord Glenlee, that there was nothing which the adjudication was competent to carry.

LORD MEADOWBANK concurred with Lords Glenlee and Justice-Clerk, and

THE COURT, in the first action, found " it unnecessary in this case to determine whether the trustee, George Cameron, was divested of the estate by the terms and conditions of the trust-deed ; quoad ultra adhered to the interlocutor, and refused the desire of the note." And in the other action adhered.

SCOTT, FINLAY, and BALDERSTON, W.S.—WILLIAM MACKENZIE, W.S.—Agents.

WILLIAM TROTTER and Others, Complainants.—D. F. Hope—

No. 223.

Rutherford.

J. FARNIE, &c. Respondents.—Sol.-Gen. Cockburn—Jameson—A.M' Neill.

Nuisance—Interdict.—Circumstances in which a remit was made to men of science, with the aid of practical men, to judge by experiment whether the operations of certain public works under interdict were a nuisance or not.

THIS was the sequel of the case reported ante, IX. 144, which see. The Mar. 3, 1832.
 Court then passed a bill of suspension, to try whether a whale blubber boil- 2d Division.
 ing establishment, about to be set agoing in the neighbourhood of Burnt- Lt. Mackenzie.
 island, was a nuisance ; and this judgment was affirmed on the 6th Sep-
 tember 1831, (ante, IX. append. p. 9.) On affirming the case, the Lord
 Chancellor observed, " that the interim interdict was warranted, both by
 the civil law, and by the law and practice of Scotland, the avowed pur-

No. 223. pose being to boil whale blubber; for although it was impossible to say, that under all circumstances such an operation is a nuisance, yet it is so prima facie, and entitles a party liable to be injured by it, to have it stopped till it be shown that it will not be injurious; and that in the present case, this had hitherto not been shown." This judgment being applied, and a record made up before Lord Mackenzie, Farnie and others, partners of the Whale Fishing Company, stated, that it was their intention "to carry on their operations in all their parts, in such a manner that no nuisance can occur, and no reasonable ground of complaint be afforded to the complainers, or those who, from contiguity or other reasons, might conceive that they had ground of complaint against the respondents' operations. Their apparatus has been constructed of the best materials, and in the best manner, and at great expense.

"The boiler is of such a size, that only one boiling will be necessary in the course of the twenty-four hours, and this boiling will be over by a very early hour in the day, and not occupy more than from four to six hours. The boiler is completely covered, and the flues have been built in such a manner as to carry off all the effluvia which can possibly escape from the blubber, in the course of boiling, into the furnace, where it will be consumed.

"There will be no smell even in the boiling-house during the operation of boiling. The refuse, when cooled, is drawn off, not into an open tank outside of the premises, exposed to the atmosphere and rain, as is customary at other manufactories, but into a covered vault within the boiling-house. It is allowed to remain in this vault till it is casked up. In this state it emits no effluvia, and is disposed of to glue manufacturers. It will be apparent to any person of skill, and the respondents have no objections to submit their operations to the inspection of any such person as may be named by the Court, that their apparatus is of such a nature as to exclude all risk of nuisance to the neighbourhood."

In reply to this statement, Trotter and others denied "that the respondents have yet stated, or are able to state, any such substantial improvement in the mode of carrying on their works, as shall prevent its ordinary consequences, and save it from being a nuisance. The precautions here mentioned, in so far as they are intelligible, do not, in most points, materially differ from those stated in the minute, and which were characterised and treated in the House of Lords as evidently fantastic and ineffectual. But farther, they are not intelligible or explicit in themselves, being accompanied with no specification, such as can either bind the party, or enable a satisfactory judgment to be formed on the efficacy of the proposed plan of conducting the work."

The Lord Ordinary pronounced the following interlocutor:—"Before answer, allows an experiment to be made, whether the respondents' manufacture, as condescended on, would be a nuisance, or hurtful, or offensive to the property of all, or any, of the complainers, or persons residing thereon,

Mar. 3, 1832.
Trotter, &c. v. Farnie, &c.

and that by the respondents carrying on the said manufacture for such time No. 223.
 as will be sufficient for such experiment; but this under the inspection and Mar. 3, 1832.
 direction of Professor Sir John Leslie, whom failing, Dr Andrew Fyfe, Trotter, &c. v.
 surgeon and chemist in Edinburgh, or Dr D. Boswell Reid, assistant to Farnie, &c.
 Dr Hope, Professor of Chemistry there, or Dr John Murray, Lecturer A. B. v. C. D
 on Chemistry in Edinburgh; with power and instructions to the said in-
 spector to fix the time of beginning the working, in so far as may appear
 necessary to insure that it may be fairly tried, and to stop the said work-
 ing as soon as the experiment shall appear to him to have been sufficiently
 made; four days' notice being always given to the agent for the com-
 plainers, of the time fixed for the experiment, under the hand of the agent
 for the respondents, by delivery to him personally, or at his office; and to
 report to the Lord Ordinary on the nature and result of the said experi-
 ment; and recalls the interdict to the above effect only,—and with power
 and instructions to admit two or more persons to be named by each party,
 to be present at the experiment, besides the respondents and their work-
 men."

Trotter and others reclaimed, and contended that the Whale Company
 had made out no case for removal of the interdict, even to the extent of
 making the experiment; that they were bound to have specified more
 particularly the nature of the precautions to be taken; that at all events,
 the experiments ought to involve every possible state of the process of
 blubber boiling, and that practical men ought to be joined with the sci-
 entific gentlemen proposed to judge the experiments.

The other party having expressed themselves willing that the fairest
 experiment should be made, the Court adhered, "with this addition, that
 the inspectors shall be present, and shall report on the effects of the whole
 process of the manufacture from beginning to end; and further recom-
 mended to the inspectors to apply for and take the assistance of persons
 practically conversant with this manufacture, as usually conducted."

JOHN LEVEN, W.S.—A. P. HENDERSON,—Agents.

A. B. Petitioner.—*Forbes.*
 C. D. Respondent.—*R. Bell.*

No. 224.

Poor's Roll.—A gentleman's servant, whose income was stated to be £24 per
 annum of wages, out of which he had to support a child, found entitled to the benefit
 of the poor's roll, chiefly on the ground of the precarious nature of his income.

THE petitioner applied for the benefit of the poor's roll on the 2d of Mar. 3, 1832.
 March current, when

2d Division

Bell, for the respondent, opposed the motion, on the ground that the
 petitioner was a servant earning £24 per annum of wages, and quoted the

No. 224. cases below,¹ to prove that under such circumstances he was not entitled to litigate free of expense.

Mar. 3, 1832.

A. B. v. C. D. The Court expressed a strong disinclination to extend the benefit of the poor's roll beyond cases of extreme poverty; but they delayed judgment for the purpose of examining the authorities referred to. The case being resumed, the opposition was repeated upon the decided cases.

Forbes, for the petitioner, stated, that he had a child to support from his income, and was in totally different circumstances from the parties in the cases referred to. In those cases the income was not only greater, but derived from a certain source; whereas the petitioner's income depended upon his wages, and was very uncertain.

LORD JUSTICE-CLERK.—After looking at the cases, I am decidedly of opinion, that this man is entitled to the benefit of the poor's roll; there is this marked distinction betwixt this case and the authorities quoted, that in all those cases the parties had a certain income secured to them, in the shape of pension or salaries, but if this man were to fall sick, he might be destitute.

The other Judges concurred.

THE COURT found him entitled to the benefit of the poor's roll.

No. 225.

JOHN HAMILTON, Common-Agent.—Keay—Marshall.

GEORGE BENNET and Others, Objectors.—D. F. Hope—Anderson.

Process—Expenses.—After a judgment by the Inner House, exhausting the merits, without any finding as to expenses—the Lord Ordinary cannot award expenses.

Mar. 3, 1832.

John Ogilvie of Gairdoch, objections to the prepared state were lodged 2d Division. Lord Medwyn. for the Rev. George Bennet and others. These objections and answers having been finally disposed of by Lord Medwyn, and also by the Inner House, on a reclaiming note, without any finding as to expenses, the objectors enrolled the case before Lord Medwyn, to crave expenses, when his Lordship "found them entitled to expenses."

Against this interlocutor Hamilton, the common agent, reclaimed, pleaded that the finding as to expenses was incompetent, as the Lord Ordinary was functus after disposing of the objections and answers, without any judgment as to expenses. A reclaiming note had been refused, and nothing said about expenses. Under the old form of process, it was incompetent, after the case had been finally disposed of by the Inner House, to find expenses due, and there was nothing in the judicature act which made a difference in this respect; on the contrary, the 17th and 21st sections

¹ Galloway Hunter, Dec. 11, 1829 (*ante*, VIII. 223); Drysdale, Dec. 12, 1829 (*ante*, VIII. 276); Christie, Dec. 14, 1830 (*ante*, IX. 169).

of the statute supported the argument of incompetency. It is true, that No. 225. when an incidental point is decided in the Inner House, the Lord Ordinary may ultimately decide the question of expenses, but here the whole case was disposed of.

To this it was answered, that there was nothing in the judicature act, or the act of sederunt, which made it incompetent for the Lord Ordinary to decide the question of expenses.

Mar. 3, 1832.
Hamilton v.
Bennet, &c.

Balfour v.
Lord Tweed-
dale's Commis-
sioners, &c.

LORD JUSTICE-CLERK.—Here is a regular record made up under the judicature act. The case is disposed of by the Lord Ordinary, and comes to the Inner House, where an order is pronounced, which the common agent was bound to obey, without going to the Lord Ordinary, who was functus. I think it was incompetent to entertain the question of expenses.

LORD GLENLEE.—I am entirely of the same opinion; it was quite incompetent. The other Judges concurred.

THE COURT accordingly recalled the Lord Ordinary's interlocutor as incompetent.

Common Agent's Authority.—Judicature Act, § 17 and 21.

Objectors' Authority.—Logan v. Buck, Jan. 24, 1824 (*ante*, II. 338.)

J. HAMILTON, W.S.—ANDREW SCOTT, W.S.—Agents.

GENERAL BALFOUR.—D. F. Hope—Alison.

No. 226.

LORD TWEEDDALE'S COMMISSIONERS.—Murray—Ivory.

OFFICERS OF STATE.—Sol.-Gen. Cockburn—Brown.

Competing.

Process—Multiplepoinding.—The raiser of a multiplepoinding as to arrears of feu-duty, &c. having allowed an interlocutor approving of a condescendence of the fund in medio given in for him by another party to become final; and having put his objections to the state of arrears condescended upon into the shape of a separate condescendence and claim of his own upon that fund; and another party being preferred in the competition, and a remit made to the Lord Ordinary “to hear parties as to the present amount of the said arrears”—held that this remit only applied to the state of arrears subsequent to the date of that approved of as the fund in medio.

AN action was raised in 1802 by Messrs Douglas, as the Commissioners Mar. 3, 1832. of the Marquis of Tweeddale, concluding, under certain titles against General Balfour, for payment of arrears of his Lordship's bailie fee of eight bolls of meal, out of Kinglassie, which estate had come by progress into the person of the General. The Court eventually directed the Officers of State to be called as a party; and, in consequence of this, a multiplepoinding was raised in name of General Balfour, in which appearance was made for the Officers of State, as well as for the Marquis's Commissioners. In this multiplepoinding, the Commissioners were appointed, by an interlocutor of the 21st December 1822, to give in a condescendence

2d Division.
Ld. Fullerton.
T.

No. 226. of the funds in the hands of the General, who was allowed to see and object to it when lodged. A condescendence was accordingly given in by them, which set forth that the fund in medio consisted of the arrears of feu-duty of eight bolls of meal, payable out of the lands of Kinglassie, from crop 1781 to crop 1821, both inclusive. On 16th May 1823, the Lord Ordinary, "in respect no objections have been made to the foregoing condescendence, approved of the same, and of new appointed the creditors to lodge their claims forthwith." The competition proceeded, and General Balfour lodged a condescendence and claim, maintaining his rights to the fund in medio, in so far as it consisted of the arrears from 1780 to 1811. The Court, on the 3d June 1831 (ante, IX. 676), "preferred the said James and Robert Douglas as commissioners foressaid to the fund in medio, consisting of the arrears of said feu-duty, amounting annually to eight bolls of oatmeal, after satisfying the Crown, or the grantees of the Crown, for the surplus of the said feu-duty." The case was then remitted to the Lord Ordinary, who, after embodying the state of process in preliminary findings, found, "that, under this remit, when taken amongst with the interlocutor of the 16th May 1823, approving of the condescendence of the fund in medio then due, the only question now competent before the Lord Ordinary is the present amount of the arrears, namely, the addition to the arrears arising since the date of the condescendence already approved of, and therefore appointed the raiser of the multiplepoinding to lodge a condescendence of these additional arrears, being the feu-duty falling due since, and including the year 1822." To this interlocutor his Lordship added the note below.*

General Balfour reclaimed.

* "Note.—The discussion on the part of the raiser, General Balfour, has assumed rather an unusual form. In so far as the Lord Ordinary can judge, the question in regard to his rights would have been more naturally raised in the discussion of the amount of the fund in medio. But a different course seems to have been adopted on his part. A condescendence was given in by the claimants, Messrs Douglas, stating the fund in medio as then consisting of the arrears of feu-duty at eight bolls of meal per annum from the year 1781 to 1821 inclusive. He allowed that condescendence to be approved of, i. e. he allowed the fund in medio up to 1821 inclusive to be fixed by the interlocutor of 16th May 1823, and then raised the question of his rights in the character of a claimant on the fund in medio, to the extent of the arrears from 1780 to 1811. Thus, in the close of his condescendence and claim, he states as his general object, that he is entitled to 'hold his lands free of any other payment than the stipulated reddendum to the crown, and that as that reddendum has been paid up to March 1811, the whole fund in medio from 1780, down to that period, should be declared to belong to him, and that he is entitled to expenses from the Marquis's factors.' In this competition, the Court pronounced the interlocutor of the 3d June 1831, preferring James and Robert Douglas 'to the fund in medio, consisting of the arrears of said feu-duty, amounting annually to eight bolls, after satisfying the crown for the surplus of said feu-duty, payable in Exchequer or to other grantees of the crown,' and remitting to the Lord Ordinary 'to hear parties as to the present amount.'

Dean of Faculty.—The effect of the Lord Ordinary's interlocutor is virtually to subject him (General Balfour) in double payment, by assuming that he had consented to the state of arrears condescended upon, and had admitted them himself out of Court. But the condescendence lodged in his name was purely hypothetical, and it was never contemplated that he should be subjected in more than once and single payment; that is to say, that if he settled with one party,—

LORD MEADOWBANK.—You use the expression settled. Did you actually pay to the Crown?

Murray for the Respondents.—He has never paid one farthing; and the whole argument is founded on the assumption of double payment.

Dean of Faculty.—The tack does not bear that General Balfour is bound to pay to Lord Tweeddale.

LORD MEADOWBANK.—This is just a question of form, and that is, whether General Balfour is foreclosed by the Lord Ordinary's interlocutor of the 16th of May 1823, approving of the condescendence lodged in name of General Balfour, from questioning that state of the fund. There were two condescendences, one in General Balfour's name, and another with his claim. I can understand that this last may be held to be his claim, but not so the first, and I do not see how he is precluded; the interlocutor of 16th May, though it approved of the condescendence, did not in terminis fix the amount of the fund in medio. Now, the invariable practice is to do so.

LORD CRINGLETIE.—I am of opinion that the interlocutor of the 16th May, 1823, approving of the condescendence, was correctly pronounced. I have a distinct recollection of this very discussion occurring before us on a former occasion. The General has paid nothing; but then he says, 'True, I have paid nothing, but the others have.'

LORD JUSTICE-CLERK.—I must pray your Lordships to consider the terms of our remit. We could only have meant that the quantum of the General's liability was still unsettled. I am inclined to think that there was nothing which precluded the Lord Ordinary from entering upon the merits, and that he was bound to decide.

LORD MEADOWBANK.—I am of that opinion too. Not one judge mentioned the amount of arrears. The question was not before us.

LORD JUSTICE-CLERK.—But I give no opinion on the merits. It is clear that the General is not to pay twice; but he does not seem to have paid at all.

LORD GLENLEE.—My view of the matter is simply this. There is no doubt the condescendence is a good condescendence of the fund in medio; that is to say, in the sense of the fund in medio: but then it does not decide the amount of General Balfour's liability. I see nothing to prevent our just adhering to this interlocutor, which I would not have done if it subjected General Balfour to double payment.

of the fund in medio.' How far the decree of preference as above expressed saves any rights of General Balfour as a claimant in the competition, is a question which it is clearly not competent for the Lord Ordinary to entertain. The only point remitted to him is the present amount of the fund in medio. And considering that the amount of the fund in medio up to 1821 inclusive, is fixed by the final interlocutor of 16th May 1823, it appears to him that the order pronounced above exhausts his powers in the present state of the process."

No. 226.
Mar. 3, 1832.
Balfour v.
Lord Tweed-
dale's Commis-
sioners, &c.

No. 226. **LORD JUSTICE-CLERK.**—I am disposed to think that the view taken by Lord Glenlee is the correct one.

Mar. 3, 1832.
Balfour v.
Lord Tweed-
dale's Commis-
sioners, &c.

The other Judges concurred, and

THE COURT adhered.

Mylne, &c. v.
Blackwood, &c.

JOHN YULE, W.S.—GIBSON-CRAIGE, WARDLAW, and DALziel, W.S.—WILLIAM FRAZER,
W.S.—Agents.

No. 227. **REV. DR MYLNE and Others, Petitioners.—D. F. HOPE—MORE.**
WILLIAM BLACKWOOD and Others, Respondents.—RUSSELL.

Inhibition—Arrestment.—Circumstances in which the Court recalled an inhibition and arrestment, executed on the dependence of an action by certain parishioners and residents in the parish of Dollar, against the trustees of the Dollar Institution.

Mar. 6, 1832. **THE Rev. Dr Mylne and others, being a majority of the trustees of**
1st DIVISION.
D.

the Dollar Institution, presented a petition for recall of inhibitions and arrestments which had been used against them on the dependence of an action, raised against them by Blackwood and others, in relation to their administration of the trust. This action had been brought by Blackwood and others, as parishioners and residents in the parish of Dollar; and concluded to have it found that the trustees had misapplied the trust-funds; that their rules for the government of the trust were improper, and should be reduced; that “the said trustees should produce a full account of their intromissions” with the trust-funds; and “be decerned conjunctly and severally to pay back to the said charitable fund, the sum which shall be found to have been squandered and misapplied,” &c.; and that, failing a full accounting, they should pay £30,000 as the sum misapplied. The inhibition was directed against all of them, and arrestments of the stipend of Dr Mylne had been executed.

Blackwood and others answered, that it was true that they did not conclude for payment to themselves of any of the trust-funds, that being impossible; but if they had a title to crave a decree for repayment of a sum to the trust-funds, under which decree they could use all manner of diligence when recovered, so must they be entitled, on the dependence, to use the precautionary diligence of inhibition and arrestment. They offered to consent to a recall on caution for £12,000, and contended that the Court could not otherwise grant the petition.¹

LORD BALGRAY.—I have no hesitation in recalling this diligence. Any one who meant to adopt so serious a measure as the use of inhibition against these

¹ M'Leay, July 8, 1826 (ante, IV. 812.)

trustees, on the dependence of such an action, should have applied to the Court No. 227. for letters of inhibition, and they would have been granted, if necessary, causa cognita. But I cannot permit it to be used at the mere discretion of these individuals, in the dependence of an action of this nature. I would propose to grant the petition, and subject the respondents in expenses.

The other Judges concurred.

Mar. 6, 1832.
Myln, &c. v.
Blackwood, &c.

Smith, &c. v.
Wylie.

THE COURT granted the petition accordingly, with expenses.

W. CLARK, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

JOHN SMITH and Others, Pursuers.—Jameson—Moir.

No. 228.

JAMES WYLIE, Defender.—D. F. Hope—Wilson.

Bankrupt.—A father having maintained his daughter and her child during the dependence of a declarator of marriage, &c., at her instance, of which he advanced the expense; and the daughter having succeeded in the declarator, and obtained decree of aliment against her husband, and assigned her pecuniary interest under the process against her husband to her brother, for behoof of her father, in payment of maintenance and advances,—held, in a question with the creditors of the husband, that the assignation was not reducible.

IN 1821, Jean Wylie was privately married to Hugh Hamilton, by whom she had a child. Having afterwards deserted her, she and the child were taken into the house of her father, and supported by him. She then instituted legal proceedings against him, and ultimately obtained a decree of declarator of marriage and legitimacy, and also decree for £60 and £20 annually during her husband's non-adherence, as aliment for herself and child respectively. He refused to adhere, and cohabited with another woman, became bankrupt, was incarcerated at the instance of his wife on the decree for aliment, and some time thereafter was liberated by a process of *cessio bonorum*.

In the meanwhile, he had granted certain deeds in favour of his brother, conveying away property; and in August 1827 he executed a trust-disposition in favour of the pursuers, for behoof of his creditors; and thereafter his brother also conveyed his property to them. From the period of Hugh Hamilton's desertion, his wife and child had been supported by her father; and it was alleged, and not denied, that the father had expended, in prosecuting her legal claims, upwards of £800. On 12th March 1830, she executed a deed in favour of her brother, the defender, James Wylie, for behoof of her father, by which, after narrating her action and decree of declarator, and the debt incurred by her to her father, she assigned her whole pecuniary interests under the processes against her husband. James Wylie, founding upon this assignation as constituting him a creditor of Hugh Hamilton, then brought an action of reduction against the trustees of Hugh Hamilton and his brother, of the deeds in favour of the

2d Division.
Lt. Moncreiff.
F.

No. 228. brother, and the trust disposition by him. The trustees met this by a counter action to reduce the deed of assignation which constituted James Wylie's title to pursue.

Mar. 6, 1832.
Smith, &c. v.
Wylie.

In support of this action, they maintained various pleas; but mainly, 1. That as there was no evidence of the advances granted by the father, either in cash or otherwise, to Mrs Hamilton, and, at all events, as these were compensated, seeing that she had wrought as a servant to her father, the assignation was gratuitous, and therefore ineffectual against onerous creditors; and, 2. That Hugh Hamilton had only been prevented from adherence by imprisonment at the instance of his wife; and as the alleged advances were improvident, and not such as any third party was entitled to advance to a married woman under the circumstances, without the authority of her husband, no debts existed against him in favour either of his wife or her assignee.

To this it was answered, 1. That as the desertion by Hugh Hamilton, the existence of the litigation, the maintenance of the wife and child, were not denied, and it was not alleged that Hamilton had supported them, or paid the expense of the litigation, and the advances were not specifically denied, the assignation was granted for a just, necessary, and onerous cause, and therefore not reducible.

The Lord Ordinary pronounced this interlocutor:—"In respect it is not denied that Jean Wylie, or Hamilton, was resident, and alimented, during the period mentioned in the record, in the house of her father, for whose behoof the assignation was granted to James Wylie, his son, sustains the defences, assoilzies the defenders from the conclusions of reduction, and decerns: finds the pursuers liable in expenses."

The pursuers reclaimed.

LORD JUSTICE-CLERK.—I am decidedly of opinion that no relevant ground has been stated for setting aside this assignation. What may be the effect of the deed is another question.

LORD GLENLEE.—I agree. The libel contains no alternative conclusion that at least the deed should be found to have only such and such effects. It concludes simply for a reduction in toto, and I think the Lord Ordinary's interlocutor right.

LORD MEADOWBANK.—I am of the same opinion.

LORD CRINGLETIE.—My only objection to the interlocutor is, that it does not mention the child.

THE COURT accordingly adhered.

WOTHERSPOON and MACK, W.S.—JOHN RONALD, S.S.C.—Agents.

CHRISTOPHER SMYTH, Advocate.—*Shene—Reid.*
GEORGE ROGERSON, Respondent.—*D. F. Hope—G. G. Bell.*

No. 229.

Mar. 6, 1832.
 Smyth v.
 Rogerson.

Arrestment.—Where a principal tenant granted a subtack with a clause of warrandice from fact and deed only, and a general clause as to fulfilment of the mutual obligations; and the principal lease was reduced before the expiry of the subtack, and both tenants removed; and it was found that the subtenant had no claim of damages against the landlord, but that the principal tenant had, which he was bound to pursue, and communicate so much thereof to the subtenant; and the principal tenant pursued the landlord directly in his own name, founding on his obligation to account to the subtenant; and a creditor of the subtenant arrested in the hands of the principal tenant, pending the action of damages, but previous to their recovery,—held, in a competition with another arrestment in the principal tenant's hands subsequent to the recovery of damages, that the prior arrestment was competent and preferable, in respect that the subtenant had, previous to the recovery of damages, a vested right in the damages for which the principal tenant was bound to account.

THE late Duke of Queensberry, by his commissioner, let the farm of Mar. 6, 1832.
 Pennersaugh to the late John Johnston for 19 years, from Whitsunday 2d DIVISION.
 1806, with a clause of absolute warrandice. Johnston assigned the lease Lord Medwyn.
 T. to one Thomson, and on the 17th February 1810, these parties subset the farm to Calvert for the remaining years of the tack, with a clause of warrandice in these terms: “ Said farm to be thenceforth peaceably possessed and enjoyed by the said John Calvert and hisforesaid, in terms of the warrandice by his said Grace's commissioner, in the said principal lease; and which subset the granters hereof bind themselves and their heirs and successors to warrant from all facts and deeds done by them prejudicial thereto.” There was this further clause: “ and parties being thus agreed, they bind themselves and theirforesaid reciprocally to fulfil the premises to each other, under the penalty of £50 sterling, to be paid by the party failing to the party observing, or willing to observe, attour performance.”

The principal lease was, along with the other leases on the Queensberry estate, reduced in an action at the instance of the Duke of Buccleugh. The summons in this action was served upon Calvert, the subtenant, as well as upon Johnston, and Thomson, the principal tenant, and his assignees. The tenants and subtenants were removed, in consequence of the reduction, at Whitsunday 1822 as to the houses and pasture, and at the separation of the crops as to the arable lands, being three years previous to the expiry of Calvert's sublease. After the reduction and removing, Thomson, the assignee, instituted an action against the executors of the Duke of Queensberry, in which he claimed damages for breach of his possession. This included a claim of damages for the three years from 1822 to 1825, for which period Calvert would have possessed as subtenant, had the principal lease not been reduced; and Thomson admitted his obligation to communicate to Calvert so much of the damages,

No. 229. when recovered, as was necessary to compensate the subtenant's loss.
Mar. 6, 1832. While this process was in dependence, and before the damages were re-
Smyth v. covered from the executors, Smyth, a creditor, holding a decree against
Rogerson. Calvert for a considerable sum, arrested in virtue thereof, on the 31st
May 1827, in the hands of Thomson.

Thereafter, on 5th June 1827, a process of multiplepoinding, (of which Thomson was the nominal raiser,) was instituted before the Sheriff of Dumfries-shire, for the purpose of settling various claims against Calvert. Thomson at first objected to its competency, on the ground that, under the warrandice granted in the subtack, he was not liable to Calvert in any damages; but the Sheriff, on the 17th July 1827, "sustained the competency of the action; found that John Calvert is entitled to insist in his claim of damages for the loss of the three years of the subtack, owing to the reduction of the principal lease; and that Mr Thomson, as assignee, and in the right of the principal tenant, is bound to concur with the subtenant in recovering the said damages." Thomson acquiesced in this interlocutor, and a remit was made to certain valuators to ascertain the amount of damages due to Calvert. Thereafter one Barbour was preferred primo loco upon the fund in medio for the sum of £20 sterling, and Smyth for the remaining balance. A pause then occurred in this process, and in the meanwhile Thomson (on the 11th June 1828) got payment from the executors of damages, comprehending, *inter alia*, a sum of £159, 15s., minus expenses, to account of the possession of the farm from 1822 to 1825, which he had agreed to pay to Calvert as soon as received. On 16th July thereafter, Rogerson, another creditor of Calvert, arrested in the hands of Thomson; and in August, he lodged a claim of preference in the multiplepoinding, maintaining that Smyth's arrestment, though prior, was incompetent and inept, there being no fund to arrest at its date. After the record was closed, the Sheriff-substitute, on 17th March 1829, pronounced this interlocutor:—"In respect the principal debtor was the raiser's subtenant, and acquired no title from the raiser to the warrandice in the principal lease, and in respect of the interlocutors in this case of 17th July and 14th Oct. 1827, and that the raiser recovered damages from the Queensberry executors for the loss of that part of the farm of which the principal debtor was deprived by the reduction, repels Mr Rogerson's claim of preference." Rogerson appealed to the Sheriff-depute; and in the meantime Smyth, having discovered what he considered a fatal objection to Rogerson's arrestment, used a second arrestment, on 9th June 1829, in the hands of Thomson, for the purpose of defeating Rogerson's arrestment, in the event of his own first arrestment not being sustained, and lodged a new claim. The Sheriff-substitute pronounced this interlocutor: "Having considered this process, with minute of appeal for George Rogerson, and second claim for Christopher Smyth, and having advised with the Sheriff, finds that Mr Smyth's second claim cannot be received at this stage of the

process, and ordains same to be withdrawn ; finds that the arrestments No. 229, used by the claimants, Meers Smyth, Barbour, and Kemp, on 31st May ^{Mar. 6, 1832.} and 2d June 1827, were inept, in respect the arrestee had no funds in his hands at that time belonging to the common debtor, nor was under any obligation to account to him ; and therefore dismisses these claims ; prefers the claimant, Georges Rogerson, to the fund in medio, to the amount of his debt."

Smyth advocated, and also raised an action of reduction of Rogerson's arrestment, for reasons unnecessary to be detailed. These processes were conjoined ; and the Lord Ordinary pronounced this interlocutor :—" Finds that the fund in medio did not come into the raiser's hands till 11th June 1828 ; and that, although prior to that date, Calvert, the common debtor, had a claim of damage competent to him against the raiser, it could not be the subject of arrestment at the instance of any creditor of his till it was liquidated and received by the raiser ; and, therefore, that the arrestment used by the advocator, Smyth, upon 31st May 1827, was inept : finds that the respondent, Rogerson, used an arrestment in the hands of the raiser, on 16th July 1828 ; and that the advocator, Smyth, also used an arrestment on 9th June 1829, to affect the fund in medio : finds that, in order to support his objections to the arrestment used by the respondent, the advocator has instituted a process of reduction of the decree of constitution on which said diligence proceeded, which is admitted to be regular : finds that there is no evidence adduced, and none offered, that the bill upon which decree was obtained was collusive, and not a debt truly due : finds that the common debtor was personally cited to the action, and did not object to the execution of citation, but allowed decree to be pronounced against him, and does not yet object to the debt, or the regularity of the decree : finds, in these circumstances, that the objections stated by the advocator to the execution of citation, are not such as can be pleaded by the advocator, to the effect of reducing the decree which was obtained, and to set aside the diligence raised upon it : Therefore repels the reasons of reduction, sustains the defences, and assuages the defender from said process ; and, upon the whole, advocates the cause, prefers the claimant, Rogerson, on the fund in medio to the amount of his debt, and finds the advocator liable in expenses."

Smyth reclaimed, and pleaded—

At the date of his first arrestment, Calvert, as subtenant, had a direct claim against Thomson, in terms of the warrantice contained in the sub-tack, for the loss of possession sustained by him in consequence of the reduction of the Queensberry leases. Thomson, in his action of relief, accordingly included this claim in reference to that liability ; and before the sum was recovered, he stood, in relation to Calvert, as a trustee who was bound to account. An arrestment in the hands of a trustee, in such circumstances, was good, and Thomson, by the very terms of his action of relief, admitted his liability to account to Calvert.

No. 229. *Answered for Rogerson—*

Mar. 6, 1832.
Smyth v.
Rogerson.

The clause of warrandice in the subtack was specially restricted to facts and deeds done by the grantor; and to establish an arrestable interest, Smyth was bound to prove something done as covered by that warrandice; but there was no pecuniary claim competent to Calvert against Thomson prior to the recovery of damages by the latter, consequently nothing to arrest. Calvert had a right to insist that Thomson should follow out his absolute warrandice against the executors, and relieve him; but this was merely a duty to be performed by Thomson, and constituted no pecuniary *jus exigendi* against him. The case of a trustee was not in point, for here nothing had occurred which could be construed into the creation of a trust; but arrestment had not been sustained in the hands of a person to whom goods were consigned before the goods came into his possession,—and that was a case in point.

LORD JUSTICE-CLERK.—It is now fixed law with regard to all the Queensberry cases, that the subtenants had no claim against the executors. That was decided by the House of Lords in the case of Maxwell.* Then in what situation does the subtenant stand? I agree that the clause of warrandice in the subtack is peculiar and limited; but it just comes to this, that although the tenants do not give absolute warrandice, they become bound to grant the subtenant all the benefit of the lease. The moment the subtenant is disturbed in his possession, he is entitled to go to the principal tenant, and require him to institute a process for redress against the Queensberry executors. Thomson was perfectly aware that he was bound so to do: it is clear that he was bringing forward every claim competent to Calvert against him. Calvert was, in fact, in the field. It has not been noticed, but I think it is of consequence in this question, that Thomson's action of relief proceeds upon the narrative of a reduction to which Calvert was a party,—for that summons of reduction had been served upon him, as well as upon the principal tenants. Now, Thomson's action was just framed so as to bring forward all claims competent to the subtenant: he was in *cursu* to have that claim liquidated; and although, for some reason or other, matters went on slowly, there was no undue delay, or doubt as to Calvert's claim. Under these circumstances, the question just is, was Calvert's right arrestable? I can have no doubt it was. There was not merely a duty to be performed on the part of Thomson,—there was a sum prestable, for every shilling of which he was bound to account to Calvert. I can see no distinction, in principle, betwixt such a case, and that of a trustee bound to account; and the cases of Lothian and of Kyle put that question beyond doubt. Therefore my opinion is, that this arrestment ought to be sustained.

LORD CRINGLETIE.—If this case had occurred before the judgment of the House of Lords, which decided that the subtenants could not come against the Queensberry executors, I would not have been inclined to view this as a case of trust; but that judgment has positively placed Thomson in the situation of trustee to Calvert, for it decided that the subtenant could not pursue the executors, but could only force the principal tenant to do so. Now, as it has been decided, that it is

competent to arrest in the hands of a trustee, even before lands are sold, the interest No. 229.
of the party to whom he is bound to account,—in like manner I think this arrest-
ment competent. Whether, ultimately, such an arrestment might prove effectual, Mar. 6, 1832.
is another question; but it is perfectly competent—and that is the true distinction. Smyth v.
Rogerson.

LORD GLENLEE.—Whether the common debtor had a vested right to call the Goldie v. Na-
arrestee to account, is the proper test of the interlocutors before us; and the ques- pier, &c.
tion is, was Calvert's interest duly constituted? Now, he was clearly entitled to
say to the principal tenant, You are bound to pursue, and whatever sum you can
recover on your own account, you are bound to communicate so much to me. The
only difficulty is occasioned by the circumstance, that in the action of relief, Thom-
son pursues directly in his own name, and for himself; but then he admitted his
liability to account, and, by the very nature of the thing, he was bound to pay over
so much to Calvert. I would put into our interlocutor sustaining the arrestment,
that we did so in respect of Calvert's right to require Thomson to account to him
for so much of the damage.

LORD MEADOWBANK.—I entirely concur. Thomson's liability is admitted on
all hands; he was bound to account to Calvert, and was placed precisely in the
situation of a trustee. If he had not pursued the Queensberry executors, the sub-
tenant could have called Thomson to account; and it is unquestionable that the
interest in the hands of a trustee is an arrestable interest.

THE COURT, “in respect that at the date of the arrestment used by the advo-
cator, Christopher Smyth, there was a vested right in Calvert, the common
debtor, as a subtenant, to call Thomson, the principal tenant, to account for
and communicate to him his due proportion of the damages to be recovered
by him from the executors of the Duke of Queensberry, after the inter-
locutor in the advocation, and prefer the advocator primo loco on the fund
in medio, to the extent of the debt covered by his arrestment; find it un-
necessary to determine the points raised in the process of reduction; find
expenses due,” &c.

Advocator's Authorities.—Kyle, Nov. 14, 1827 (ante, VI. 40); Lothian, Nov. 27, 1828
(ante, VII. 72.)

Respondent's Authorities.—Carmichael, June 22, 1742 (740); Stalker, Feb. 9, 1759 (745.)

J. BISSET and MORRISON, S.S.C.—WILLIAM STEWART, W.S.—Agents.

ALEXANDER GOLDIE, (Common Agent in the ranking of Parton,) Peti- No. 230.
tioner.—Keay—Henderson.

JOHN NAPIER, Respondent.—D. F. Hope—Greenshields—Whigham.

MISS GLENDONWYN and Others, Creditors Compearers.—Jameson—

A. Wood—Shaw.

Process—Ranking and Sale—Interest—Circumstances in which an objection
that a petition in a ranking and sale was by the common agent, not by creditors, was
disregarded; and a party ordained to consign, or find security for, a large amount
of interest, which had accrued on the purchase of land.

THIS was a branch of the case reported ante, VIII. 149. In 1814, Mar. 7, 1832.
Napier purchased land belonging to Scott, the price of which was to bear
interest from November 1813. A ranking and sale of Scott's estates was 1st DIVISION.
S.

No. 230. brought in 1817, in which Napier purchased a lot, the price of which was to bear interest from Martinmas 1819, and to be payable at Whitsunday Mar. 7, 1832.
Goldie v. Na- 1820. Napier retained to the extent of £22,000, on the ground that he pier, &c. was a preferable creditor. On 1st December 1829, the Court ordered

Robertson, &c. the arrears of interest to be accumulated into a principal, from and after v. Allan. Whitsunday 1821, (see ante, VIII. 149,) and the House of Lords (3d October 1831) affirmed the judgment. The common agent then presented a petition, stating that the sum due by Napier, with interest as at March 1831, was £40,000, of which £19,300 was interest, and praying for an order on Napier, either to consign the amount in bank, or find security for payment of it.

Napier objected, 1. that the petition, as at the instance of the common agent, and not of a creditor, was, in terms of 54 Geo. III. c. 137, § 6, incompetent; and, 2. that he was a preferable creditor for a capital sum of £22,000, which was more than enough to secure the interest; and besides, it was in part farther secured by a bond of caution, granted when the purchase was made.

To this it was answered, 1. that although the petition was in name of the common agent, yet it was truly at the instance and for behoof of the creditors, and they had accordingly compeared in support of it; and, 2. that Napier's claim was under reduction; and he was in possession, and so drawing the rents, while he was paying no interest on the price.

The Court ordained him to consign, or find security for £16,000, by Whitsunday next.

J. GOLDIE, W.S.—R. RUTHERFORD, W.S.—R. and W. KENNEDY, W.S.—Agents.

No. 231. MRS ROBERTSON and Others, (Glasgow's Trustees,) Pursuers.—D. F. Hope—R. Robertson.

HUGH ALLAN, Defender.—Shene—W. Bell.

Trust—Clause.—1. Construction of a trust deed, under which trustees were found entitled to sell heritage generally conveyed to them, though such power was not given in express words. 2. Where it was for the benefit of the trust that a question regarding trustee's powers should be judicially settled—expenses of all parties allowed out of the trust estate.

Mar. 7, 1832. THE late Mr Glasgow of Montgreenan, in Ayrshire, was possessed of a large fortune; and in 1815, he purchased a small villa near Ayr, called 1st Division. Ld. Corehouse. Seafield, for a price of about £4000. In 1818, he executed an entail of S. the estate of Montgreenan and others. The heirs first called were his natural daughter and her husband, Mr Robertson, and their children. Having subsequently acquired farther property, Mr Glasgow, in 1821, executed a supplementary entail in favour of the same heirs. He also made a testament, and another deed, conveying West Indian estates to

trustees, under both of which deeds, the heirs of entail were the parties, No. 231.
having the sole beneficiary interest, with the exception of some minor legacies. At the same time Mr Glasgow executed a general trust-disposition and settlement in favour of the same parties, who were constituted trustees on his West Indian estates. The trust-deed and the supplementary entail narrated the conveyance of the lands of Montgreenan and others, in Ayrshire, to the heirs of entail, and then proceeded, "Whereas, it is my intention to enlarge the said estate, by further purchases, and in particular, that, whatever monies, whether heritably secured or otherwise, or other personal estate, may at my death belong to me in Scotland (excepting as after-mentioned), shall be appropriated for the purchase of lands, or other hereditaments lying as near to my said lands of Montgreenan as can be had; and that the said lands and additional purchases shall be settled upon the same series of heirs upon which I have already settled my said lands and estate of Montgreenan and others, and under the same species of entail. And having full confidence in my friends and connexions after-named; therefore, and for sundry good causes and considerations me hereunto moving, I do hereby assign, dispone, and make over from me, my heirs and successors, to and in favour of Mrs Anne Glasgow or Robertson, &c., all and sundry lands and estate, heritable bonds, adjudications, and all other heritable subjects of whatever kind or denomination pertaining and belonging to me, or which shall pertain and belong to me at the time of my decease, in Scotland, (but excepting always herefrom the foresaid lands and estates of Montgreenan and others in Scotland, contained in the foresaid deeds of entail executed by me of the dates before mentioned)." He also assigned to the trustees, "all and sundry debts and sums of money, both heritable and moveable, presently pertaining, &c., or which shall pertain, &c., to me at the time of my death; and also every other subject of personal estate, with the whole vouchers, dispensing with the generality hereof, and admitting and declaring these presents to be as good, valid, and effectual, as if every particular of my said real and personal estate before conveyed, were herein particularly enumerated," &c. He named his trustees to be his executors "for rendering this disposition, so far as concerns my personal estate, before conveyed, the more effectual," &c.; and gave them power to "settle by arbitration or otherwise, all disputes which may arise relative to my real and personal estate hereby before conveyed," &c. There was no special mention of the lands of Seafield, or any other heritage. The conveyance was declared to be in trust to pay debts; "make up such titles as may be necessary, to my said real and personal estates hereby conveyed;" that the trustees should, "at the first term of Whitsunday or Martinmas which shall ensue after the expiry of a twelvemonth from the period of my death, cause make up a state of the trust estate under their management, in order to show, as nearly as possible, the free amount of my said estate, after deduction of my said debts, and allowance for the expenses attending

Mar. 7, 1832.
Robertson, &c.
v. Allan.

No. 231. the execution of the trust: and shall, from and after such term of Whit-sunday or Martinmas, account for, and pay over yearly, and proportionally, to the heir of entail in possession, for the time, of my said estate of Montgreenan and others in Scotland, contained in the deed of entail executed by me, of the dates before mentioned, such a sum as shall be equal to the interest upon what shall so appear to be the free residue and amount of my said estate, and that until such residue to be accumulated and made part of the stock, shall be disposed of in manner after-mentioned. Fourthly, To the end and intent that my said trustees or trustee shall, as soon as they shall have it in their power from the state of the trust funds, and as they shall think proper, appropriate and apply such produce or proceeds of my real and personal estates hereby conveyed, to the purchasing of lands or other heritages in Scotland, lying contiguous, or as near as may be to my said lands and estate of Montgreenan in Scotland, as such purchases can be met with, and most conveniently and advantageously made, and take the rights of the lands and other subjects so to be purchased by them, to and in favour of themselves and the survivor of them, as trustees, for the ends, uses, and purposes, particularly before and after-mentioned." The fifth purpose of the trust, directed the trustees, " upon making the said purchases," to convey the lands so to be purchased, to the heirs of entail; the sixth was in these terms,— " After the residue or free reversion of my said estate shall be so invested in the purchase of lands and heritages, and the same settled and secured in mannerforesaid, I appoint my said trustees to denude of this trust, and to pay over any balance in their hands, and to deliver over to the said heir of entail in possession for the time of the said estate of Montgreenan, and others in Scotland, the whole title-deeds of the lands so purchased by them, together with the vouchers and discharges of the debts and other obligations they may have paid in the execution of the trust, and all other writings and papers connected with the same," &c. The deed afterwards proceeded, " In which lands and other heritable subjects before disposed, I bind myself to infect my trustees," &c. contained a general procuratory and precept, and concluded with a provision that the trust purposes should be engrossed in the charter and infections in favour of the trustees, " but declaring, that it shall be nowise necessary to engross the said conditions and provisions, or any of them, in the dispositions, or charters and infections in favour of the purchaser or purchasers," &c.

After the death of Mr Glasgow, his trustees, being desirous to sell the villa of Seafield, which lay about 17 miles distant from Montgreenan, and to make a purchase of land nearer Montgreenan with the proceeds, for the purpose of being entailed, raised a summons of declarator against the heirs of entail. They set forth the trust-deed of 1821, and the two deeds of entail: " And whereas, at the time of executing the said two deeds of entail, the said deceased Robert Glasgow had belonging to him a property situated near to the town of Ayr, passing under the name of Sea-

Mar. 7, 1832.
Robertson, &c.
v. Allan.

field, which is neither conveyed by, nor included in, either of the said deeds No. 231. of entail, nor is it specially conveyed by the said trust-disposition and deed of settlement, although included under the general disposition thereof, and that it appears to have been the intention of the said deceased Robert Glasgow to have disposed of the said property of Seafield, on account of its distance from the said estate of Montgreenan, and that he had, in the year 1824, agreed to sell the said property of Seafield to a Mr John Cunningham, but that the sale thereof was not carried into effect, in consequence of the said deceased Robert Glasgow's illness and subsequent death: and in regard that the said property of Seafield, from its situation, at a distance from the said deceased Robert Glasgow's other lands and estate of Montgreenan, does not fall under the description in the said trust-disposition of 'lands or heritages, lying contiguous to the said lands and estate,' and that it seems to have been the declared intention of the said deceased Robert Glasgow, to dispose of the said property of Seafield, and not to settle the same upon his heirs of entail before mentioned," &c., and that it would be beneficial to the trust estate; therefore it should be found, that the trustees "are entitled to sell and dispose of the same by public roup, at such a reasonable price as can be obtained, and to grant a valid and unexceptionable title to the purchaser; and, after having completed the said sale, and received payment of the price, to appropriate and apply the same to the purchasing of lands or other heritages in Scotland, lying contiguous, or as near as may be, to the said lands and estate of Montgreenan, as such purchases can be met with, and most conveniently and advantageously made, and to take the rights of the said lands, or other heritages so to be purchased by them, to and in favour of themselves, and the survivor of them, as trustees, for the ends, uses, and purposes particularly described in the said trust-disposition."

Defences were lodged, and the cause being reported on Cases, their Lordships "sisted this process until the heirs-at-law of the villa of Seafield shall be called as parties." This being done by a supplementary summons, Hugh Allan, the heir-at-law, stated defences, and pleaded, that as Seafield was not specially conveyed to the trustees, and as the trustor had never intended it to fall under the entail, the trustees were not entitled to impose on Seafield, or its surrogatum, the fetters of an entail, to the prejudice of the heir-at-law. There was no intention that the trustees should have a power of selling Seafield; at least the trust-deed contained no clauses by which such intention could be validly carried into effect.

The trustees answered, that by the general trust-disposition in their favour, the whole heritage of the trustor was effectually conveyed, and they could therefore make up titles to Seafield, though it was not specially disposed; that the intention of the trustor, on construing his deeds of settlement, clearly was to have his whole property of every sort realized, and the proceeds applied in the purchase of lands near Montgreenan, to be

Mar. 7, 1832.
Robertson, &c.
v. Allan.

No. 281. entailed ; and that the purposes and directions of the trust-deed gave power to the trustees, by necessary implication, to sell Seafield, or other heritage Mar. 7, 1832. Robertson, &c. conveyed, and even declared expressly that none of the trust provisions v. Allan. need be engrossed " in the dispositions, or charters and infestments, in favour of the purchaser or purchasers," &c.

The Lord Ordinary reported the cause on supplementary Cases.

LORD BALGRAY.—If any doubt remained as to the intention of the trustor, or the power of the trustees, after carefully construing the trust-deed, it would clearly be necessary to give the heir-at-law the benefit of it. The legal course of succession would then prevail. But upon looking at some of the clauses of this trust-deed, I can see no ground for doubting what was the trustor's intention, and just as little as to the powers of the trustees to give effect to that intention. It is true that the word "sell" is not inserted in the trust-deed ; but words are there which, according to their only interpretation, are tantamount to it. The trustor begins his deed by declaring his intention to be to enlarge his entailed estate by farther purchases ; he then proceeds to convey " all and sundry lands and estates, heritable bonds, &c. pertaining to me, or which shall pertain to me at the time of my decease." This is followed up by a procuratory and precept. I can have no doubt that the general terms of this disposition reach to Seafield, and that it fell under the conveyance to the trustees. Observe, then, the ends and purposes for which such conveyance was made. The second purpose is, that the trustees shall make up titles to the heritage conveyed. Under the third purpose, it appears that the heirs of entail alone are to receive the whole annual proceeds of the free residue and amount of the trust-estate conveyed to them until such residue be disposed of, as mentioned in the fourth purpose of the trust, which is alone decisive of this question. It directs the trustees to apply the " produce or proceeds of my real and personal estate, hereby conveyed, to the purchasing of lands" to be entailed. This direction to the trustees how to apply the produce and proceeds of the whole estate conveyed to them, does, necessitate juris, bestow upon them powers of sale of that whole estate. Seafield forms part of it, and the powers of sale therefore apply to it. I would therefore decern in the declarator in favour of the trustees ; but as the judicial adjustment of this question has been for the benefit of the trust-estate, I would allow all parties their expenses out of it.

LORD CRAIGIE expressed his doubt regarding the conclusion arrived at by Lord Balgray. His Lordship thought that the pursuers had no powers of sale to the exclusion of the heir-at-law, except what was expressly given to them, and that, failing such express power, the crown, as ultimus haeres, if there were no heirs-at-law, would take the estate preferably to the heirs of entail.

LORD GILLIES.—The case is one of great difficulty ; but I concur in opinion with Lord Balgray. It is true, that the fettors of an entail are not to be reared up by inferential implication ; and it is a very delicate matter to allow trustees to have a power of sale, where such power is not directly conferred in express words. But the power may be equally given, if words are used which possess an equivalent meaning, and which do not admit of rational interpretation, except by construing them as implying a power of sale. It is quite certain that the lands of Seafield are conveyed to the trustees. This is not done per expressum, but the conveyance clearly embraces these lands. Then the trustees are directed to pay to the heir of

entail the interest on "the free residue and amount" of the estate conveyed to them, until such residue be disposed of by them. And how is it to be disposed of? By applying "the produce or proceeds of the real and personal estate hereby conveyed, to the purchasing of lands" to be entailed. These words, by necessary implication, and according to their only rational interpretation, intimate that a power of sale is given to the trustees, and I would therefore decern in the declarator in their favour.

LORD PRESIDENT.—I concur with the majority. The villa of Seafield was left out of the previous entails, apparently because, from its being a small and distant property, the trustor did not wish it to be entailed. But he has effectually conveyed this, along with his other heritage, to his trustees, and I am satisfied, on the grounds already expressed, that they possess powers of sale.

THE COURT accordingly found and declared, "that under the directions contained in the trust disposition and deed of settlement executed by the deceased Robert Glasgow, Esq., the trustees have full power and authority to sell and dispose of the lands of Seafield within mentioned, for such price as can be obtained for the same by public sale; that the said trustees have full power to grant a valid and unexceptionable title to the purchaser of the said lands, and to apply the free proceeds of the said lands in purchasing lands to be settled and entailed in terms of the directions in the trust disposition and deed of settlement; found the trust funds in the hands of the said trustees chargeable with the whole expense of the process, and authorized the trustees to take credit for the same accordingly, in accounting for the intromissions under the trust."

Pursuers' Authorities.—Kames' Princ. of Eq. I. 1, 3; Hill, Dec. 14, 1824 (ante, III. 389, and II. W. S. 80); Crichton, May 12, 1826 (ante, IV. 553, and III. W. S. 329); Drummond, July 17, 1782 (2313); Skene, July 31, 1725 (11354); Robson, Feb. 18, 1794 (14958).

Allan's Authorities.—3. Ersk. 8, 29.; D. of Roxburgh, Dec. 17, 1813; (2. Dow. 210).

J. WISHART, W.S.—M'LEAN and GIFFEN, W.S.—Agents.

ROBERT GEORGE, Pursuer.—*Reid.*
JAMES SCOTT, Defender.—*J. Anderson.*

No. 232.

Sale.—Acquiescence.—A party to whom furnishings were made, and an account rendered, having used the articles, and made a partial payment to account, and been repeatedly pressed for payment for some years, without objecting to the rates of charge,—not allowed afterwards to object to them.

SCOTT, a coach proprietor in Edinburgh, incurred an account to George, Mar. 7, 1832. a London coach-builder. The furnishings were charged at £855, 1s. 6d., and were made between January 31, 1826, and November 18, 1827. Scott used the various articles as they were furnished. Prior to the 10th of September, 1827, an account was rendered to Scott, who, of that date, paid £300 to account. Only one item of £5 in value was subsequently incurred, on November 19, 1827. Among the previous items, Article 10, bearing date the 4th of August, was for a carriage furnished to Scott.

1st DIVISION.
Ld. Corehouse.
S.

No. 232. Scott had ordered another one for Mr Greig at the same time with this, but had afterwards countermanded it, and eventually received only one of these two carriages. After the partial payment on 10th September 1827, Mar. 7, 1832.
George v. Scott. Scott having delayed to make farther payment, though frequently pressed by George to do so, an action was raised on 22d May 1830, for the balance of £555, 1s. 6d. remaining due.

Scott admitted the furnishings, but alleged that they were excessively charged, and, in regard to the carriage, Art. 10, that it was not sent for him, was of an inferior sort, and ordered for Greig, who refused to receive it on account of the delay in sending it; that it had then been put into his (Scott's) coach-yard, and kept for some time unused, but he was willing to allow £70 for it as a fair price, in place of £110, the sum charged. He admitted a sum of £347, 19s. to be justly due. George alleged that the carriage was never meant for Greig, but for Scott, and pleaded, that it was too late to object to the reasonableness of the charges after having used the articles sent, made a partial payment to account, and obtained repeated delays, without any objection being taken to the rate of the charges. Scott denied that accounts had been rendered as George alleged. Under a diligence, an account was recovered from Scott's agent, in which he was debited with the whole furnishings down to August 4, 1827, inclusive, and in which the balance was brought out against him, without allowing credit for any payment to account, as having been made of the date when the account was rendered.

The Lord Ordinary "decerned in terms of the conclusions of the libel, with expenses."*

* NOTE.—"The defender admits that all the articles mentioned in the account libelled on were furnished to him by the pursuer, except the carriage, article tenth. It is proved that the account was rendered to him in the same terms as the account libelled, except that his remittance in September 1827 is not placed to his credit, and the last article of the account libelled, for boxes and caps, is omitted. To the account so rendered he made no objections, either in respect of the quality or price of the goods furnished. It is true, he states in his deposition as a haver, that he did not receive this account till years after the articles to which it relates were furnished, and that he cannot be positive whether it was delivered to him in London, or transmitted to Edinburgh. But it is evident from the account itself, recovered from his agent, that it must have been rendered before the 10th of September 1827, when he remitted £300 to the pursuer; for if he had received the account afterwards, he must have objected that credit was not given him for that sum. Farther, it appears from the correspondence produced, that in 1827 and 1828 he was often pressed by the pursuer for payment, from which it must be presumed that the account had been previously sent. As none of the articles, therefore, were objected to in due time, and as they have now been used or disposed of by the defender, it is too late for him to maintain that they were not agreeable to his order, or were charged too high.

"With regard to article tenth, it is proved that the defender ordered that carriage, along with another carriage for Mr Greig at Newhaven, and that he countermanded

Scott reclaimed.

No. 232.

LORD BALGRAY.—I am satisfied that the account, which comes down only to August 4, 1827, inclusive, was rendered in prior to September 1827, the date of the partial payment. If it had been rendered posterior to that date, then Scott would have objected that it was erroneous in not allowing credit for the partial payment of £300. But he did not, and therefore it is clear he must have got the account before making that payment. Now; that being the case, and no objection then made to the reasonableness of the charges, nor any until this action was impending, I cannot allow such objections now. I have no difficulty in adhering.

The other Judges concurred, and the Court adhered.

J. GOLDBECK, W.S.—J. LIVINGSTONE, W.S.—J. SHAW, S.S.C.—Agents.

JAMES MURDOCH and WILLIAM BROWN, Advocators.—Keay—Shaw.
JAMES WYLLIE and WILLIAM NOBLE, Respondents.—Jameson—Cowan.

No. 233.

Jurisdiction—Trust—Process.—1. Circumstances in which an action, which set forth that a lease, although in name of the pursuers, was held by them for behoof of them and the defenders, and concluding for a pro rata relief from its obligations, was competent in the Sheriff Court. 2. Although a Sheriff had expressly found no expenses due, and the party, unsuccessful on the merits, brought an advocation, and there was no counter-advocation as to expenses,—held (contrary to Pollock, Gil-mour, and Co., ante, VI. 913,) on consulting all the Judges, that it was competent to award the expenses of the Sheriff Court in favour of the respondents.

In 1820, an arrangement was entered into by John Ramsay, and Mar. 8, 1832. Wyllie, Noble, Murdoch, and Brown, under which a bill for £120 was drawn by Murdoch and Brown upon Wyllie and Noble, the proceeds of which bill were applied to the erection of a brewery near Ayr, for Ramsay. A lease of the premises at the same time was taken in name of Wyllie and Noble, as tenants, at a rent of £20. Ramsay occupied the

1st Division.
Ld. Corehouse.
B.

Mr Greig's carriage. He admits that he received one of the two; it is charged in the account rendered, and the price not objected to at the time. He cannot be heard to say now, that the carriage he received was the one ordered for Mr Greig, and that it is of inferior quality to that which he had ordered for himself, and that a deduction should on that ground be made from the account libelled on. The boxes and caps, composing the last article of the account libelled on, do not appear in the account rendered, which affords another ingredient of evidence that it was rendered before October 1827. But it is proved that these articles were ordered by the defender, and he admits that he received them. He states that they were required to supply a defect in the carriage previously sent; but they were not commissioned on that footing in 1827, as is proved by the letter produced; and it does not appear that the defender alleged he was entitled to have them for nothing till 1830, when this action was about to be raised."

No. 238. premises, and was the party properly liable for this rent. After several renewals, the bill was enlarged to the amount of £140; and finally, Noble was allowed to withdraw from it. Ramsay afterwards became insolvent in 1824, and the bill was retired by the three parties to it, Wyllie, Murdoch, and Brown. Wyllie and Noble having been obliged to pay the rents under the lease, which fell due at Martinmas 1825, and subsequently till Whitsunday 1827 inclusive, brought an action against Murdoch and Brown before the Sheriff of Ayrshire. In the summons they libelled, that Ramsay had asked Wyllie to assist him with funds in erecting a brewery, and had stated that Murdoch, Brown, and Noble, would join Wyllie in making the advance, and guaranteeing the rent, and that the whole four parties should, for their relief, have right to the premises; that £120 was raised by a bill, to which all four were parties, the proceeds being put into Murdoch's hands to be applied towards the erection; that when the lease came to be drawn out, the names of Murdoch and Brown were omitted on Ramsay's representing this to be their own desire; that it was agreed "that the same should be taken exclusively in the names of the complainers (Wyllie and Noble), who should hold the same for behoof of all parties, and that if required, they, the said William Brown and James Murdoch, were ready to give the complainers any formal obligation of their joint responsibility with the complainers for the obligations of the lease, but which the complainers, relying on their assurances, did not at the time demand; that the bill was repeatedly renewed, and at last enlarged to £140, and that a correspondence ensued with Murdoch and Brown, embodying what had been all along the mutual understanding of the parties," "in relation to their interest in and responsibility for the obligations of the lease;" that Ramsay's affairs became embarrassed, and Murdoch took various steps for the common behoof, "acting for himself, on the mutual understanding of an equal owner in the premises, and as taking with Noble the active management at Ayr," &c.; that as Ramsay was unable to carry on the brewery business, and no tenant could be found for the brewery, Murdoch and Brown had intimated that they had no further concern with the premises and lease, &c.; that Wyllie and Noble were then obliged to pay the rents of several terms under the lease, and some accessory expenses besides, and for the "one-half of which several sums, so paid by the complainers, the said James Murdoch and William Brown are jointly and severally liable to relieve and repay the complainers, with the legal interest thereof, from the respective dates of advance aforesaid till paid, as well as they are bound to continue to relieve the complainers of the one-half of the rents, payable for the premises during the continuance of the lease, and while the same yields no profits to the parties, as well as of all other claims and obligations incumbent on the complainers by said lease; but all which, the said James Murdoch and William Brown, defendants, refuse to do unless compelled: Therefore, the

Mar. 8, 1832.
Murdoch, &c.
v. Wyllie, &c.

said James Murdoch and William Brown, defendants, ought and should be No. 233. decerned and ordained, jointly and severally, to make payment to the com- Mar. 8, 1832.
plainers of the sum of £10 sterling, being the one-half of the foresaid Murdoch, &c.
year's rent due at Martinmas 1825, and the sum of £4, 4s. 10½d., the v. Wyllie, &c.
half of said account of expense; item, the legal interest thereof since the
3d day of March, 1826, when the said sums were advanced by the com-
plainers; item, the sum of £10 sterling, being the half of the foresaid years' rent due at Martinmas 1826, and interest thereof since the 2d day of January last, when the same was advanced by the complainers; item, the sum of £5 sterling, being the half of the foresaid half year's rent due at Whitsunday last, and interest thereof since the 22d day of June last, till paid; and farther, they ought and should be decerned and ordained to free and relieve the complainers of the one-half of the rents of the said premises, and of all other claims and obligations incumbent on the complainers by said lease, and of all damages, skaith, and loss, the complainers may sustain in and through said lease during the continuance of the same."

Murdoch and Brown pleaded in defence, 1. that the summons involved a declarator of trust, and was incompetent in the Sheriff Court; and, 2. that on the merits, the utmost amount of their liability was for their proportion of the bill, which they had duly paid.

Wyllie and Noble answered, 1. that the action was an ordinary action of relief, and therefore competent before the Sheriff; that accordingly the conclusions of the action were merely petitory, and not declaratory; and that, even if any finding as to the existence of a trust-right were requisite in determining the questions raised, the Sheriff might competently entertain such question in explicating his proper jurisdiction; and, 2. that there were documents, and facts, and circumstances, sufficient to establish the obligation of relief.

The Sheriff found, "from the whole circumstances of this case,—the active share taken by the defenders throughout the business,—and the written correspondence produced—particularly Mr Murdoch's letters of 10th May 1822, and 29th September 1823—that the said defenders engaged to share the profit or loss arising from the lease of the brewery; and that there is every reason to believe, that the pursuers were partly induced thereby to undertake their share of the engagement: found, that although the defenders, in a question with the landlord, might not be subjected as tenants, from not having subscribed the written lease, still their separate engagement with the pursuers to share the profit or loss thereon, may be binding in a question with those pursuers; therefore found the defenders liable jointly and severally for the sums, and interest thereon, as libelled, as well as for all future loss which may arise on the concern: found, on the other hand, that the pursuers are bound to communicate to the defenders their share of any profit which may arise thereon; and to consult with them in regard to the management and disposal of the con-

No. 233. *cern, and decerned ; but in a question where there has been a good deal of looseness and inaccuracy in doing business, found no expenses due."**
 Mar. 8, 1832. Murdoch and Brown brought an advocation, but none was brought by v. Wyllie, &c. Wyllie and Noble. Murdoch and Brown farther pleaded, that as Ramsay was the party properly liable for the sums concluded for, he should have been made a party to the action from the first, and that it had been incompetently brought without calling him. Wyllie and Noble stated that Ramsay was insolvent, and had obtained the benefit of the cessio, so that it could be of no avail to call him ; and that the question of relief raised under their summons was competently raised without calling him, even if it should be held that he ought still to be made a party. The Lord Ordinary "advocated the cause, and appointed the respondents to call John Ramsay as a party to this cause, reserving the point of jurisdiction, and all other questions, till the issue thereof." A supplementary summons was then raised against Ramsay, who lodged defences, stating his own insolvency, and craving that, whatever might be his liability under the lease, he might not be subjected in any of the expense of the legal discussion to which he was thus involuntarily made a party. The Lord Ordinary conjoined this action with the advocation ; "and in the conjoined actions, remitted simpliciter to the Sheriff, and decerned : found the respondents entitled to expenses, both in this and in the inferior court, and remitted the accounts thereof to the auditor to tax and report : found the defendant Ramsay liable in no expenses."†

Murdoch and Brown having reclaimed, the Court, without making any

* "NOTE.—The Sheriff cannot view this case in the light of a declarator of trust; for if there was any such, the pursuers were the trustees; whereas the trusts meant by the act 1696, c. 25, are those established against the trustee, and proveable only by his oath. Besides, the Sheriff has no authority for holding that matters of trust (when not brought in the shape of a declarator, but arising incidentally in a petitory action) are excluded from the Sheriff Court. But this is truly a common petitory demand, grounded on an alleged engagement of the defendants. The case, 5th July 1822, *Stirlings v. Stirling and Robertson*, is much in point; parties being there subjected in virtue of a private correspondence, although they did not appear ostensibly in the written documents. The chief difference between that case and the present is, that there it was a single transaction, while here it involves a tract of future time: but this does not seem to influence the principle of decision."

† "NOTE.—The action in the inferior Court, at the instance of the respondents against the advocators, was not a declarator of trust, neither was it a declarator that the advocators were joint tenants of the subject. It was an ordinary action of relief, on the grounds that the advocators had agreed to share profit and loss with the respondents in the concern. The objections to the Sheriff's jurisdiction, therefore, which were taken in the inferior Court, are ill-founded; and although it was proper that Ramsay should be made a party, the neglect to do so in the inferior Court does not render the proceedings there incompetent.

"On the merits, the documents produced, and in particular the letter of 29th September 1823, from the advocators to Wyllie, appear to the Lord Ordinary to be decisive."

observations, intimated an intention to adhere ; but before the interlocutor was written, Murdoch and Brown called the attention of the Court to the situation in which parties stood, so far as regarded the expenses incurred in the Sheriff Court. The Sheriff had expressly "found no expenses due." Wyllie and Noble acquiesced in that finding ; Murdoch and Brown alone brought an advocation of it, and therefore, when the cause came before this Court, there was no party who asked, or who could competently ask, the expenses of the Inferior Court, except the advocates. Such expenses might be refused to them, and had been refused ; but the Court could not, *proprio motu*, award such expenses against them, for the first time, in the court of review, where the respondents were not in condition to ask for them. The respondents should have brought a counter-advocation, to entitle them to ask these expenses. The case of Pollock, Gilmour, and Co., June 5, 1828, (*ante*, VI. 913,) was expressly in point.

Wyllie and Noble answered, that when a cause was advocated, the whole cause was brought up ; and it was as competent to this Court to award the whole expenses of the Inferior Court, as it had originally been competent to the Inferior Court to do so. The case quoted was not in point ; or if in point, was erroneous.

The Court delayed judgment until they should consult with the other Judges.

The LORD PRESIDENT intimated that the consulted Judges were of opinion that the decision of Pollock, Gilmour, and Co. was erroneous, as an advocation brought the whole cause here, and nothing was left to be the subject of a counter-advocation. Such counter-advocation would, therefore, be inept and incompetent. Under the present advocation, the Court possessed power to award the whole expenses to either party.

THE COURT accordingly "refused the desire of the note ; recalled the interlocutor of the Lord Ordinary, in so far as his Lordship thereby remits the cause simpliciter to the Sheriff ; and in the conjoined actions, found that the pursuers and defenders, as joint tenants in the lease libelled, are liable to relieve each other per rata of all loss which has arisen, or may arise, on the concern ; and, on the other hand, are bound to communicate to each other their respective shares of the profits which may arise thereon, and to consult together in regard to the management and disposal of the concern ; and decreed against the defenders for their respective shares of the sums libelled, and the interest thereof, and found expenses due to the respondents, both in this and in the Inferior Court, and remitted," &c.

Advocators' Authorities.—Nimmo, May 23, 1824 (*Ante*, III. 58) ; Flechers of Glasgow, Nov. 20, 1824 (*Ante*, III. 305) ; 1696, c. 25.

Respondents' Authorities.—1 Ersk. 3, 19, and 4, 3 ; Mudie, June 13, 1766 (12403) ; Dunbar, Feb. 2, 1790 (7395) ; Gilmour, Dec. 11, 1765 (12758) ; Stirling and Sons, July 5, 1822 (*Ante*, I. 545).

No. 234.

Mar. 9, 1832.
Ure v. Pollock.GEORGE URE, Advocator.—*A. M'Neill.*
MARGARET POLLOCK, Respondent.—*D. F. Hope—Neaves.*

Process—Advocation.—1. In an action for the aliment of a natural child, the defences consisting chiefly of extracts from medical certificates regarding the alleged impotency of the defender, and comments on them, ordered to be withdrawn, and the defender subjected in the expenses of the replies. 2. On failure to lodge defences anew, decree being given, and an advocation brought—a remit made to the Sheriff to adhere to his order, but to proceed in common form to prepare a record; and the advocator found liable in the expenses of the advocation.

Mar. 9, 1832. POLLOCK, the mother of a natural child, brought an action for its aliment before the Sheriff of Lanarkshire, against Ure, who pleaded in defence, that he had been rendered impotent by a species of paralysis. A

^{1st Division.}
^{Ld. Corehouse.}
^{D.} considerable portion of his defences was occupied by the quotation of certificates of medical men, stating their opinion as to the existence of the disease, and its probable effect on his constitution. Replies were lodged to the defences. The Sheriff, “in respect the medical certificates founded on, and produced by the defender, cannot competently be received in evidence, and that the defences are chiefly occupied by copies or extracts of, and comments upon, these certificates, ordered the defences, certificates, and replies to be withdrawn, with liberty to the parties to give in defences and replies within fifteen days each; and, in the meantime, found the defender liable in the expense of the replies ordered to be withdrawn,” &c.

Afterwards the Sheriff, “having seen the clerk’s certificate, that the defender had failed to give in defences, in respect of that failure, decerned against the defender for inlying charges and aliment, as libelled, and for such part of the expense of process as has not already been awarded, of which allowed a report to be given in,” &c.

Ure brought an advocation, and contended that the Sheriff’s judgment was erroneous, and that a record should still be made up.

Pollock answered that the whole procedure of the Sheriff was regular; that, as he had never considered the merits, or made up a record, it was incompetent to advocate, and the process should be remitted to the Sheriff to enforce his order, and proceed in the cause only on condition of the advocator paying all expenses.

The Lord Ordinary, “having considered this process, on which the counsel for both parties have declined to be heard, remitted to the Sheriff, with instructions to adhere to his interlocutors, in so far as they order the medical certificates, defences, and replies, to be withdrawn, and in so far as they find the advocator liable in modified expenses of process, and thereafter to proceed in common form, to prepare a record, and to do as he shall

see just, and found the advocator liable in the expenses incurred by the respondent in this Court," &c.

Mar. 9, 1832.
Ure v. Pollock.

Forbes & Co. v.
Edin. Life Assur-
ance Co.

Ure reclaimed. The Court adhered.

J. HAMILTON, W.S.—M. SMILLIE and J. MURDOCH, S.S.C.—Agents.

SIR WILLIAM FORBES and COMPANY, Pursuers.—Sol.-Gen. Cockburn— No. 234.

Shene—Anderson—W. Forbes.

EDINBURGH LIFE ASSURANCE COMPANY, Defenders.—D. F. Hope—
McNeill—Patton.

Insurance—Warranties—Process—Bill of Exceptions.

1. Where payment of a policy on a life was resisted on the ground that a dangerous habit of opium-eating was not disclosed ; and the Judge directed the jury to consider whether a question regarding habits remained unanswered, and if so, whether this did not imply a waiver, or abandonment of the enquiry into the habits—held that he should have told the Jury, that such implied abandonment or waiver did not relieve the assured from making a disclosure of every fact material to be known.
2. The party whose life was proposed, having signed a declaration that he was in perfect health, and the general state of his health was good ; and the party proposing his life having made the truth of that declaration a fundamental condition of the policy—held that an express warranty was undertaken, that the life was not more than usually hazardous.
3. Question raised, whether a party, bona fide insuring on the life of another, believed to be sound, and so stated, can recover, in respect of his bona fides, though the life is unsound.
4. Opinion expressed, that in bills of exceptions it is discretionary either to except in general terms, or to state the legal doctrine contended for ; and, that it is unnecessary to take an exception to a Judge's charge before the close of the trial, but that it may be competently taken afterwards.

THE pursuers raised an action against the defenders, alleging that William Inglis, W.S. had drawn a bill, dated 2d November 1825, for £7000, Mar. 9, 1832. on the then Earl of Mar, by whom it was accepted ; that it was discounted with them by Inglis, and protested for non-payment on 30th May 1826 ; that in security of £3000 of this debt, Inglis effected an insurance on the life of the Earl, with the defenders, who, on the 26th September of that year, bound themselves by a policy to pay the amount on the death of the Earl ; that this policy was assigned to the pursuers, and that the Earl died on 20th Sept. 1828, but the defenders refused to pay the amount.

The defenders admitted that they had granted the policy, but denied their liability, on the ground that they had been led to effect the insurance at the ordinary premium, as on a good insurable life, by misrepresenta-

No. 235. **tion, or not having been made acquainted with facts relative to the habits and state of health of the Earl of Mar, material and important for them**
Mar. 9, 1832. Forbes & Co. v. to know in determining whether they would undertake the insurance of
Edin. Life Assurance Co.

his life on the terms proposed, or on any terms. These habits, they alleged, consisted in making use internally of opium, laudanum, and spirituous liquors, to a great and dangerous extent, which had impaired his health, and rendered his life either a hazardous insurance, or not insurable at all. They alleged that these facts had been misrepresented, or withheld from them, when they granted the policy.

The following issue was sent to a jury:—"It being admitted that, on the 26th day of September 1826, the defenders granted the policy of insurance, No. 6 of process, whereby, in consideration of a certain premium, the defenders agreed to pay to William Inglis, writer to the signet, the sum of £3000 sterling, on the death of John Thomas Earl of Mar, and that the right to the said policy is now in the pursuers;—

"It being also admitted that, on the 20th day of September 1828, the said Earl died:—

"Whether the defenders are indebted and resting owing to the pursuers in the said sum of £3000, contained in the said policy?"

The case was tried before the Lord Chief Commissioner and Lord Cringletie.

The pursuers put in evidence the bill, and a proposal of insurance and declaration, dated 26th August 1826, signed by the Earl, which, after stating his age, contained the following questions and answers:—

<i>Questions.</i>	<i>Answers.</i>
" Present and General State of Health ?	At present in perfect Health, and General State of Health Good.
If at any time been afflicted with Insanity, Gout, Asthma, Dropsy, Liver Complaint, or been subject to Consumption or Spitting of Blood, Fits, Hernia, or any other Disorder tending to Shorten Life?	Has never been afflicted,—or subject to any of these complaints.
Reference to a Medical Man (if possible to the usual Medical Attendant), to ascertain the present and general health of the party to be Assured.	Dr George Wood, Edinburgh.
Reference to a Private Friend for the like purpose.	Mr Matthew Weir, W.S.

The pursuers next put in a declaration by Inglis, endorsed on the above schedule, in these terms:—"I, having an interest in the life of John

Thomas Earl of Mar, the party mentioned on the other side, do hereby No. 235. declare, that the preceding statement of his present and general health, Mar. 9, 1832.
Forbes & Co. v.
Edin. Life Assurance Co. age, and every thing therein contained, shall be the basis of the contract betwixt me and the said Edinburgh Life Assurance Company. And if any of the facts set forth in the above proposal be not truly stated, then all monies which shall have been paid on account of the assurance to be made in consequence hereof shall be forfeited, and the assurance itself absolutely null and void. Dated at Edinburgh, the nineteenth day of September 1826."

They also put in a letter addressed by the Assurance Company to Mr Weir, as the party to whom reference was given for information regarding the present and ordinary state of Lord Mar's health, accompanied by these questions, to which the annexed answers were returned by Mr Weir:—

Have you seen his Lordship lately, and } I saw his Lordship on the 19th of last
how long since? } month.

Was he then in good health? —He then appeared in perfect health.

Do you believe he is now in good } I have every reason to believe he is so
health? } still.

What is the general state of his health? —His general state of health is good.

How long have you known him? —For a good many years.

Have you at any time known him to be
afflicted with Insanity, Dropsy, Liver
Complaint, or been subject to Con- } I have not.

sumption, Gout, Fits, Asthma, Her-
nia, Spitting of Blood?

Has he any other disorder which has a } Not to my knowledge.
tendency to shorten life?

Can you give any and what information } He takes moderate exercise, and is tem-
respecting his habits? } perate in his living.

Whether active or sedentary? }

Temperate or free?

Do you know any reason why an As- } I know of none.
surance on his Life would be more
than usually hazardous?

A similar letter was put in, addressed to Dr Wood, as the medical referee, containing the following questions and answers:—

Have you seen his Lordship lately, and } Very lately.
how long since?

Was he then in good health? —He was.

Do you believe he is now in good } I do.
health?

What is the general state of his health? —Good.

How long have you known him? —Many years.

No. 235.	Have you at any time known him to be afflicted with Insanity, Dropsy, Liver Complaint, or been subject to Consumption, Gout, Fits, Asthma, Hernia, Spitting of Blood ?	I have not.
Mar. 9, 1832. Forbes & Co. v. Edin. Life Assurance Co.	Has he any other disorder which has a tendency to shorten life ?	
	Can you give any and what information respecting his habits ?	I believe he has not.
	Whether active or sedentary ?	
	Temperate or free ?	He is active. He is temperate.
	Do you know any reason why an Assurance on his Life would be more than usually hazardous ?	
	Are you the ordinary Medical Attendant on him ? If so, for how long ?	From his Lordship never residing in Edinburgh, I have not had occasion to attend him professionally.

The policy dated 26th of September 1828, and the assignation and intimation thereof, besides other documents not necessary to be noticed, were also put in. Many witnesses were adduced by both parties, and particularly by the defenders, as to the extent to which the Earl had been addicted to the use of opium, laudanum, &c., in 1826, and for a long period previously, and down to his death in 1828 ; and regarding the materiality of the fact of such a habit, as requiring to be communicated to an Assurance Company, when asked to grant a policy. It appeared that Dr Abercrombie of Edinburgh had been called to see the Earl once or twice in 1825.

The Lord Chief Commissioner, (as set forth in a bill of exceptions, afterwards recurred to in the Court of Session,) "in directing the jury, told them that insurance is a contract of indemnity, and is of a most sacred nature, in which the material facts must be disclosed, whether the subject is a ship, a house, or a man. In all of them, there is a sum paid to get indemnification in the event of a loss ; and as the premium is in proportion to the risk, concealment voids the policy ; but the party objecting must make out, to the satisfaction of the jury, that the fact was material. His Lordship then directed the jury to consider the certificate of Dr Wood, as to the questions put respecting the habits of the Earl of Mar. That by the paper it appeared that there was no answer given to the question, ' Can you give any, and what information respecting his habits ? ' That to the next question, ' Whether active or sedentary ? ' Dr Wood answered, ' He is active.' To the next question, ' Whether temperate or free ? ' he answers, ' He is temperate.' The Lord Chief Commissioner told the jury that they must consider whether the first question remained unanswered ; and if unanswered, whether this did not amount to a waiver, or an abandonment of the enquiry as to the Earl of Mar's general habits.

The counsel for the defenders contended, That the Lord Chief Commissioner should have told the jury that it was the province of the Court to construe the certificate as a written instrument, and that he should not have left it to the jury to put a construction upon it, and that those questions were not to be construed separately, but that the first question was to be considered as a preface to the two last questions; and that by answering the two last questions, Dr Wood had fulfilled the object of the defenders in the enquiry, and answered to the whole. And the counsel for the defenders farther contended, that, even assuming that a separate general question as to habits had been intended, that the defenders, remaining satisfied without a specific answer to the general question, could not be, in law, considered as a waiver or abandonment of the objection to the validity of the insurance, arising out of their not having been made acquainted with a fact material and important for them to know in judging of the risk; and the said counsel contended, that the Lord Chief Commissioner should have directed the jury to consider, whether the habit instructed by the defenders' evidence was not a fact material to the risk, or which the insurers might reasonably consider as material, and that if they (the jury) were satisfied of this, then that the policy was void, seeing that the defenders were led to effect the assurance in ignorance of the habit; and the said counsel also contended, that, over and above the implied warranty, which exists in all cases of the kind, the defenders were entitled, from the terms of the documents on which the policy was entered into, to hold Lord Mar's life to be a sound one, and about which, either as regards habits, or otherwise, there existed nothing to render an assurance on his life more than usually hazardous, and that upon all, or one or other of these grounds, the Lord Chief Commissioner should have directed the jury to find a verdict for the defenders. But the Lord Chief Commissioner, as there was no evidence to instruct that the assured (William Inglis) knew of the habit of the Earl of Mar, left it to the jury, if they were satisfied on the evidence on the whole case, to find a verdict for the pursuers."

A verdict was found by the jury for the pursuers.

The defenders made a motion in the Jury Court for a new trial, on the ground of misdirection by the Judge, and on the ground that the verdict was contrary to evidence.

While the motion was in the course of being discussed in the Jury Court, its jurisdiction was abolished by the statute 1 Will. IV. c. 69, which transferred that jurisdiction to the Court of Session. By the arrangement of parties, it was then agreed that the case should be heard in this Court, as if the trial had taken place after the union of Jury trial with the Court of Session, and the case was argued on a bill of exceptions to the charge of the Judge, and on a motion for new trial.

Pleaded for the defenders—

1. The verdict was contrary to evidence. It was established that Lord

Mar. 9, 1839.
Forbes & Co.
v. Edin. Life
Assurance Co.

No. 285. Mar indulged the habit of opium-eating to such excess as to make his life more than usually hazardous ; a fact material to be disclosed, but which was not disclosed.

Mar. 9, 1832.
Forbes & Co.
v. Edin. Life
Assurance Co.

In tendering a life, as the subject of insurance, it is a fundamental principle of the contract that there shall be full communication to the assurer, of every fact material to the risk of the proposed life, or which the assurer may reasonably think material. Even the innocent non-communication of a material fact voids the policy as completely as wilful concealment or misrepresentation ; because, in all these cases equally, the risk, as tendered to the assurer and accepted by him, is not the actual and existing risk.* By the relative position of the parties, and also by the

* The defenders printed, for the use of the Court, a charge by Lord Lyndhurst, in the case of Duckett v. Williams, relative to a life assurance. His Lordship, in addressing the jury, began by telling them, "the two questions for your consideration are these : 1. Whether, at the time when this policy was effected, the gentleman, Mr Stephenson, was labouring under any disease tending to shorten life. If you are of opinion that he was labouring under a disease tending to shorten life, in that case the plaintiffs are not entitled to recover. But there is another question, and a material question for your consideration, which is this—Whether, at the time when this policy was effected, there were any facts material to be communicated to the persons taking this insurance, that were not communicated. If, in your judgment, considering the evidence that has been offered on both sides, you should be of opinion that there were facts material to be communicated tending to influence this insurance, or to lead to enquiry that might influence this insurance, if it had not been withheld, in that case the plaintiffs cannot be entitled to your verdict. These are the two points to which your attention must be directed in the course of the enquiry."—Again, in concluding, his Lordship stated, "It is a case important in point of amount, and in point of principle too ; it will be for you to direct your attention to the two points to which I have repeatedly requested your attention, and that you would apply the evidence. First, are you of opinion that this gentleman, at the time when the policy was effected, on the 16th of June, in the year 1827, laboured under a disease tending to shorten life ? If you are of that opinion, the plaintiff cannot be entitled to your verdict, because that is one of the exceptions in the policy. Another point for your consideration is, whether any material facts, with respect to the state of his health, were withheld, and not communicated at the time of the examination. If you are of opinion that any facts which were material were not communicated ; that is, facts material to enable the parties to form their opinion as to whether or not they would take the life,—facts material, in order to enable them to make further enquiry, to direct the course of that enquiry ; if you are of opinion any material facts were withheld, and not communicated, although there may be no intentional fraud in the case ; if you are of opinion any material facts were withheld, in that case the plaintiff cannot be entitled to your verdict, because every party insuring has a right to know when he insures a life,—he has a right to know the correct state of the facts on which that insurance is founded. Those are the two points for your consideration, connected with the evidence on the one side and on the other ; and from the shape the case has taken, it is entirely immaterial for me to tell you which is one side, and which the other—the whole of the evidence is before you, and you will say what is your conclusion from that evidence.

" After the jury had remained in deliberation about ten minutes,

express declaration of Inglis, Lord Mar was his agent in emitting his No. 235. signed answers, which included both the state of his Lordship's health, and the nomination of the referees. Therefore non-communication in ^{Mar. 9, 1832,} ^{Forbes & Co.} ^{v. Edin. Life Assurance Co.} these answers was as fatal to the policy, as if made by Inglis himself; and under the implied warranty in making the reference, the statements by the referees formed part of the basis of the contract between Inglis and the defenders. But in the signed answers, Lord Mar had expressly stated that he was then "in perfect health, and his general health was good." He had also referred to Dr Wood, who had never attended him; and he had omitted all notice of Dr Abercrombie, who had attended him.

2. But, independent of the verdict being contrary to evidence, it had been returned in consequence of misdirection by the Judge.

His Lordship had failed to construe the document containing the questions and answers of Dr Wood, the medical referee. It was the province of the Court to construe this written instrument; in place of which, his Lordship had left it to the jury to say whether it purported a waiver of enquiry as to Lord Mar's general habits. His Lordship should have told them that there was no such waiver; as the subsequent general question put to Dr Wood, whether he knew any reason why the life should be more than usually hazardous, showed that there was no such waiver. But, besides, his Lordship should have told the jury, that, even had there been a waiver, it did not relieve the assured from the necessity of fully disclosing every material fact. In place of this, the charge, as given, implied a contrary doctrine. His Lordship had farther assumed that there was no evidence of the privity of Inglis to Lord Mar's habit; while there was, on the contrary, such evidence on that point as ought to have been laid before a jury; and the direction to the jury implied, that the privity of Inglis was an essential element in the question whether the policy was void; whereas, it was a matter of total indifference to that question, because Lord Mar was both expressly and impliedly the agent of Inglis, and the statement of Lord Mar was the statement of Inglis.

Answered by the pursuers—

1. In considering a motion for new trial, on the ground that the verdict is contrary to evidence, it is not enough for a party to induce the

"*One of the Jury said—My Lord, we want to know, with your Lordship's permission, whether the fact of concealment does not,—whether in fact the policy is not void in consequence of the fact of concealment?*

"*Lord Lyndhurst.—If you are of opinion that the facts—that there are any facts material to be communicated that were not communicated, that renders the policy void; it is for you to decide whether in your opinion on the evidence, the facts were material. You made use of that word 'concealment.' 'Non-communication.' I do not choose to use the word 'concealment'—that may import more than that. The non-communication of a material fact, whether fraudulent or not,—the non-communication of a material fact—will affect the policy. Then you must be satisfied the fact was material to be communicated."*

No. 225. Court to draw, from the evidence, a different inference from what the jury has drawn. It is only where a verdict is so extravagant that all reasonable men are astonished at it, that the Court can grant a new trial on this ground.

Mar. 9, 1832.
Forbes & Co.
v. Edin. Life
Assurance Co.

There was evidence sufficient to give the jury a right to determine whether the habit of opium-eating (in so far as they held it proved, which was a question for them) had been injurious to Lord Mar's health. This habit affects constitutions variously. The jury had reason to be satisfied that it had not hurt Lord Mar's health at the date he signed his answers. These answers, in stating his health to be good, consequently contained no misrepresentation, or non-disclosure ; and no question was put to Lord Mar about his habits, nor was it material to state any which had not hurt his health. The answers of the referees were no part of the basis of the contract, and, at any rate, were honestly given by them. Lord Mar's reference to Dr Wood was given in the best faith, as Dr Wood had long known him. The attendance of Dr Abercrombie had been so casual, that there was no breach of warranty in not referring to it.

The defenders had no right to disclosure of every fact which they might think material, or likely to have influenced their enquiries, before granting the policy. The fact not communicated must be proved to be material. Neither was the statement made by the referees any part of the basis of the contract ; it was solely Lord Mar's own statement which was so. Even if it were otherwise, the referees were only asked to state what they knew, and they had honestly done so. Therefore, the statements made by them did not affect the validity of the policy.

2. There was no erroneous direction by the Judge. Regarding the waiver, his Lordship had merely left to the jury to say, whether there was evidence to satisfy them that a particular question was unanswered ? and whether the defenders, by accepting the non-response, were not proved to have waived the enquiry ? This was limiting the jury to their appropriate function of deciding on the import of the evidence laid before them regarding the conduct of the defenders. Nor was his Lordship obliged to construe that there was no waiver, and to direct to that effect.

He was correct in assuming that there was no evidence of Inglis's privity ; and there was no charge given, nor any doctrine laid down, to the effect that such privity was essential to void the policy. On the contrary, the case was left generally on the whole evidence to the jury.

THE LORD CHIEF-COMMISSIONER.—My Lords—This case has been admirably argued at the bar. It has been long in my mind, and that the opinion which I have formed on it may be understood, I must call the attention of your Lordships to the manner in which it has come before the Court in its present shape. It was tried on a general issue in these words :—

“ Whether the defendants are indebted and resting owing to the pursuers in the sum of £3000, contained in the policy.”

The policy, as your Lordships know, was on the life of the late Earl of Mar. It is material in considering the bill of exceptions, to bear in mind, that the case was tried under the general issue.

The history of the case is shortly this:—After a trial (in March 1830), which occupied twelve or fourteen hours, the jury found a verdict for the pursuers. There was no exception taken to my direction in point of law, nor any intimation at that time of moving for a new trial; but in the following Session of the Court, within the regular time, a new trial was moved for, founded both on the ground of misdirection by the Judge in matter of law, and on the ground of the verdict being contrary to evidence. The misdirection of the Judge then contended for, was the same with that which has found its way into the first branch of the present bill of exceptions.

The case went on, and the arguments for the new trial were not concluded till the 5th or 6th of July 1830. Lord Mackenzie sat with me and heard the arguments for the new trial, and the matter being so various and important, we took time to consider, and had several conversations on the subject. I looked very minutely into the cases, and re-examined very carefully the doctrine which I laid down at the trial, and I have no hesitation in saying, that I then began to entertain doubts of that doctrine. This is not material, in so far as it refers to myself, but as it may bear upon any future proceedings in the many cases which may be brought forward as to insurance on the same life, it is material.

Lord Mackenzie and I found it impossible to deliver the opinion of the Court before the 10th of July, when the Session closed; and when the Winter Session began, we found it out of our power, for the Jury Court had in the mean time been abolished, without any provision in the Act of Parliament to enable it to conclude the depending causes. In this situation a number of difficulties occurred, which led finally to the case appearing here in its present shape.

It appeared to me that the only certain way of settling all the points which the case embraced, was for the parties to agree to have a bill of exceptions, so framed as to settle all matters of law; and, at the same time, to revive the motion for the new trial, on the verdict being contrary to evidence. It was material to have the bill of exceptions, because I thought that there were reasonable grounds to suppose that I was wrong in the legal doctrine which I laid down at the trial in respect to what was called the waiver or abandonment of enquiry into certain habits of the Earl of Mar, which had not been disclosed to the insurers. The doubts which I began to entertain, were first suggested to my mind by an attentive perusal of the case on a policy on the life of Sir James Ross, which was tried by Lord Mansfield in 1780. In that case Lord Mansfield lays down distinctly all the law which I shall think it necessary to refer to in the consideration of the case before us, without going into the detail of the subsequent cases which have been referred to at the bar.

The case of Sir James Ross embraces the question of non-disclosure or concealment. It appears from that case that full disclosure of all that is known to the party making the insurance is a duty, but that if the assured and assurers are both equally ignorant, that the assurers must stand the risk; and I am not aware that either in principle, or by any decided case, that doctrine has been shaken. This was very important in considering the question of misdirection as it affected the motion for a new trial. It did not appear at the trial that Mr Inglis, the assured, was in the knowledge of the fact of the Earl of Mar's taking laudanum to excess,

Mar. 9, 1832.
Forbes & Co. v.
Edin. Life As-
surance Co.

No. 235. which was the concealed habit on which the insurers refused to pay the sum insured. I considered it to be most material that this should be brought into the view of your Lordships in delivering judgment upon the new trial in this case, because Mar. 9, 1832. Forbes & Co. v. Edin. Life As. if a new trial had been granted on my misdirection, on the ground of waiver or insurance Co. abandonment of enquiry into the habits of Lord Mar, that ground would have been rebutted by the fact of Mr Inglis's ignorance; and as he was not proved to have been in the knowledge of the fact, the granting of a new trial would have been abortive, as his ignorance relieved him from the effect of non-disclosure, and kept the insurers liable under the policy. Now, all this is cured by the bill of exceptions.

When I signified my readiness to have the bill of exceptions by agreement of parties, I intimated that I should sign any bill which excepted to what I was conscious of having stated at the trial as direction in matter of law, and of course to sign whatever law I had omitted to state, and which ought to have been stated.

Having said this, I shall begin by making a few observations on the form of bills of exceptions. It has been correctly said at the bar, that I have lately been in correspondence as to bills of exceptions with the highest English authorities, the Lord Chief-Judge of the King's Bench, Baron Bayley, and other Judges.

Lord Eldon had laid it down in the second appeal in Lord Fyfe's case, and desired it to be particularly attended to, that the party who excepts should state the grounds of law that he contended for. From that time it was the constant habit of the Jury Court to require the party who except, to state their views of the law. It became doubtful how far this was proper and necessary, and the correspondence to which I have alluded then commenced. The result of that correspondence has been (with the approbation of Lord Eldon) the adoption of the opinion of Lord Tenterden—that it was better to leave parties to their own discretion, and to allow them to state or not to state their views of the law, according as they should judge most expedient. It was apprehended that there might be some cases which required the law, as contended for by the parties, to be fully stated; and, on the other hand, there might be cases where it would be better simply to state the law excepted to—and that there could be little difficulty in the Court, with a bill of exceptions drawn in either form,—and in conformity to this the present bill has been drawn. It partly coincides with the previous practice, and partly does not, and I think it right to announce to the Gentlemen of the Bar, that, in future, parties are to be at liberty to exercise their discretion either in stating the law as contended for by themselves, or in not stating it.

Having made these few preliminary observations, I now come to the merits of the case.

This bill contains three branches:—First, an exception to the law, which I laid down at the trial respecting the waiver, or abandonment of the enquiry into Lord Mar's habits. The second relates to the warranty, not implied but express; the third excepts to the statement, as to the materiality of Mr Inglis's ignorance of the fact of the habit.

Now, as to the first of these, counsel have not only objected to the directions given, but they have also stated the law contended for by them. As to the second, they say that I ought to have directed the Jury, as there was an express warranty, to find a verdict for the defenders. And, on the third point, they merely say that I did wrong in directing the jury to find for the pursuers, if they were satisfied that

it was not established by the evidence that Mr Inglis knew that Lord Mar was in No. 235.
the habit of taking opium to excess.

On the first point, which relates to the direction which I gave at the trial respecting the question of waiver, I shall be very short.

Mar. 9, 1832.
Forbes & Co.
v. Edin. Life
Assurance Co.

When a judge makes up his mind at a trial, more especially where it has lasted for many hours, and is obliged on the instant to address the Jury, if his opinion in matter of law is objected to, he is bound to reconsider it with great care. But, such is the structure of the human mind, that the effect of a change of opinion is likely to give a dangerous tendency to the other side, and to create an undue bias against the original opinion. I have endeavoured to fortify myself to the utmost against this tendency. I have examined this case with very great anxiety. I may say I have devoted my mind to it both by day and night, and the result of my deliberations, and my examination of the decided cases, is, that I was mistaken in the law I laid down at the trial. I do not think that the law stated by the counsel in the bill of exceptions is correct; and as this case may go further, and as, in the last resort, it is material that the grounds of judgment should be known, it becomes me to observe in what respect I consider the opinion I gave at the trial to have been erroneous.

I stated to the Jury that they were to consider whether, because Dr Wood did not answer the first question as to the habits of Lord Mar, this was not to be held as an abandonment or waiver of the enquiry as to such habits; and if abandoned, whether they, the Insurance Company, could now set up the habits against the payment of this insurance?

Now, it is stated, that I ought to have construed the instrument, and that I did not construe it, but left it, contrary to law, to the Jury to construe. But I could not let the case go to the Jury without having construed the instrument, and without being satisfied that the three questions were separate, and that the two particular questions which followed the general question, were not a repetition or exposition of the general question,—I thought that they were all separate questions, and I think so still; and I am confirmed in this, for it coincides with the opinion of Lord Lyndhurst, in the case which has been cited by the defenders. I am also confirmed in it by the case as stated in the pleadings of the defenders themselves. Look at the pleas in law;—the defenders state the question as to habits not being disclosed, as the ground of their resistance to pay. Now, the two questions as to his being “active or sedentary”—“temperate or free,” were answered, and the pleas in law could have no reference except to the first general question. What I say ought to have been the law stated by the defenders, is this—that an implied abandonment, or waiver, does not relieve from a distinct and conscientious obligation to disclose every thing material; that the law enforces the performance of such obligations as are binding on conscience; and that such obligations are more especially enforced in contracts of insurance. Now, this I conceive is the correct law, and on a most deliberate review of all the cases and principles, this, I now think, is the law which I ought to have laid down at the trial. If the case, therefore, turned solely on the question, how far I mistook the nature and construction of the instrument, and the obligations arising from it, I am now clearly of opinion that I ought to have directed in the above terms. And this is of extreme importance, because it was evident that the doctrine, as laid down by me at the trial, had great weight with the jury in forming their verdict.

No. 235.

All this matter is to be got in Lord Mansfield's summing up in the case of Sir James Ross. He lays down the doctrine of the necessity of fairness, and the effect of disclosure and non-disclosure; and the more you examine it, the more apparent it is that that case comprises every thing of importance in the questions raised here.

Mar. 9, 1832.
Forbes & Co.
v. Edin. Life
Assurance Co.

Suppose, then, that the present case had been left in the position in which it stood under the direction I gave at the trial being erroneous, if this were the question for the new trial only, and not the question on the bill of exceptions, I should say, on the ground of misdirection in law, that the new trial ought to be granted. But in considering the effect to be given to this part of the bill of exceptions, we must also keep in view the situation of Mr Inglis. Now, if Mr Inglis was ignorant of the habit, (and the evidence does not prove that he was acquainted with the habits of Lord Mar,) that would have counterbalanced the effect of my misdirection, and the granting the new trial would have been useless and unjust. On this point there does not appear to be any evidence tending to instruct that Inglis was informed. If that be so, I think the verdict of the jury (had no other question been raised by the bill of exceptions) must have been against the party who excepted. But the case takes a very different shape, in my mind, when I come to consider what I have called the central or second exception, which stands between the two others;—I mean the warranty. This exception cost me a considerable degree of—I will not say trouble,—but of care and attention, in order to see how it was brought forward; for at the trial there was nothing whatever agitated but the concealment or misrepresentation as to the habit. The whole question on both sides turned on it, and almost all the law which arose at the trial turned on it; and if any thing else turned upon it, it escaped me at the time, and it escapes me now; but it makes no difference in regard to the result. It comes exactly to the same result, according to the opinion I am about to give.

I have examined the proceedings, and I have stated that this is a general issue, which embraces every question that can arise in a case. In all policies, whether on lives, houses, or ships, the great load of the case generally rests on the defender; and the general issue takes in all his grounds of defence. In an insurance on ships, it takes in the question of sea-worthiness,—not departing with convoy,—deviation from the voyage, and so on; and so in life insurances, the general issue admits all grounds of defence, unless they should be matter of surprise by being unnoticed in the previous pleadings. Now, I find in the defences, the first paper put in, the defenders set forth, almost *ipsissimis verbis*, the precise objection that is taken in the shape of exception under the head of warranty. They state in the defences, that the life insured was not a sound one,—that it was more than ordinarily hazardous to insure it,—that there was a disease tending to shorten life. Now these are the heads that are incorporated in the second or central exception, in which it is stated, that as this was a warranty arising out of the documents, it must be considered as a case where it was necessary to prove the warranty completely; and the Judge should have told the jury, that if they were satisfied that the warranty was not made out, they should find for the defenders.

This leads to the consideration of two questions—the one a question of law—the other of fact. With regard to the question of law, it is to be derived from the case to which I have alluded—the case of Sir James Ross. Lord Mansfield lays down the distinction between warranty and fraud; and with regard to warranty, he says, if litigated, it must be proved,—so that a warranty supersedes all other

questions. Accordingly, it annihilates the question that relates to Mr Inglis's ignorance or knowledge. It renders it unnecessary to enter into that question. His ignorance is of no consequence; he must make good his warranty.

The next question is one of fact; and it is divided into three parts.

The first branch relates to the papers signed by the Earl of Mar, in which he declares that he is then in perfect health, and that his health is generally good. This is a declaration of the state of his health, and in that declaration by Lord Mar, Mr Inglis endorses on the back of it his proposal to the Company, and the insurance is made; and the terms of it are, that if what is contained in the preceding paper is not true, the policy is void—(and the assured must prove its truth.) Here, then, Mr Inglis confirms the terms of that warranty.

Mar. 9, 1832.
Forbes & Co.
v. Edin. Life
Assurance Co.

But, then, there come the answers of Dr George Wood and Mr Weir, and they are subsequent. These are, that there was no disease in the Earl of Mar tending to shorten life, or to render insurance more than ordinarily hazardous. These, likewise, are declarations of warranty. It may be said that they affect Mr Inglis, on the one hand, because they are pars ejusdem negotii; and, on the other hand, that they do not affect Mr Inglis, because they were not made with his knowledge or sanction, or by his desire. In the case of Duckett, Lord Lyndhurst directs answers, standing precisely in the same situation with those given by Dr Wood and Mr Weir in this case, to be taken by the jury into their consideration as affecting the assured. The presumption therefore is, so far as it can be discovered, that he thought them pars ejusdem negotii. But the solution of this question, as to whether Mr Inglis was cognisant of these answers of Dr Wood or not, does not seem to be material at present, because if I am right, and if the Court agrees with me in opinion, that in this part of the bill of exceptions there must be a judgment in favour of the bill, it then follows, as a necessary consequence, that if it goes down to trial, the fact of Mr Inglis's knowledge or ignorance will be enquired into; but at any rate, I am conscious that I summed up nothing to the jury on the head of warranty, and the omission of a Judge in not bringing the attention of the jury to an important point of law, is as much a ground for a bill of exceptions, as stating law which is erroneous. If any of your Lordships will take the trouble of looking into Lord Eldon's able speech in Lord Fife's first trial, you will find what a Judge must do, and that his faults of omission are as much subjects of exception as those of commission.

Now, what I suppose is contended for here (and what I admit was the duty of the Judge), is, that the jury should have been told, that in the case of Lord Mar, there is a warranty of perfect health, and general good health; and Mr Inglis's proposal proceeds upon the truth of that statement. I might then have gone on to say, there are likewise warranties contained in the answers of Dr Wood and Mr Weir. They may not apply to Mr Inglis; but it was for the jury to consider whether it was made out in proof that Mr Inglis, the insurer, was affected by a knowledge of them. At any rate, it goes to trial again if the exception is allowed, and it will be seen then, in point of fact, whether Mr Inglis was cognisant of Dr Wood and Mr Weir's answers, or not. In case he was not cognisant, there is then only one head of warranty—the warranty of health.

Now we come to the evidence. The evidence almost turns entirely on the subject of the habit, and of the dangerous nature of the extent of the habit, and the reasoning is also all on the habit. The question to be put to the jury is—Whether

No. 235.

the taking of opium takes away the representation of perfect health? The law of warranty must be laid down. It must be laid down and applied to the case, and then it must be left to the jury to decide whether they think this warranty fulfilled or not. That was not done, and therefore there was error. With regard to those questions that fell under Dr Wood's answer, they come more home as applicable to the subject-matter of the habit. "Whether he knew any reason why an insurance on Lord Mar's life would be more than usually hazardous?" is a question more extensive, and gives greater latitude for the consideration of the jury with regard to their finding. But, at all events, it is clear on my mind, that to try this case well, it ought to be tried in this way; and, on the subject of warranty, it is clear that it absorbed the other two points, and leaves the question for the jury on the warranty alone.

With regard to the motion for a new trial, on the ground of the verdict being contrary to evidence, which is all that I presume now remains behind, I shall be short. I always think it advisable, that when a new trial is applied for, on the head of the verdict being against evidence, that the Court, in stating their grounds in sending it to a new trial, should do it with as much caution as possible, and that they should be as careful as possible in giving an opinion as to the effect of the evidence; because if a strong opinion is expressed by the Court, the case goes down with more or less disadvantage to a second trial, which is often injurious to the fair decision of the case, which ought by all means to be sent down to the second jury as pure as possible. In this case such risk may be avoided, as it must go to another trial on the misdirection. As I have observed that what I said at the trial was a misdirection, I am bound in justice to add, that it is my clear impression that what I said on the waiver of the habit had great weight in causing the verdict; for the jury, a very respectable one, retired, and in a very short time found for the pursuers, their consciences, as I conceive, being satisfied that the waiver was a good ground for their verdict. Accordingly, they did not take sufficient time to examine into the evidence. In fact, it was a verdict without due and sufficiently deliberate consideration of the evidence. Under all these circumstances, my opinion is, that the bill of exceptions ought to be allowed, and that the rule for a new trial should be made absolute.

LORD BALGRAY said that the Lord Chief Commissioner had explained most distinctly the grounds on which he wished the bill to be allowed, and the new trial to be granted; and he fully coincided with his Lordship.

LORD CRAIGIE concurred.

LORD GILLIES said he was of the same opinion. But he thought that the new trial must be granted, not only on the bill of exceptions, but also on the ground that the verdict was against evidence. He added, that if their Lordships allowed the bill, that judgment could be appealed from; and if they granted a new trial, as in the case of a verdict being contrary to evidence, that judgment could not be appealed from; and perhaps, therefore, some arrangement should be made between the parties.

LORD PRESIDENT.—I hold the Earl of Mar's statement to be not only an express warranty, but to contain an unfair representation. I think Lord Mar committed a fraud. I mean, that he did not act as he ought to have done in fairness, by referring to Dr Wood. Under all the circumstances which had taken place, the fair answer of Lord Mar in reference to a medical man to ascertain his present and

Mar. 9, 1832.
Forbes & Co.
v. Edin. Life
Assurance Co.

general health, was, "I have no medical man in Edinburgh; for this reason, that for the last ten or fifteen years I have lived in England, and I only came to Scotland to attend my father's funeral, and have had no occasion for a medical attendant here; but last year I had occasion to consult Dr Abercrombie—he attended me once or twice, and I refer either to him or to Dr Wood, a medical man." In fairness, I repeat that he ought to have made this disclosure. Dr Wood knew little more, or rather nothing more, about Lord Mar's health than Mr Weir. It was a farce to refer to him as a medical man. In regard to the knowledge of Mr Inglis as to his Lordship's habits, that is done away with now altogether, by holding that he was bound to know what Lord Mar knew. Lord Mar was his agent, and so he is bound by his knowledge. I take the case of a ship for instance. The ship may be lost when I am making the insurance. This may be considered as a hardship, but it is cured in England by putting into the policy the words "lost or not lost." It is not so abroad, however. In most foreign countries no such words are in use, because they hold, that when both parties are necessarily ignorant, the insurer runs the risk. I insure a ship from Newfoundland to Lisbon. I receive intelligence that she was to sail on such a time. I insure her, and it turns out that she has been lost three weeks before. That is nothing to the purpose; the insurer must suffer the loss. On the other hand, it may happen, that by a quick passage the ship has arrived before I effect the insurance. That makes no difference; the insurer retains the premium. In the same manner, if I were to insure the life of a person in India,—say that I have received a letter from a mutual friend, stating that he was in good health when he wrote. I insure that life accordingly. It may afterwards turn out that the man was dead before the insurance was effected; but that would be nothing to the purpose—the risk is run. In such a case as this, where the ignorance was positive, and without any blame in either of the parties, the insurer runs the risk; so Lord Mansfield laid it down, in *Ross v. Bradshaw*, 1 Bl. 312; but that is not the case here. Lord Mar is examined here—he makes these answers, and Mr Inglis knew the answers. Under these circumstances, the bill of exceptions ought to be allowed; and in regard to a new trial, I suspect that the jury have paid very little attention to the evidence, in consequence of the direction that there had been a waiver or abandonment of the enquiry. It was a verdict given without evidence at all.

THE COURT accordingly "sustained this bill of exceptions, set aside the verdict, and granted a new trial, reserving consideration of the point of expenses till the final settlement of the cause."

Pursuers' Authorities.—Marsh. on Ins. 772 and 775, and cases there cited (3d Edit.); Grant on New Trials, p. 170; Carstairs, May 30, 1815 (4 Maule and Selwyn, 191); Camden (1 Blackst. 418); Watson, May 6, 1813 (4 Taunton, 763); Ross (1 Blackst. 312).

Defenders' Authorities.—Park on Ins. 643 (7th Ed.); Marsh. on Ins. 152-7, 449, 463 (3d Ed.), and cases there; Carter, (1 Blackst. Rep. 593, and 3 Bur. 1909); Campbell, (4 Barn and Ald, 423); Marsh. 449, 456, and 740; Maynard, (5 Dowl and Ryl. 266); Everett, (5 Bingh. 503); Morrison, (4 Bingh. 60); Lindenau, Nov. 12, 1828; 8 Barn and Cres. 586.

CRAVENOUR and ANDERSON, W.S.—J. T. MURRAY, W.S.—Agents.

Mar. 9, 1832.
Forbes & Co.
v. *Edin. Life
Assurance Co.*

No. 236.

JOHN NEILSON, Advocate.—*D. F. Hope—A. M'Neill.*
JOHN THOMPSON, Respondent.—*Robertson—J. Anderson.*

Mar. 9, 1832.
Neilson v.
Thompson.

Process—Advocation—Road Act—4 Geo. IV. c. 49.—An advocation of a judgment by the Sheriff under the general road act, 4 Geo. IV. c. 49, and a local act, incompetent.

Mar. 9, 1832. NEILSON presented a petition to the Sheriff of Lanarkshire, setting forth that, by the general road act, 4 Geo. IV. c. 49, § 36, and also by 1st DIVISION. Ld. Corehouse. the late road act for the Garscube and Possil roads, there were some exemptions from paying toll, to the benefit of which he was entitled; notwithstanding which, Thompson, tacksman of certain toll-bars near Glasgow, had illegally exacted toll from him. He therefore craved that Thompson might be subjected in repetition of the toll dues, and in the statutory penalty of £5. The Sheriff assailed, with expenses. Neilson brought an advocation, to the competency of which it was objected, that, by the general road act, the judgment of the Sheriff was declared to be "final and conclusive," and "not subject to review by advocation, or suspension, or reduction, or by any process of law whatsoever, any law or usage to the contrary notwithstanding." The Lord Ordinary "sustained the objection to the competency of the advocation, repelled the reasons of advocation, and remitted the cause simpliciter," &c.; "found the respondent entitled to expenses," &c.

Neilson reclaimed; but the Court adhered.

LORD BALGRAY.—We cannot allow a review of this judgment. The general road act pervades all local acts, so far as its provisions go. The object of the legislature was to give finality to the local jurisdiction of the Sheriff; and that would be entirely defeated if we hesitated to adhere to the Lord Ordinary's judgment. I concur with the Lord Ordinary, and think the advocation incompetent.

LORD GILLIES.—I doubt if the petition, as framed, was originally competent before the Sheriff. But that doubt cannot avail the advocate; for, if the petition were competent, I think the Sheriff's judgment final, and not subject to review; if, on the other hand, the petitioner presented an incompetent complaint to the Sheriff, he cannot complain that the Sheriff has refused it, with expenses.

The other Judges concurred.

C. FISHER—J. M'GILL—Agents.

WILLIAM HENDERSON, Advocate.—Shene—Neaves.
CHRISTOPHER BURNS and Others, Respondents.—Thomson.

No. 237.

Mar. 9, 1832.
Henderson v.
Burns, &c.

Ship—Master and Servant.—Where a vessel arrived at a port in a leaky condition, and the master entered into a written agreement with three seamen to assist in working her to another port for a stipulated sum, to be paid on arrival,—held, that although they subscribed the ship's articles regulating the conduct of the seamen, and bearing that wages were not to be payable till 20 days after arrival, they were entitled, on the vessel arriving safely, to immediate payment of the stipulated sum; and observed, that they were also entitled to wages and board wages till payment was tendered.

HENDERSON was owner, and Berry was master, of the brig Naiade, Mar. 9, 1832. bound on a coasting voyage from Liverpool to Limerick, or to any other port in Great Britain. By printed articles, dated 24th October 1830, it was agreed, with reference to the voyage, inter alia, “that no officer or seaman, or person belonging to the said ship, shall demand, or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered, nor in less than 20 days, in case the seaman is not employed in the delivery.” The Naiade, in April 1831, arrived in a leaky condition at Inverness, where three seamen, Burns, Cumming, and Gray, were hired by the master, under an agreement in these terms: “These do certify that I have hereby agreed with the said Christopher Burns, and John Cumming, to proceed from this place on board the brig Naiade, to Borrowstounness, for which I agree to pay them the sum of £5 sterling each man, on arrival of the ship at the said place, Borrowstounness.—P.S. In case the vessel should be under the necessity of putting into any harbour, and to discharge, before reaching the said Borrowstounness, that we will be entitled to receive the said sum, £5 sterling each man.” A separate agreement, in the same terms, for £4, was at the same time entered into with Gray. These seamen also signed the ship's articles.

The brig was brought safely to Borrowstounness upon the 22d of April; and Burns, Cumming, and Gray (who were strangers, and destitute), requested immediate payment of their wages. They were informed that they would be paid on the 25th; and this not being done, they then raised a summary process before the Sheriff of Linlithgowshire against Henderson, concluding for the stipulated sums, and also for 7s. 6d. a-day as wages and board wages from the time the brig arrived, till they should receive payment. Several days afterwards, and pending the process, Henderson offered the stipulated wages, which the seamen refused to accept, unless accompanied with payment of wages, board wages, and expenses of process.

In defence, Henderson maintained, that by the ship's articles, which these seamen had signed, they could not claim their wages until the cargo

2d Division.
Ld. Fullerton.
T.

No. 237. was delivered, or till the expiry of 20 days, if not employed in the delivery ; that by mercantile usage, even had there been no such express agreement, they were bound to wait for payment of the wages till the fifth day after arrival, or four days after the vessel's entry at the custom-house, or delivery of the cargo ; and that special agreements as to paying seamen's wages are regulated and modified by the above usage, in the same way as, by practice, days of grace are allowed in the payment of bills.

Mar. 9, 1832. Henderson v. Burns, &c. To this it was answered, that the terms of the special agreement could not be affected by the alleged practice, the existence of which was not admitted.

The Sheriff pronounced this interlocutor : " Finds, that the general articles of agreement between the master and crew of the vessel in question were entered into in a different port, and long before the pursuers had any thing to do with the vessel ; that the said articles, though signed by the pursuers at Inverness, cannot be regarded or held as binding on the pursuers, inasmuch as these articles were modified and altered by the special agreements founded on in the libel ; that these special agreements, being entered into by the master in possession and charge of the vessel at the time, are to be held as binding on the owners of said vessel ; that the defender Henderson has admitted as much by offering payment of the wages claimed, but refusing at same time to pay the extra wages incurred by the delay of payment ; that there is not any analogy between the days of grace, in payment of bills, and that of wages to poor seamen in a strange place, who ought to have been paid instantly upon the fulfilment of their engagement ; and, therefore, repels the defences, and decerns in terms of the libel ; finds expenses due."

Henderson having advovated, the Lord Ordinary pronounced this interlocutor, adding the note below :* " Recalls the interlocutor of the Sheriff,

* " Note.—The litigation here seems to be most absurd and unnecessary. In the first place, it is difficult to acquit the pursuers of precipitancy in raising the action, as the vessel arrived at Borrowstounness only on the 22d April, and it does not seem to be denied by them that they were promised payment on the 25th, which payment they declined to receive, unless it was accompanied with wages and board-wages from the date of the ship's arrival, and the expenses of raising the action. But the defender, instead of confining himself to these questionable points, chose to enter into the general defence, that, by the ship's articles of agreement, signed by the pursuers, they were not entitled to demand their wages until 20 days after the arrival of the vessel ; and it is from the discussion of this point that the whole expense has arisen. Now the Lord Ordinary agrees with the Sheriff in thinking that the printed paper, termed ' Articles of Agreement,' founded upon by the defender, cannot control the terms of the missive granted by the master of the vessel. That printed paper describes the voyage as from the port of Liverpool to Limerick, or to any other port in Great Britain, while the voyage for which the pursuers were engaged, was from Inverness to Borrowstounness. Although, therefore, the pursuers, by signing that printed paper at Inverness, may have subjected themselves to such part of the regulations as were generally applicable to them in the discharge of their duty, the clause regarding the term of payment of wages, in such printed paper, cannot receive effect, in opposition to the express written obligation granted by the

in so far as regards the claim of the pursuers for wages and board wages, No. 237. from the date of the ship's arrival at Borrowstounness, and, quoad ultra,
 decerns in terms of the libel; finds the advocator liable in expenses both Mar. 9, 1832.
 in this Court and in the Inferior Court." Henderson v. Burns, &c.

The seamen acquiesced in this interlocutor, but Henderson reclaimed on the point of expenses.

LORD GLENLEE.—The seamen ought to have got both their wages and board wages.

LORD JUSTICE-CLERK.—I think so too. Unless it can be maintained that the missives of agreement were departed from, or are of no avail, these poor sailors were entitled to make immediate demand for their wages, which should have been instantly paid. Had they reclaimed, we must have given them wages and board wages up to the date when the stipulated wages were tendered.

LORD MEADOWBANK.—I am entirely of that opinion. When these poor men presented their petition to the Sheriff, on the third day after their arrival at a port where they were utter strangers, and without the means of subsistence, it is not alleged that there was either payment or an offer of payment. Several days afterwards, the master tenders the money, and consigns; and during all this time, the sailors are left without a farthing of the wages they were entitled to demand the moment they arrived. I never knew a more outrageous proceeding. I think it was a mistake in conducting the cause not having reclaimed against the interlocutor refusing wages and board wages; but that is no reason why we should alter the finding of expenses against the advocator, who instituted a long litigation in the Inferior Court, in the face of his written agreement.

LORD CRINGLETIE.—The advocation should not have passed at all. The decree in the Inferior Court had not exhausted the cause there, for it did not specify the extra wages to be paid. But if the Lord Ordinary had only looked at the 55th section of the coasting trade act, 31 Geo. III. c. 39, he would have found it there laid down, that if the master do not pay in terms of his agreement, he is liable in a penalty of £1 additional to each seaman. Here the special agreement was not fulfilled, and the parties might have claimed that additional payment.

THE COURT accordingly adhered.

Respondents' Authorities.—31 Geo. III. c. 39; M'Nair, Feb. 21, 1829 (ante, VII. 451)

GREG and MORTON, W.S.—WILLIAM ALLAN, S.S.C.—Agents.

master at Inverness, certifying that he had agreed with the pursuers to proceed from that place to Borrowstounness, and to pay them the stipulated sum, 'on arrival of the ship at the said place, Borrowstounness.' In regard to the claim for wages and board wages, the Lord Ordinary sees no ground for sustaining it. To that extent he has, therefore, altered the Sheriff's interlocutor, but, considering all the circumstances of the case, and, in particular, that the expense has arisen entirely in the discussion of the general defence, he has thought the respondents entitled to expenses."

No. 238.

Mrs M'QUEEN and HUSBAND, Claimants.—D. F. Hope—More.
SIR JAMES NASMYTH, Respondent.—Jameson—Anderson.

Mar. 9, 1832.
 M'Queen, &c.
 v. Nasmyth.

Interest—Provisions to Children.—In equalizing provisions to children in terms of the father's obligation, where one of them had, during the life of the father, received payment of interest, the Court allowed to the other simple interest for the same period, but refused interest on interest.

Mar. 9, 1832. **THIS** was the sequel of the case reported ante, IX. 355. Sir James Nasmyth, the father of Mrs M'Queen, bound himself in her contract of marriage, to pay her at his death a sum equal to any portion to be given in

2d DIVISION.
Lord Medwyn.
 T.

his lifetime, or at his death, to his other daughters. He afterwards, in the marriage-contract of his daughter, Mrs Dalrymple, bound himself to pay her £2000 at his death, with interest from Whitsunday 1815, payable half-yearly; and again, after the marriage of his daughter, Mrs Villiers, he directed £100 per annum to be paid her during his life, and £2000 at his death. He died in Dec. 1828; and in a multiple poinding brought by his son, Sir John, Mrs M'Queen claimed to be put on an equality with her sisters. The Lord Ordinary found, “that under the deed of covenant, Mrs M'Queen is only entitled to the sum of £2000, payable six months after her father's death, and repelled her claim *quoad ultra*.” She re-claimed, and the Court, on 29th January 1831, altered and found, “that under the complainer's contract of marriage, to which her father, the late Sir James Nasmyth, became a party, she is entitled to claim a provision equal in amount and value to that which has been made in favour of any of the other daughters of the said Sir James Nasmyth, and that in ascertaining the amount of any of the provisions made to his other daughters, there must be taken into account, the sums that may have been advanced or paid to such other daughters, during his lifetime, in name of annuity or of interest on the capital sums of such provisions payable at his own death, reserving to the parties to be farther heard on the complainers' claim of accumulated interest relating to such advances, as set forth in their pleadings, and with these findings, remit to the Lord Ordinary to proceed farther with the cause as to his Lordship shall seem just.” Thereafter the Lord Ordinary, “in respect the Court has found that Mrs M'Queen is entitled to draw a provision equal in amount and value to that of any of the other daughters, and that the provision would not be equal in value, unless it be held that the interest was received half yearly, as stipulated in Mrs Dalrymple's contract of marriage, appointed Mrs M'Queen to put in a state of her claim, in terms of this interlocutor.”

Sir John Nasmyth reclaimed, and the Court, “before further answer, remitted to the Lord Ordinary to receive the state of claims, &c., it being understood, that the claim of Mrs M'Queen for interest on sums equivalent to those payable half-yearly to her sister Mrs Dalrymple, in the lifetime

of her father, as the interest of the principal sums provided by her marriage- No. 238.
contract, shall be held as still open for discussion."

Mrs M'Queen claimed, in addition to the principal sum of £2000, and interest calculated half-yearly upon it, accumulated interest. The Lord Ordinary ordered minutes, and made avizandum to the Court, adding the note below.* Mrs M'Queen maintained, that on a fair construction of

Mar. 9, 1832.
M'Queen, &c.
v. Nasmyth.

* "NOTE.—The view taken of this case by the Lord Ordinary was, that when the father stipulated to give his first married daughter such share or proportion of his effects at his death, as shall be equal to the portion or fortune which any of his daughters shall have or become entitled to, through or from him, he alluded to the capital sum settled as a provision or marriage-portion, and that this was the share of his fortune he meant to bestow upon his daughter. A marriage-provision, or tocher, he inclined to view as the capital sum stipulated in the contract, at whatever time payable; and that if a father agrees also to pay the interest during his life to any of his daughters, this is a payment in addition to the marriage-portion, made on account of the husband not being in affluent circumstances, saved from his own annual income, and which he would otherwise have expended, if the means of the married pair had been more ample. In short, that such would be an addition to the provision, but not the provision itself. He conceived Sir James Nasmyth to have acted on these principles, on the marriage of his three eldest daughters, suiting the different stipulations in their respective contracts to their different circumstances. Not being able to say, at the time of the first marriage, what provisions he would be able to make upon his daughters, he agreed to give Mrs M'Queen as large a portion as any other daughter. On Mrs Villiers he settled an annuity of £100, and to Mrs Dalrymple he agreed to pay, by way of provision or tocher, the specific sum of £2000, with the legal interest from the term preceding her marriage. The Court, however, did not adopt this view, and held that the interest paid during the father's life, was to be reckoned a part of Mrs Dalrymple's provision or tocher, and that Mrs M'Queen was entitled to be put on a footing of equality with her. The Lord Ordinary does not see how this can be done, without taking into view, that this interest was not only payable, but actually paid, half-yearly. It is no doubt true, that interest upon interest is not exigible by the law of Scotland, and if Mrs Dalrymple had forbore, during her father's life, to ask payment, she could only claim, at his death, the principal sum of interest. But as the interest was actually paid to Mrs Dalrymple, and as the payments to her are to be the measure of the share of the father's effects, to be paid at his death to Mrs M'Queen, the Lord Ordinary cannot see how she can be put on a footing of equality with her sister, unless the claim is sustained to the utmost extent made by her.

" If the Lord Ordinary has not misunderstood the illustration from the case of legidim put by the respondent, he is inclined to doubt its bearing on the present case. If money is to be repaid with interest by a debtor, compound interest cannot be exacted. But where it is not to be repaid by the person who has received it, but is to be retained by him, as legally his own share of a certain fund, and another person is to get an equal share with him of this fund, and further, if the payment to him was by way of annuity half-yearly, would not simple interest on these payments be taken into account, on the same principle that it would be due on the single capital sum in the case past? To receive £1400 at the end of 14 years is a very different thing from receiving £50 half-yearly during that period, and will be a very different share of a man's fortune.

" Under these circumstances, the Lord Ordinary has thought it best to report the case, for decision by the Inner House."

No. 238.

Mar. 9, 1832.
M'Queen, &c.
v. Nasmyth.Flockhart v.
Lawson.

the family settlements, as well as in terms of the interlocutor of 29th January 1831, she was entitled to the accumulated interest. Sir John Nasmyth, on the other hand, contended, that although in questions as to legitim perfect equality must be observed, and on that principle, where principal sums have been paid by the father in his lifetime, these, with the interest thereon from the date of payment, must be taken into the computation; yet interest on the periodical interest had never been sanctioned, though the child who had received her portion might, with proper management, have accumulated interest upon interest. In the present case, the settlements authorized no such claim, which was illegal in itself, and there was a misconception of the previous interlocutor of the Court.

LORD JUSTICE-CLERK.—The Lord Ordinary has certainly mistaken the import of our former interlocutors. We never intended to sanction a claim for accumulation of interest upon interest.

The other Judges concurred, and

THE COURT accordingly “repelled Mrs M'Queen's claim of £602, 16s. 10d. of periodical interest, and quoad ultra sustain the said claim for £2000 and £1450, as set forth in the condescendence, with the legal interest on the said sums from the 4th of June 1829, and till paid.”

JAMES BRIDGES, W.S.—CRANSTOUN AND ANDERSON, W.S.—Agents.

No. 239.

WILLIAM FLOCKHART, Suspender.—*More.*
EBENEZER JAMES LAWSON, Charger.—*Shene—Thomson.*

Proof—Bill of Exchange.—In a suspension of a charge on a decree in absence, proof by parole admitted to establish that a bill alleged to have been given on a compromise in extinction of the debt contained in the decree, was so given, and not merely in payment of a claim of bygone interest.

Mar. 9, 1832.

2d DIVISION.

Lord Medwyn.

R.

THIS was the sequel of the suspension of a charge on a decree in absence, mentioned ante, IX. 873, in which the Court remitted to the Lord Ordinary, with instructions to allow a proof by parole as to the res gesta at granting a bill of exchange, with a view to determine whether it had been granted on a compromise, in settlement in full of the claim for which decree in absence had passed, or merely as a payment of interest. A proof was allowed, on which the Lord Ordinary pronounced this interlocutor:—“ Finds, that the res gesta, at the time the bill for £22, 19s. 6d. was granted, as now proved, distinctly shows that the bill was intended to settle the amount of the decree that had been obtained in absence, which had been suspended, and which the parties had met along with friends mutually chosen to settle; therefore sustains the reasons of suspension, suspends the letters simpliciter, and decerns; finds the suspender entitled to expenses.”

The charger reclaimed, but the Court adhered.

LORD GLENLEE.—This is not a question as to the amount of a bill. The suspension is rested upon the allegation of a compromise, and the question was, what were the circumstances? Your Lordships, when the case was last before us, required evidence as to the res gesta—and the suspender has proved his allegations—the **Lawson**.
interlocutor is quite right.

Mar. 9, 1832.
Flockhart v.

Kincaid v.
Agnew.

LORD CRINGLETIE.—My only difficulty was, as to the competency of admitting parole proof to remove the effect of a decree; to be sure it was a decree in absence.

LORD JUSTICE-CLERK.—I do not wish to interfere with general rules as to parole proof in reference to the contents of a bill; but this is a special case, where an alleged compromise was founded on to remove the effect of a decree in absence, and the compromise has been proved.

LORD MEADOWBANK concurred.

A. GIFFORD, S.S.C.—J. MOWBRAY and A. HOWDEN, W.S.—Agents.

JOHN LENNOX KINCAID, Complainor.—D. F. Hope—Bell—Miller. No. 240.
SIR ANDREW AGNEW, Respondent.—Jameson—Ivory.

Freehold Qualification.—Circumstances where it was held, 1. That it was competent to found upon the combined evidence of two retours, to instruct a forty-shilling land of old extent. 2. That the retours proved the extent, notwithstanding an error calculi in one of the retours, which created a slight discrepancy betwixt the general valent clause, and the summation of the several parcels contained in the descriptive clause.

At the meeting for the election of a member of Parliament for the county Mar. 9, 1832.
of Wigton, held on the 16th of May 1831, John Lennox Kincaid of An-
termony claimed to be enrolled as a freeholder, in respect of his lands of Bal-
lenwyne, or Balgowan, part of the barony of Corsewall. To instruct
that these were a three-merk or forty-shilling land of old extent, Kincaid
produced, 1. Extract retour of the special service of Janet Campbell, grand-
daughter of the deceased Finlay Campbell of Corsewall, as one of the two
heirs-portioners of her grandfather, dated 27th April 1568, which bore,
“Quod quondam Finlaus Campbell de Corswell, avus Janetæ Campbell
latricis præsentium, obiit ultimo vestit. et sasit. ut de feodo ad fidem et
pacem, S.D.N. Regis et suor. predecessorum de omnibus et singulis decem
mercatis cum dimidia mercat. terrar. subscript. viz. Tribus mercatis terrar.
de Airie; tribus mercatis terrar. de Knobrek et Auchinss; tribus mer-
catis terrar. de Balgoone. Et de viginti solidatis terrar. de Carnbrook
antiqui extensus cum pertinen. jacen. in parochia de Kirkcum, infra vice-
comitat. de Wigton. Et q. prædict. quinq. mercatæ et quadraginta de-
nariar. terrarum predict. ex decem mercat. cum dimidia, mercat. terrarum
prescript. valent nunc per annum, decem libris et decem solidis usualis
monetæ regni Scotiæ; et tempore pacis valuerunt tribus libris et decem
solidis monetæ præscript.” 2. Extract retour of the special service of
John McDowall of Garthland, to Uchred McDowall, his father, dated 17th
October 1600, which bore that the deceased had died vest and seised in

2d Division.
Ld. Moncreiff.
T.

No. 240. a great variety of lands, and inter alia, in "Decem mercatis cum dimidia mercate terre de Arie, Knokbrek, Cairnebrok, et Ballingowyne, duabus mercatis terrarum cum dimidia mercatae terre de Mye, cum superioritate duarum mercatarum et dimidia mercatae terre de Knocknayne existend. pars decem mercatarum terrarum de Bruchjerk, jacen. in parochiis de Kirkcum et Stanykirk infra vice-comitatem predict. Omnes unit. et annexat. in una libera Baronia de Corsewell nuncupand. extenden. in integro, ad sexaginta mercatas et dimidia mercate terre in proprietate et tenendrietate." The valent clause applicable to the above in cumulo, was in these terms: "Et quod praedicta baronia de Corswell jacen. at ~~sexaginta~~ extenden. ad predict. sexaginta mercatas terrarum cum dimidia mercate terre valent nunc per annum summam centum viginti et unam librarium monete antedictae et tempore pacis valuit, summam quadraginta librarium sex solidorum et octo denariorium monete."

This claim was objected to by Sir Andrew Agnew: "That, by the act 16th Geo. II. ch. 11. § 8. it is declared, that no person shall be entitled to be enrolled in respect of the old extent of his lands, unless such old extent is proved by a retour of the lands. That in this claim two retours are founded on, which is illegal; but, moreover, neither of the two proves that the lands mentioned in the claim are of the legal extent, inasmuch as in the retour of John M'Dowall, dated 17th October 1600, there no doubt are described the ten-merk and half-merk land of Arie, Knockbreck, Cairnebrok, and Ballingowyne; but the extent of the lands mentioned in the claim is not proved by the said retour; and in the other retour of Janet Campbell, dated 27th April 1568, the lands of Auchins are included as part of the said ten-and-a-half-merk lands, which are not mentioned in the former retour; and the valent clause of Janet Campbell's retour does not prove the extent of the lands in the claim, as it only relates to one-half of them, and it is settled law, by the decision in the case of M'Dowall v. Buchanan, 20th February 1787, and by the authorities of Mr Wight and Mr Connell, that although the valent clause bears, that the half of certain lands is worth a particular amount, that will not be held evidence that the whole is worth twice that amount, even although in the descriptive clause the whole is mentioned as being of double value."

The court of freeholders having decided against Kincaid, he presented a petition and complaint to the Court. The Lord Ordinary reported the cause on cases.

Pleaded for the Complainant—

- With regard to Janet Campbell's retour, it is sufficiently instructed by the retour of Janet Campbell, as heir-portioner of her grandfather, Finlay Campbell, dated 27th April 1568, that the lands of Balgoone, Ballenwyne, or Balgowan, are a three-merk, or 40s. land of old extent. The retour, in the descriptive clause, states these lands to be a three-merk land of old extent; and—along with other two parcels, Airie and Knockbreck, of three merks each, and a third parcel, Cairnbreck, of 1½

merk—to amount in whole to a $10\frac{1}{2}$ merk land. In all these her grandfather died last vest and seised; in the valent clause, her pro indiviso half is retoured to a £3, 10s. or $5\frac{1}{2}$ merk land. No. 240.

Mar. 9, 1832.
Kincaid v.

Agnew.

But when a person is served heir-portioneer in the pro indiviso half of lands, in the whole of which the predecessor died last vest and seised, and the pro indiviso half is retoured in the valent clause to a certain amount, this affords sufficient legal evidence that the whole is in cumulo exactly double; and that each of the two portions of the cumulo is exactly one-half.

2. With regard to the retour of John McDowall, (as to which it was admitted, that while the cumulo valent was $60\frac{1}{2}$ merks, the several sums in the description, added together, amounted to 61 merks):—This retour enumerates various lands in the descriptive clause, and particularly the four parcels of Airie, Knockbreck, Balgowan, and Cairnbrock, as constituting a $10\frac{1}{2}$ merk land. The whole amount of the different parcels is stated, in the descriptive clause, to be $60\frac{1}{2}$ merks: while in the valent clause, the whole of the parcels are retoured in cumulo to be £40, 6s. 8d. corresponding exactly with the $60\frac{1}{2}$ merks in the descriptive. This is legal evidence in corroboration of the fact established by the other retour, that the whole lands,—in one-half of which Janet Campbell was served heir-portioneer,—amounted to $10\frac{1}{2}$ merks in cumulo; and that the parcel called Balgowan amounted to a three-merk or 40s. land.

But where the valent clause corresponds in cumulo exactly,—or with a slight variation,—with the descriptive clause, wherein the parcels are separately enumerated, the descriptive clause has always been held to afford sufficient evidence of the extent of the separate parcels. Wight, B. 3. c. 2.—5th Feb. 1745, Colquhoun of Luss."

Plead for the Respondent—

1. With regard to Janet Campbell's retour:—According to the authority of Wight and of Bell, it is not the descriptive, but the valent clause of a retour which can afford the evidence required by the statute; but even in the descriptive clause founded on, the lands are not described as being of old extent, at least the words *antiqui extentus* are only applied to the lands of Cairnbrock, which implies a distinction as to the rest. It is not sufficient, to establish the cumulo valuation of the whole lands, that there appeared to have been some division of the subjects in which Janet Campbell is limited to the “*dimidietate earum extenden. ad quinque mercat. et quadraginta denariar. terrarum supra script.*” Although it may be very true that the five-merk and forty-penny land, thus cut out of the original subject, may have furnished an old extent of £3, 10s., yet the remainder may have been extended to a very different value. The case of McDowall v. Buchanan was therefore expressly in point, where it was found, “that though the retour sufficiently proved one-half of the lands to have been valued at thirteen-and-fourpence, it did not thence appear

No. 240. that the other half was precisely of the same value ; and accordingly the law has been so stated both by Bell and Connell.

Mar. 9, 1832.
Kincaid v.
Agnew.

2. In regard to M'Dowall's retour, it contained nothing to prove the value of the lands of Balgowan as a separate subject ; taken per se, it could not avail the claimant ; and even the doubtful doctrine—to which the late Lord President Campbell was opposed—of making out a case by the joint evidence of two retours, had never been extended to the species fact of the present. Where there are two retours, each applicable to a distinct subject, the aggregate extent has been obtained by adding together the separate extents, and producing the two retours in evidence of this result. So also where, in one retour, two subjects are valued in cumulo, and in another retour one of these subjects is extended separately, the extent of the remaining subject has been obtained by subtracting the separate valuation in the one retour from the cumulo valuation in the other,—and in that case, also, the two retours have been received in evidence of the result ; but two retours, each of them per se defective, have never been allowed to be mixed up together, so as to cobble up a case between them. Besides, ex facie of the retour in question, there was an error calculi, which brought the present claim precisely under the rule stated by Mr Wight, that in all cases where the error is so considerable as that it may reduce the particular lands upon which the vote is claimed, under forty shillings if applied to them, the objection is good ; for quomodo constat that this admitted blunder of one half-merk does not arise on that very parcel which contains the claimant's lands of Balgowan ? And even were the half-merk to be divided pro rata over the whole nineteen parcels which compose the barony of Corsewall, it would still be sufficient to destroy the qualification. Besides, the two retours attempted to be joined in the proof are discrepant ; for in the one retour the lands of Auchins are stated, which do not appear in the other, and this objection is fatal to the argument of their combined evidence.

LORD JUSTICE-CLERK.—It has been determined not to be necessary, under the act 1748, that the old extent shall be proved by one individual retour. That was the decision in the case of *Davidson v. Hill*. Then came a case where I was a party, which is not reported (*Oswald and Boyle v. Cunningham*, June 21, 1803.) A claim was there made to be enrolled in right of the £5 land of Culellan, in Ayrshire. A retour was produced of one half of the lands of Culellan, Millhouse, and Holmes, bearing the old extent of the said half to be £5. Two other retours were produced, applying to Millhouse and Holmes respectively, and establishing the one to be a £2, and the other a £3 land of old extent ; and in this way the claimant endeavoured to make out, not by direct evidence of one retour, but by a calculation drawn from the combination of the three retours, that Culellan was a £5 land. The matter was keenly contested, and the Court decided in conformity to the case of *Hill v. Davidson*, that the extent of Culellan as a £5 land was sufficiently instructed. Then the question comes to be, have we sufficient evidence before us in the present case ?

With regard to the first retour, it is material to observe, that the lady is expressly No. 240. said to be co-heiress in the just and equal half pro indiviso. I think this evidence Mar. 9, 1832. is good, and very different from the case of Buchanan, which I am not satisfied is Kincaid v. in point. In that case, the evidence did not regard a pro indiviso half, but merely Agnew. a half, and there was no evidence that the other half was of the same description; M'Donald v. but here the ancestor died in possession of the whole as a £10 land, and this lady Rose, &c. succeeds as a co-heiress in her pro indiviso half. I do not exactly arrive at the conclusion that this retour alone would have been sufficient; it is now finally determined to be competent to look to another retour, and we have here the Garthland retour, where the whole parcels amount to a ten and a half merk land. I lay no stress upon the trifling discrepancy of the half merk, which is a mere error calculi in the enumeration. If such an objection were to be sustained, it would vitiate the evidence of many other qualifications. Upon the principle, then, of those cases which have latterly so determined the point,—though it might have been better if the Court had required a single retour for every parcel,—I am of opinion that this claim ought to be sustained.

The other Judges concurred, and

THE COURT accordingly "sustained the complaint, and ordained the complainer's name to be added to the roll."

Complainant's Authorities.—Wight, b. 3, c. 2; Bell on Election Law, pp. 171-5-8, and 181-2; Colquhoun, Feb. 5, 1745 (8572); Davidson v. Hill, June 22, 1802 (8597); Abercromby, Feb. 28, 1753 (Elches, Mem. of Parl. No. 55); 16 Geo. II. c. 2.

Respondent's Authorities.—Bell's Election Law, 169-70-8; Wight, 167-72; Macdowall, Feb. 20, 1787 (8625); Supp. to Wight, p. 26; Connell on the Law of Election, 105-6; Malcolm, Jan. 23, 1787 (8692).

VANCE HATHORN, W.S.—T. MACKENZIE, W.S.—Agents.

DONALD CANTACH or M'DONALD, Charger.—Cunninghame—W. Bell. No. 241.
PATRICK ROSE and DONALD FOWLER, Suspenders.—Monro.

Proof—Poinding—Process.—1. Where a party craved interdict of a sale under a poinding, and produced written evidence of his having purchased the effects; and the poinder offered to prove that the purchase was fictitious, that the effects had never been out of the possession of his debtor, and remained his property—held competent to prove this by parole, without a reduction of the documents. 2. Where a Sheriff granted interdict, and found expenses due, and allowed decree for expenses to go out in the agent's name, and a charge for expenses was given by the agent—held, that the party was entitled to suspend both as to the interdict and the expenses.

ON 9th October 1828, Cantach executed a poinding of certain cattle Mar. 10, 1832. and effects, as the property of his debtor, Ewen Fowler. During the poinding, Donald Fowler, the son of, and a minor living in family with Ewen, claimed a stot as his property, which the messenger in consequence did not poind. While Cantach was proceeding towards a sale under his poinding, Donald Fowler presented a petition to the Sheriff of Ross-shire,

1st DIVISION.
Ld. Corehouse.
D.

No. 241. craving interdict in respect that the subjects poindred were his property, and alleging they had been claimed as such by him at the time of the poinding.

Mar. 10, 1822. M' Donald v. Rose, &c. He stated that they had belonged to his father till 21st July 1828; that his father then sold them to Ure, along with seven bolls of meal, in payment of an account of £22, 5s. 4d., on which occasion the following document was written: "The above account has been, of this date, settled in manner above specified, in presence of Alexander Mackenzie, miller at Ussie, and Murdo Cameron, writer in Dingwall, and writer hereof. (Signed) James Ure, E. F.; (Ewen Fowler), his mark; Alexander Mackenzie, witness; Murdo Cameron, witness;" and that Ure, on 6th August, had resold these articles to him, in terms of this document: "I have sold this day to Donald Fowler, Newton Ferintosh,

A grey mare, cart, and harness, at	.	.	.	£9	0	0
A cow and calf,	.	.	.	6	15	0
Five and a half bolls of oatmeal,	.	.	.	6	10	4
Four bolls of oatmeal, 22s.	.	.	.	4	8	0
Four months' interest, and stamp,	.	.	.	0	9	4
				£27	4	8

By bill at four months, payable at British Linen Company's Bank, Inverness, £27, 4s. 8d., and due the 9th of December 1828." Donald Fowler also produced a bill, at four months, for £27, 4s. 8d., drawn on him by Ure.

The Sheriff granted interim interdict. Cantach averred and offered to prove that the whole transactions of the father and son with Ure were fictitious, collusive, and fraudulent; and that the subjects had never left the custody and control of Ewen Fowler, but remained his property up to the date of the poinding. Donald Fowler objected, that, as he had instructed the property to be his, by written evidence, no parole proof could be allowed to contradict it, unless brought under reduction.

The Sheriff found "that the bill, and account produced, bear prima facie evidence of their being valid and legal documents, establishing the truth of certain transactions by which the property of the articles, which form the subject of the process, appears ex facie to have been transferred from Ewen Fowler to Mr James Ure, and by the latter to the original petitioner, Donald Fowler: that, as such, these documents cannot be defeated by the parole proof offered by the respondent: that till these documents are reduced in a competent Court, they must be held valid and effectual in maintaining the right of the petitioner to the property of the articles in question;" and therefore "continued and perpetuated the interdict already granted," and found Cantach liable in £25, 16s. 11d. expenses.

Decree was allowed to go out in the name of the agent, Rose, who gave Cantach a charge for the amount. Cantach presented a bill of suspension of the decree, both in so far as it awarded expenses, and granted interdict. It was passed on consignation.

The chargers objected that, as the decree was for expenses of process, No. 241. in favour of Rose, and as the only question raised by the charge was the merits of that decree, it was incompetent to review the judgment of the Sheriff on the merits of the interdict. Mar. 10, 1832.
M' Donald v. Rose, &c.

Cantach answered, that as the interdict took effect as soon as pronounced, without being extracted, he was entitled, although the charge was confined to the expenses, to bring the whole case under review by suspension. Miller. Jardine v. Brown.

The Lord Ordinary, "in respect the decree of the Sheriff has been extracted as to the point of expenses, and as the interdict took effect immediately, repelled the objections to the competency of the suspension, remitted to the Sheriff, with instructions to recall his interlocutor complained of, and allow the suspender a proof of his averments mentioned in the sixth article of the Revised Reasons of Suspension, and thereafter to proceed as he shall see cause; reserving all questions of expenses until the issue of the cause: farther, granted warrant, authorized and ordained the clerk of the bills, in whose hands the sums charged for, amounting to £25, 16s. 11d., were consigned, to pay the said sum to the complainer."

Rose and Fowler reclaimed. The Court adhered.

LORD PRESIDENT.—The Sheriff made his interdict perpetual. It was in actual operation against this party at the time he presented his bill of suspension, which I consider to be an apt remedy against the interdict, as well as against the charge for expenses.

G. MONRO, S.S.C.—J. M' KENZIE, W.S.—Agents.

WILLIAM MILLER, Petitioner.—*Christison.*

No. 242.

Agent and Client—Expenses—A. S. Feb. 1806.—An agent allowed the expenses of an application for decree under A. S. Feb. 1806, against his client.

MILLER, S.S.C., was employed by the trustee on a sequestrated estate. Mar. 10, 1832. He presented an application under A. S. 1806, to recover payment of his account. Considerable expense was incurred in the citation of the creditors, some of whom lived in separate counties. No appearance was made to oppose the application, and the Court gave decree for the taxed account, and allowed the expenses of the application.* 1st Division.

W. MILLER, S. S. C.—Agent.

JOHN JARDINE, Advocator.—*Whigham.*

No. 243.

JOHN BROWN, Respondent.—D. F. Hope—G. G. Bell.

Process—Advocation.—An advocator having failed to proceed after expediting the letters of advocation,—held incompetent for the respondent to extract the letters and enrol the cause.

* The case of Brown, ante, p. 45, was not adverted to by the Court.

No. 243.

JARDINE presented a bill of advocation, which was passed, and the letters

Mar. 10, 1832. • expedie ; but as he proceeded no farther, Brown extracted the letters, and
1st Division. enrolled the cause in the Lord Ordinary's printed roll. Jardine objected to
Ld. Corehouse.

Jardine v.
Brown.

this proceeding as incompetent, and the Lord Ordinary, holding it to be incompatible with the nature of the objection taken to write any interlocutor, unless the enrolment were to be sustained, reported the question orally. The Court ordered a report from Mr Bruce, D.C.S.;† on considering which, they intimated to the Lord Ordinary, that they considered the proceeding incompetent, and directed him to proceed accordingly. No interlocutor was written, for the reason already mentioned.

* This case was decided on the 29th February, but accidentally omitted.

† " Report as to the Respondent in an Advocation enrolling the cause upon an Extract.

" Having been desired by the Court to ascertain whether there exists any practice of the respondent in an advocation, on the failure of the advocator to proceed, extracting the Letters off the Signet, and enrolling the cause, I beg leave humbly to report, that I have been unable to discover any instance where this has been done, with the exception of the case mentioned at the pleading.

" I have found considerable difficulty in making a satisfactory investigation into the practice on this point. On application at the Signet-Office, I find that no record is kept of the advocations or suspensions that are extracted; nor does the clerk, who gives out these extracts, keep any record or list of them. It is therefore very difficult to discover what advocations have been extracted.

" A search has been made in the printed rolls of causes in the Outer House from March 1789, to December 1831, upwards of 41 years. During the above period, no instance has been observed of an advocation bearing to be enrolled upon an extract, though the case referred to at the pleading, (Robertson v. Cochrane,) which depended before Lord Fullerton, occurred during the above period. It may be noticed, however, that the rolls contain several suspensions, which bear to be enrolled upon extracts, and many of these occurred since the date of Act of Sederunt, 14th June 1799, which provides, that, upon the respondent in an advocation or suspension obtaining protestation for not insisting, both the cautioner and the principal shall be liable for the expenses incurred.

" An endeavour has been made to search out several of the advocations enrolled, during the above period, in absence. It is not easy to trace the whole of these, but in none of those that have been found, has the enrolment been made by the respondent upon an extract.

" Without searching through the whole advocations that have been in Court, (a work which would require much time and labour,) it cannot be said, with certainty, that no instance of this has occurred; but so far as the search, as above detailed, goes, I have humbly to report, that, with the exception of the case above mentioned, no instance of such practice during the last forty years has been discovered.

" I beg leave to add, that one of the Outer House Clerks of Session is confident of having seen such practice. He has not observed it recently, and has not been able to point out, or refer to, a particular instance of it. The others do not recollect of having observed it.

" As I consider it unnecessary in the Report to offer any observations upon the principle or expediency of such a mode of procedure, I may merely take the liberty of referring upon the point, to the Acts of Sederunt, Nov. 30, 1692; Jan. 1. 1709; Jan. 1, 1726; and June 14, 1799, § 5."

LORD GILLIES.—Had there been a practice in support of the proposed procedure, a question might have been raised, but there is no evidence of such practice. I think the procedure incompetent.

No. 243.

Mar. 10, 1832.
Jardine v.
Brown.

W. STEWART, W.S.—W. DOUGLAS, W.S.—Agents.

Watson, &c. v.
Glasgow Police
Commissioners.

JAMES WATSON, Jun. and Others, Suspenders.—*Skene—Ivory—Dick.*
COMMISSIONERS OF POLICE of GLASGOW and F. G. DENOVAN, Respond- No. 244.
ents.—*D. F. Hope—Sol.-Gen. Cockburn—Monro.*

Police Act—Public Officer—Process.—1. At a meeting of statutory Police Commissioners, held for the purpose of filling up the vacant office of Superintendent of Police, a candidate having been preferred by a majority of votes, taken by ballot, with the addition of the casting vote of the chairman—Circumstances in which the Court considered this mode of voting illegal. 2. Competent to suspend, and not necessary to reduce, an election, where the party elected has not been fully inducted by taking the necessary oaths.

THE Police of Glasgow is regulated by various acts of Parliament, and Mar. 10, 1832. in particular by the act 1st and 2d Geo. IV. c. 48, passed in 1821. By 2d DIVISION. the 14th section of that act, the Lord Provost, Dean of Guild, five Bailies, Bill-Chamber. and Deacon Convener, with thirty-three Commissioners, elected by a Ld. Moncreiff. corresponding number of wards, are appointed “a board of General Commissioners, for assessing, levying, and applying the monies herein-after directed to be raised for the purposes of this act, for naming and appointing the master or superintendent of police, collectors, treasurers, clerks, and other servants to be employed in the execution thereof, for fixing their salaries, for regulating the manner of watching, patrolling, lighting, and cleaning the streets, for establishing rules and regulations for the direction and government of the said master or superintendent, collectors, treasurers, clerks, and other servants, all as hereinafter directed, and for executing the other matters specified in this act, and committed to their charge.” The 15th section provides,—“That the Lord Provost, and, in his absence, the next senior Magistrate present, and, in absence of all the Magistrates, the Dean of Guild or Deacon Convener, and, in their absence, a person to be chosen by the meeting, shall preside at all meetings of the said commissioners, and shall have both a deliberative and casting vote, in cases of equality, in all matters and questions which shall come before them, and that any seven of the board or meeting shall be a quorum for transacting ordinary business; but, provided that no money shall be assessed, and that no appointment of servants shall be made, and that no salaries shall be fixed at such meetings, unless there shall be present a majority at least of the members of the board who have accepted of their offices.” The 36th section provides,—“That it shall and may be lawful to the said Lord Provost, Magistrates, Dean of Guild, Deacon Convener, and other general commissioners herein named, and they are hereby empowered and required, to appoint a fit

No. 244. and proper person to be a master or superintendent of police, for executing the matters committed to him by this act for regulating the police, Mar. 10, 1832. Watson, &c. v. and for preserving peace and good order within the said city; provided Glasgow Police always, that it shall be in the power of the said Lord Provost, Magistrates, Commissioners.

Dean of Guild, and Deacon Convener, or of them and the other general commissioners herein appointed, at any meeting held for the purpose, to dismiss the said master or superintendent of police from his said office." The 132d section provides,—“ That it shall and may be lawful for the said Lord Provost, Magistrates, Dean of Guild, and Deacon Convener, and other general commissioners, or a majority of them, at any quarterly meeting, or other meeting to be held for the purpose, at any time or times, to make, ordain, or establish orders, rules, and regulations for the direction and government of the whole servants belonging to the establishment, appointed as aforesaid; as also, to make, establish, and ordain by-laws, for the better executing this act, particularly as to erecting sheds, and laying down building materials on the streets, and for removing obstructions and encumbrances, and preventing nuisances and annoyances on the said streets, or on the foot-pavements, or other places within the said city; and also, from time to time, as occasion may require, to repeal, add to, and amend or alter, such rules, orders, and by-laws, as to them shall seem necessary and expedient, and to enforce the same by pecuniary penalties, not exceeding, in any case, the sum of £5 sterling, to be levied and applied in manner herein directed: provided always, that none of the said orders, rules, and regulations shall become valid, or take effect, till they be ratified and confirmed by the Magistrates and Town-Council of the said city, in council assembled, nor the said by-laws, till they be published in two or more of the newspapers of the said city; and the said Magistrates, and other general commissioners, are hereby directed to cause the said orders, rules, regulations, and by-laws, to be printed and affixed on conspicuous places in the police-offices and watch-houses, and such other parts of the said city, as to the said Magistrates and other general commissioners shall seem proper for publishing the same, and to cause such prints to be renewed from time to time, when torn down, obliterated, or defaced; and provided also, that no such regulations or by-laws shall be repugnant to the laws of Scotland, or to any thing contained in this act.”

In pursuance of the powers contained in the act, certain standing orders and by-laws were printed in 1823, and, inter alia, the following: “ 6th, When motions are made at the meetings, they shall not be inserted in the minutes unless duly seconded, and, when this is done, the names of the mover and seconder shall be inserted; and, when put to the vote, the majority by which the motion was carried or lost shall be regularly entered in the minutes.

“ 8th, In taking the votes, the clerk shall begin with the chairman, naming each commissioner as he goes along, carefully marking the votes as given; and, to prevent confusion, no commissioner shall give his vote until his name is first called by the clerk. The Chairman shall at all

times check the votes as taken by the clerk, without prejudice to any other commissioner doing so, if he think proper ; and no commissioner shall be permitted to offer an opinion after the voting has commenced, until it is finished."

" 11th, But no resolution or regulation agreed to at a weekly meeting, shall be altered, except by resolution of a quarterly meeting."

The office of superintendent of police having become vacant, a number of candidates offered themselves, among whom were the complainant, Watson, and the respondent, Denovan. The 1st of March, 1832, was fixed upon as the day for filling up the vacancy, and on that day a numerous meeting was held for the purpose ; the usual mode of election had been by open vote, but some months previous to this meeting, it had been proposed and carried at a weekly meeting of the Board of Commissioners, that in future the mode of voting by ballot should be adopted in all elections by the commissioners.

This had been determined on the 21st of July, 1831, the resolution being in these terms :—" The board resolved accordingly, the mode of ballot to be, by each member present putting into the ballot-box a slip bearing the name of the candidate for whom he votes, each commissioner, before the ballot, being furnished with slips for the purpose, the voting to be repeated, throwing out those who have the least number of votes, until one of the candidates shall have the votes of a majority of the members present and voting, who shall be declared elected, the casting vote of the chairman, in case of an equality of votes, being always reserved to him. The same procedure to be followed in committee, when nominating candidates best qualified for any situation." On the day following, this mode was put in practice at the election of a surgeon to the establishment, but the by-law was neither ratified by the Magistrates, nor published in the newspapers, in terms of the act. At the meeting of the 1st of March, the mode of voting by ballot was adopted for the election of a superintendent. The Lord Provost, as chairman, took charge of the ballot, and declared the numbers for Watson and Denovan to be equal, namely, 19 for each, there being 38 commissioners present. His lordship then gave his casting vote for Denovan. It was alleged by Watson's party, that the Lord Provost had committed an error in reckoning the votes ; that, in point of fact, 20 votes had been given for Watson, and only 18 for Denovan ; and thereafter 20 commissioners signed and made public a written declaration that they had voted for Watson.

Under these circumstances, Watson, along with several of the commissioners and certain inhabitants of Glasgow, presented a bill of suspension and interdict, to try the question. The Lord Ordinary, in respect of a caveat lodged for the Magistrates and Commissioners, and of a pledge given that nothing was to be done to change the state of possession, or to induct Denovan until the parties were heard on the question of interdict, allowed the bill to be seen before answer as to the interdict, and, after hearing parties, his Lordship reported the case to the Court.

Mar. 10, 1832.
Watson, &c. v.
Glasgow Police
Commissioners.

No. 244. *Pleaded for the suspenders—*

Mar. 10, 1832. Watson, &c. v. the vote was uncertain and fallacious, totally unauthorized, contrary to Glasgow Police Commissioners. 1. The proceedings were illegal, inasmuch as the mode of ascertaining

former practice, to the acts of parliament, and to the common law. The whole provisions and spirit of the legislative enactments, under which the police establishment of Glasgow existed, was opposed to latent votes, and it was expressly enjoined that the record of proceedings should contain a specific list of the voters on each question, to be open for public inspection ; that clause of the act, in particular, which gave the chairman a deliberative and casting vote in cases of equality, was quite inconsistent with the very meaning and object of vote by ballot. 2. This new mode of voting was an innovation adopted in the form of a by-law ; but it was of no force or effect as such, there having been no ratification or publication of the by-law, in terms of the statute. And, 3. The suspenders offered to prove, by competent evidence, that the actual majority of the votes given at the meeting was in favour of Watson.

Pleaded for the respondents—

There are two preliminary objections to the suspension,—1. The present case is not a proper subject for a suspension at all—Denovan was inducted into the office before any intimation of suspension was given, and therefore it was now only competent to pursue by reduction. 2. Some of the parties, whose names are included in the list of suspenders, have no title or interest to pursue, being merely inhabitants of Glasgow, who are not qualified.

With reference to the pleas of the suspenders, 1. The parties are barred personali exceptione from stating the objection to the vote by ballot ; that mode had been previously adopted and acted upon without any objection or protest taken against it. But, at any rate, the objection is unfounded in law ; there is nothing illegal or objectionable at common law to voting by ballot ; on the contrary, it is, to say the least, as legal as any other mode ; it is adopted in many instances, one of which is furnished by the Faculty of Advocates. 2. The by-law is in subsistence, and has never been competently challenged ; and, 3. It is not true that 20 voted for the suspender at the election.

LORD JUSTICE-CLERK.—The first question is, as to the competency of this suspension. It is said that Mr Denovan has been installed, and that a process of reduction was necessary ; but I am clearly of opinion, that, under all the circumstances, his cannot be called an induction, and that the case of the burgh of Lauderdale¹ is not in point ; he must take the oaths before he can be inducted, which he has not done ; and therefore I have no difficulty in repelling that objection. Then comes the question of the title to pursue. Now, so far I agree with the respondents, that it is not competent to mere inhabitants of Glasgow to enter this complaint ; but I have gone carefully over the list, and I find several of the commis-

¹ Orr v. Vallance, Dec. 2, 1831 (ante, 93.)

sioners among the complainers, and their title cannot be disputed. So, looking to No. 244. the whole circumstances, I think the process perfectly competent. The next consideration is, whether we can sanction the proceedings that took place at the election. Assuming that, in terms of the act of parliament, the parties could frame a Glasgow Police by-law, adopting the mode by ballot, yet if this was not ratified in terms of the act, the by-law was waste paper. Now, there was no appearance of any such ratification or publication having taken place. But, besides, they had no power to make a by-law contrary to common law, and will it be said that vote by ballot is not opposed to the common law? We had to consider this point fully in the case of the burgh of Montrose.¹ In that case they chose to proceed by ballot, and we then gave our deliberate opinions of the illegality of that mode, and after having thought well on the subject, decided accordingly, and our decision was affirmed. With that case before us, are we to sanction the same proceeding here? The act declares that the Lord Provost is to have a casting vote—a deliberative vote, and accordingly upon this occasion he gave it; but is not that in direct contradiction to the mode and principle of ballot, which is secrecy? If any thing was wanting to convince men of common sense of the absurdity of such a mode, we have it in the proceedings before us. There is not the slightest imputation against the conduct of the Lord Provost; but I am decidedly of opinion that it is our duty to express an opinion, declaring the proceeding adopted to have been illegal.

LORD MEADOWBANK.—I am of the same opinion. I entertain no doubt as to the competency of this suspension, and do not think the case of the burgh of Lauderdale in point; nor am I satisfied with the decision in that case, which may be contrasted with those of Culross in 1803, and Pittenweem in 1819, both, however, unreported. With regard to the title to pursue, I entirely concur with what has fallen from the chair. Then, as to the merits of the case, were we to decide simply in reference to the terms of the act, I think it contains words totally exclusive of the idea of vote by ballot. The act gives the chairman a deliberative casting vote, which, to my mind, puts a negative upon secret voting. It is a mere quibble to say, that the determination to vote by ballot, was not of the nature of a by-law, or one requiring sanction and publication in terms of the act. But on the general point I think it contrary to the principle of the law of Scotland, that the election of public functionaries should be by the mode of ballot. The only reason of the rule in the present case seems, according to the conflicting statement of facts, to have been to cover deception; and I cannot conceive how men of common sense can stand up for a rule, the object of which is to dispense with fair and honourable responsibility.

LORD GLENLEE.—I am satisfied of the illegality of the proceedings, simply by reading that clause of the act which provides that no by-laws shall have effect unless sanctioned by the magistrates, and published.

LORD CRINGLETIE.—That is my opinion. It is impossible to maintain that this was not a by-law; it was a law altering the usual mode of voting.

THE COURT accordingly passed the bill of suspension and interdict, but
“without prejudice to the commissioners proceeding with a new election,
according to law.”

J. Padix, Jan. W.S.—W. Dickson, W.S.—Agents.

Mar. 10, 1832.
Watson, &c. v.
Glasgow Police
Commissioners.

¹ June 7, 1807. See Appendix.

No. 245.

W. PAUL (INGLIS'S TRUSTEE), and MISS ANNE BUCHAN, Pursuers.

Mar. 10, 1832.
Paul, &c. v.
Harper.

—Sol.-Gen. Cockburn—Ivory—A. Dunlop.

JAMES HARPER, Defender.—D. F. Hope—Buchanan.

- Proof.*—1. Circumstances in which a verdict set aside as contrary to evidence.
 2. An account rendered by a person having an interest in the issue of a cause, not allowed to be produced in evidence, as the party tendering it, by passing from the objection on the head of interest, might have examined him as a witness as to the point intended to be established by the document.

Mar. 10, 1832.

2d DIVISION.
Jury Court.
R.

MRS MARGARET MATHESON, who had been for many years house-keeper in the Edinburgh Custom-house, died at an advanced age, on the 17th May 1826, leaving a will, dated two days before, whereby she appointed the defender, Harper, her sole executor, subject to the payment of such legacies "as I may instruct him to pay in a letter signed by me of this date, to the several persons therein named." This will was found in the repositories of the deceased duly executed, and along with it a letter, written by the agent who had prepared the will, bearing the same date, and purporting to be signed by the deceased, but not tested. It was addressed to Harper, and, referring to the will, instructed him to pay several legacies, including one of £1000 to the late William Inglis, W.S., another of £300 to her cousin, the pursuer, Miss Anne Buchan, and one of £1000 to the agent by whom it was written. Harper having refused to pay the legacies contained in this letter, Inglis and Miss Buchan raised separate actions, which were ultimately conjoined by the Court. In these Harper pleaded, that legacies of the amount here bequeathed could only be constituted by a probative writing, and that the letter being neither holograph nor tested, was incapable of affording evidence of the testator's will, or of being supported by parole evidence. On the other hand, it was contended for the legatees, that the legacies were truly constituted by the probative will which referred to this letter, described in a certain way by date and signature, as the specification thereof, and that all which could be required, was identification of the letter sued on, with that referred to in the will. The Court of Session sustained the defences, and assizied;¹ but on an appeal, the House of Lords reversed, and remitted the cause, "with directions to submit to a jury to consider whether the letter bearing date, Edinburgh, 15th May 1826, &c., was signed by Margaret Matheson on that day, and is the letter referred to by the will of Margaret Matheson."² An issue in these terms was accordingly sent to a jury, and was tried before Lords Justice-Clerk and Cringletie. On the trial, the pursuers, in the first place, put in and

¹ May 27, 1826, ante, VI. 865.² Oct. 13, 1831, ante, IX. Appendix.

proved certain memoranda of wills formerly executed and cancelled, No. 245. whereby the deceased had bequeathed legacies to almost all the parties favoured in the letter, and generally of similar amount, but there was no trace of any legacy having been previously intended for the agent, to whom £1000 was bequeathed by the letter. The pursuers then adduced Dr Smith, who had attended Mrs Matheson during her last illness, and who was one of the instrumental witnesses to the will. This witness deposed, that he was with the deceased on the morning of the 15th May, on which the will and letter were dated; that she expressed an anxiety to have her settlements executed, and sent for the agent to come to her for that purpose; that the agent shortly afterwards arrived with papers prepared for her signature, and accompanied by his clerk, who acted as the other instrumental witness; that they went into Mrs Matheson's room, where she was lying in bed, the instrumental witnesses remaining close by the door; that a tea-tray was handed in to the bed to Mrs Matheson, to place the papers upon while signing; that she signed two papers, with a pause between; one was the will, which consisted of a single page, and the other was of two leaves like a letter, and similar in appearance to that sued on, though the witness could not depone that it was the same; that thereafter the agent, with the two witnesses, retired to another room, the agent having with him the two papers which had been signed, and that the deponent and the clerk there subscribed the will as instrumental witnesses; that the deponent asked the agent whether the letter also should not be tested, but that he replied it was unnecessary; that the two witnesses thereupon left the house, the agent remaining with the papers, and that the deceased died on the 17th, two days thereafter. The other instrumental witness, who was the agent's clerk, was not called by the pursuers, nor was he adduced on the part of the defender. The next witness offered was a servant of the deceased, to whom a legacy was left in the letter. An objection was taken to her admissibility, on the ground of interest, which was sustained by the Court, but was thereafter waived by the defender, and she was examined accordingly. She deponed to the sending for the agent on the day in question, and to having handed the tray into the bed for her mistress to sign, but having left the room, she did not see her subscribe; that in the course of the same day, after the agent had gone, her mistress desired her to bring a particular box, of which she, the witness, kept the key, and having brought it, and opened it, her mistress put into it certain papers, which the witness had no opportunity of examining, and locked it, giving her again the key; that the witness then placed the box in a closet, which she locked, as she also did the room in which the closet was situated; that next day the agent having come to the house, her mistress desired her to bring to her this box, which she did; that the box was opened and a paper taken out, but what paper the witness did not know, and held up to her mistress, who put on her spectacles, and appeared to read it; that

Mar. 10, 1832.
Paul, &c. v.
Harper.

No. 245. it was thereafter replaced in the box, the box locked, and the key returned to her; that she again put the box in the closet, locked the closet and the room, and that she kept the key, without its being again opened, till the repositories were sealed up by the commissary-clerk, immediately after her mistress's death. In regard to some points, the testimony of this witness did not exactly correspond with that of Dr Smith, and, in particular, as to whether on one occasion, when the Doctor had called subsequently to the execution of the will, her mistress had been in bed or up. The last witness examined for the pursuers, was the commissary-clerk, who deponed, that he had, immediately after Mrs Matheson's death, sealed up her repositories, including the box above mentioned; that he had been present at opening them after the funeral, and that in the box was found the will of the deceased with the letter sued on, the one being within the other. No witnesses were adduced by the pursuers as to the genuineness of the subscription at the letter, but the counsel for the pursuers referred the jury to their own comparison by ocular inspection of the signature to the letter, and that to the will itself. On the other hand, the defender adduced three witnesses who had been in the habit of seeing Mrs Matheson's signature some years before, while housekeeper in the Custom-house, where she was obliged to sign receipts for her salary, &c., and they generally deponed that they did not consider the signature to the letter to be that of the deceased, while they thought that to the will and others admitted to be genuine were such; but one of these witnesses, called M'Ivor, admitted, that on one occasion he had refused to receive as hers a signature, which, on going to her, she had acknowledged to be genuine. The counsel for the defender further referred the Jury to their own inspection of the documents.¹ The defender also adduced certain letters, written by the deceased shortly before her death, in which she expressed an intention of leaving him all she had; and further proposed to put in evidence an account rendered to him by the agent who had written the letter and will, with a view to instruct by one of the charges, that he had, between the execution of the will and the death of the testatrix, made a search among her papers, and thereby leading to the inference that he had an opportunity of substituting a different letter from that signed by the deceased. The admission of this was opposed on the ground, that the defender, by waiving his objection on the head of interest, to the admissibility of the agent, might have had his personal testimony on this point, and that he was not entitled to refer to an inferior description of evidence, in order to avoid the necessity of examining him. The Court sustained the objection, and with a charge (to which no exception

¹ In consequence of some doubt being expressed as to the competency of leaving a jury to judge of the genuineness of signatures by ocular inspection, the Court, when a new trial was moved for, expressed an opinion that ocular inspection was a competent mode of proof by the law of Scotland.

Mar. 10, 1832.
Paul, &c. v.
Harper.

was taken), left the case to the Jury, who (having themselves inspected No. 245. the signatures) returned a verdict for the pursuers.

Thereafter the defender obtained a rule on the pursuers, to show cause Mar. 10, 1832.
why the verdict should not be set aside, and a new trial granted on the Paul, &c. v.
grounds :—1. That the verdict was contrary to evidence ; and, 2. That the Harper.
document offered by the defender in evidence was erroneously rejected.

In regard to this latter ground, the Court were so clearly against the defender, that he abandoned it, and confined himself to the first, in support of which he contended—

1. There was by the issue an onus thrown upon the pursuer, positively to prove the three following propositions. 1st. That this was the genuine signature of the lady. 2d. That it was the identical letter referred to in the will ; and, 3d. That it was signed on that particular day. The words of the remit from the House of Lords required her knowledge of the contents of the letter to be proved. The general rule of law is, that where the deed is authenticated, the party is presumed to have known the contents when he signed ; and it falls upon the other party to disprove. But here the House of Lords departed from that rule. They have required, first, the signature to be proved, and then knowledge of the contents to be proved. The general question has been broke down by the House into these two, for the express purpose of preventing any idea of a presumption in favour of the pursuer, if he only proved one half.

2. There has been a total failure to prove what was required by the issue to be established, and in regard to the proof the following points deserved particular consideration.

1st. The letter contains a legacy in favour of the agent, who, so far as appears, was a stranger.

2d. The evidence of Dr Smith is that of a single witness, unsupported ; for that of the servant, who had an interest in the issue sufficient to affect her credibility, is contradictory, and does not confirm the testimony of Dr Smith in the material points ; and there is, besides, no identification whatever of the letter sued on as that signed by the deceased.

3d. There was complete evidence within reach, but not adduced—viz. that of the other instrumentary witness, the agent's own clerk ; and,

4th. While there was no attempt by the pursuers to prove the genuineness of the signature to the letter, the evidence adduced for the defender positively established that it was not the subscription of the deceased. In these circumstances, the verdict necessarily falls to be set aside, as “contrary to evidence, and to the justice of the case.”

Pleaded for the pursuers—

It is not sufficient to warrant the Court to set aside the verdict of a jury, that they may think a different verdict should have been returned, unless in very gross cases, or where the evidence is not legally sufficient. Here the evidence was amply sufficient to warrant the verdict. There was first proved previous intention on the part of the deceased, to favour

No. 245. almost all the individuals mentioned in the letter ; then the probative will established the existence of the letter—that the deceased did not intend to leave all her property to the defender, but meant to burden him with legacies—and that the letter was the mode by which she was to leave them. The medical attendant saw the subscription by the deceased of the will, and of a letter similar to that sued on ; the deceased was afterwards seen by the servant in possession of papers, which she locked up in a box, and which she must at this time have satisfied herself were the very papers executed by herself that morning ; they were again examined by her next day, and again locked up ; the key of the box, and those of the closet and room where it was deposited, were kept in possession of the servant, without access to any one, till sealed up by the commissary-clerk at the death of the testatrix, only two days after the date of the letter, and it was found with the will in the box when the repositories were opened. The letter sued on, therefore, was traced back in such a manner as to establish clearly its identity with that signed by the testatrix, and although Dr Smith was the only witness who deponed to the act of signature, his testimony was confirmed by the probative will itself, and the circumstances deponed to by the commissary-clerk and by the servant, whose testimony did not differ in any material point, or further than must always be expected from the discrepancy naturally incident to the detail, by different individuals, of events occurring several years before their examination. Then, as to the testimony of the persons acquainted with the handwriting of the deceased, they did not speak very positively, and one of them admitted that he had once been deceived in supposing a really genuine signature not to be so ; while an aged person, in extreme ill health, signing her name in bed and lying, might be expected to make two signatures, though at the same time, somewhat different, from becoming tired, and not being accustomed to write in such posture, although such difference might not occur if writing at her ease, and in her accustomed position ; but, at any rate, that both parties had referred the Jury to their own inspection of the signatures, which the Court also would have an opportunity of examining, and satisfying themselves that the signatures to the letter and the will were the same.

LORD CHIEF COMMISSIONER.—This case stands in peculiar circumstances. The House of Lords has remitted a particular point to be tried, and yet our decision cannot go back to that house ; therefore, with regard to granting a new trial, this case is in a position which leads to a larger exercise of discretion upon our parts, than on ordinary occasions. I will now state my views as perspicuously as I can, and your Lordships will correct me if I am wrong. I am anxious to be clear and well founded on all I say. In this case there are three points, which, by direction of the House of Lords, we are to determine : 1st, Whether the letter bearing date 15th May, 1826, was really signed by Mrs Matheson ; 2d, Whether it was signed on that very day ; 3d, Whether the letter produced be the letter mentioned in the will. Now, the *onus probandi* is thrown upon the pursuers, who produce

Mar. 16, 1832.
Paul, &c. v.
Harper.

no evidence as to the handwriting. My present view is, that it was not requisite No. 245. to do so. All that the pursuers required to prove was, that the letter was signed on that day, and signed by that lady, &c., and the case might just go like any other Mar. 10, 1832. case to a jury, for them to form their judgment from the facts. Supposing this case Paul, &c. v. Harper. to have gone to a jury simply on the pursuers' evidence, Dr Smith swears she signed twice, with a pause between, &c. A letter or paper, along with the will, is taken into the room by the agent. All this is *prima facie* evidence that she signed the letter, &c., and this evidence goes to the identification of such a document as is produced in process. So the matter stands on the evidence of Dr Smith—then comes that of the servant. Now my impression is, that this witness is not to be received with suspicion. I think her evidence deserving of great attention, and it is material to observe how she gives her evidence, compared with Smith. There are discrepancies certainly betwixt the testimony of these two witnesses; but to my mind, they are just of a nature rather to confirm the veracity than otherwise—(His Lordship here noticed the discrepancies betwixt Smith and the servant.)—Now the question is, whether there be any such discrepancy as affects the merits of the case? After the most careful consideration of them, they appear to me not to bear upon the case, so as to affect the truth of the three points at issue. For what purpose could the woman have invented? She had no motive. I do not know upon what theory to reconcile the discrepancies; but neither do I find it possible to reject her testimony. As to the agent, he certainly had an object and an interest to fulfil; but this consideration does no more than create a suspicion. If he really fulfilled that interest, he did so under all the risks of a capital crime. That this was the letter always under lock and key, is proved by all the witnesses. It is proved that the testatrix was in sound mind, and seemed to read it, and put on her spectacles for that purpose. As the matter stood upon that evidence, I do not think it was a case for a nonsuit. It was a fair case for a jury to decide upon. But then there is the omission to call the other testamentary witness, the agent's clerk. He was a witness out of the enemy's camp. The defender was not bound to call him; but it certainly requires consideration why the pursuers did not. Such was the case, as submitted to the jury, before the defender led evidence. Had it rested there, I would have thought it my duty to direct the jury to take the case into their most deliberate consideration; and I would have thought their verdict well grounded, had they, on that state of the case, affirmed the issues as they have done. The defender's proof is of a nature which, from my infirmities of sight, I am not the most able to judge of in some respects; yet I shall state to your Lordships what occurs to me on that evidence. It consisted of two witnesses who were brought to swear as to the lady's handwriting, of whom various signatures were produced. The usual mode of proof was adopted.—(His Lordship here went into some details of the proof.)—Mr M'Ivor's evidence has in it this fact: upon one occasion he refused to pay upon the lady's signature till she acknowledged it. This leads me to an important observation upon the nature of such proof generally. In all cases where the fact to be established is the signature of a particular individual, the first and best proof is to have witnessed the signature—to have seen the party sign the deed. The next species of proof is by a witness who can swear to the signature upon his general knowledge of the party's handwriting. Such proof steers clear of all considerations derived from mere comparison of signatures by juxtaposition. It is not in the comparison of signatures, or the knowledge even of minute characteristics, that such evidence consists. I do not know how to describe it better than by this illustration: When we

No. 245. see a friend, we know him by a momentary glance at his countenance. We recognise him, not by the examination of a particular feature, but by the immediate and general impression made upon our sight, which is more or less certain in proportion to our acquaintance. Now, our knowledge of handwriting strikes me to be precisely of this nature. We know it when we look at it by a general impression, just as we know a friend when we look him in the face. These are two distinct species of evidence as to handwriting, of which the first is the best, being the most certain; the value of the second depends upon circumstances, and is in proportion to our acquaintance with the handwriting, and to the quantity submitted to our inspection; for as it is by the general impression made upon our sense that we judge, so the certainty is diminished as the quantity of writing on the page inspected is diminished. In such evidence, therefore, the most veracious witness may be mistaken.—(His Lordship again entered into the details of the proof.)—Here are two signatures produced, and various modes of evidence. If the testimony of the maid-servant be pure, and is not got rid of upon any of the objections to its veracity, so as to identify the paper locked up with that which Dr Smith saw the deceased subscribe, then this evidence must, from its nature, be true; while as to the other evidence, it may not be true, although there may be no imputation upon the veracity of the witness. We have the signatures before us, and I now come to the consideration of that part of the case for which I am greatly unfitted,—I mean ocular inspection by comparison. I can observe certain discrepancies; but it appears to me, that the signature must be judged of by general feature, and not minute differences, and there is no substratum to found a proof on such inspection whether this signature be fictitious or true. Were this an ordinary case, I would be inclined to say that there was no sufficient reason for allowing a new trial, because the jury have so determined upon the facts fairly before them. I assume that the evidence of the maid-servant is not to be rejected, and I have not been able to discover any thing to warrant me in doing so. The positive evidence must outweigh that contrary evidence, which is doubtful and fallacious in its own nature, however unimpeachable in character. Therefore, in an ordinary case, I would not have been inclined to interfere with the verdict of a jury coming to their own conclusion with such evidence fairly before them. But this is not an ordinary case. The issue is directed by a Court to which the record cannot recur; and, therefore, it appears to me, that we are here to use a more than ordinary discretion. Now, the case having come so solemnly to us from the House of Lords, who cannot get it back again, I think it will not be a deviation from the discretion intrusted to us, if we allow a new trial. On that special ground, therefore, and still protecting the general rule, I would grant it.

LORD CRINGLETIE.—I had certainly come to the conclusion that the jury were wrong in their verdict; but I freely admit that to be no sufficient reason for granting a new trial. The opinion of a judge cannot be put in opposition to the verdict of a jury, to the effect of setting it aside. I think, moreover, that the Lord Chief Commissioner has adopted the proper course in the manner in which he has reviewed the case. The first consideration is the nature of the evidence for the pursuers as it stood alone; and the next is, whether any was led by the defender, which altered the case.—(His Lordship here noticed generally the nature of the case and the proof.)—There are three issues directed to be tried: 1. Is this the signature? 2. Was the letter signed on that day? 3. Is this the letter mentioned in the will?—(His Lordship here entered into some details of the proof.)—One circumstance strikes me

Mar. 10, 1832.
Paul, &c. v.
Harper.

particularly. How is the identity of that letter proved? The woman's evidence, No. 245, taking it as unimpeachable, only amounts to this, that she saw a paper taken out of the box; but then I do not know whether this was the letter or a letter, or the will Mar. 10, 1832.
itself. Now, this I hold to be fixed in the law of Scotland, that the testimony of one Paul, &c. v.
witness is not competent evidence if it stand alone. The undeniable rule is, that it must be supported at least by circumstances; therefore, let Dr Smith's testimony be ever so strong, it must be so supported, or it goes for nothing. That witness certainly says, that so far as his knowledge extends—in so far as he could recognise—it was a letter that was taken into the room; but the evidence of the woman does not amount to any thing that can supply the place of the corroborating testimony. Dr Smith again does say that it was the letter. So, had the case rested on that evidence of the pursuers, in my opinion it would not have been sufficient, by the law of Scotland, to warrant the verdict of the jury. But then comes the evidence for the defender as to handwriting. I cannot have a doubt, upon simple inspection, that the witnesses for the defender were right. This lady's signature was of a peculiar and marked description. Now, what are the issues to be proved? They are, whether the letter dated 15th May 1826, was signed by Mrs Matheson on that day, and is the letter referred to in the will?—Even upon the pursuers' evidence, I would have said that the verdict was wrong. As to the identity of the letter, no one speaks except Dr Smith, and he not directly; but his evidence stands alone, and is not, by the law of Scotland, competent. Then, upon the whole proof, I think the verdict was contrary to the evidence, and to the real justice of the case.

LORD MEADOWBANK.—My opinion coincides entirely with that just delivered, although after what I have heard, with diffidence I state it, but I cannot agree with the view of the evidence taken by my Lord Chief Commissioner. I wish, however, to be distinctly understood when I say, that I do not proceed upon the ground merely of having formed an opinion on the evidence differing from that of the jury. There can be no doubt that it is only upon extraordinary occasions, and under peculiar circumstances, that their verdict is to be interfered with. It is difficult precisely to define the discrepancy betwixt the evidence and the verdict necessary to found the general rule; but I may say in a word, that I hold that I am bound, before acceding to a new trial, to have satisfactory evidence before me, either that the jury have decided contrary to evidence, or have proceeded upon no evidence at all. I must be satisfied in my own mind, that, supposing the very same evidence to be laid before another jury, not only is there a probability of a different result, but hardly by possibility could they be imagined in that second instance to arrive at the same conclusion. The present case was sent by the House of Lords for trial upon three distinct issues: 1. That the signature was genuine; 2. That the letter was signed on the identical day stated; 3. That this was the letter mentioned in the will. There cannot be a doubt, that the remit from the House of Lords threw the onus upon the pursuers specially to prove each and all of these points. It was clearly not intended that a jury were to gather their opinion, as they best could, from the whole case on the combined evidence, however defective. Nor could it have been contemplated by the House of Lords, when they remitted the case, that a jury were to consider it proved upon evidence not in conformity with the most ordinary rules of the law of Scotland. This cannot be said to be a case where there is any penuria of testimony; and Smith's evidence must absolutely go for nothing, unless we find it supported by unexceptionable circumstances. Now, there were two witnesses actually present. Are they both brought? and why not? Then as

No. 245. to Smith's evidence, supposing him clear as a single witness, how is it supported? Certainly not by the servant. Her evidence, such as it is, goes not one step farther than to confirm the fact, that something was going on, for which the tray was required; but she affords no confirmation of Smith as to subscribing the letter, for she sees nothing subscribed. After the defender had waived the objection as to her admissibility, I think she must be received, and I agree with the Lord Chief Commissioner so far, that her competency cannot be impugned. But does she confirm Smith? On the contrary, there are serious discrepancies betwixt their testimony.—(Here his Lordship entered into the proof.)—Smith positively swears, that on a particular occasion the lady was not in bed. This is directly opposed to the maid's evidence as to the same occasion. I cannot, as the Lord Chief Commissioner observed, divine her motives; but I see her incapacity, as a second witness, to support Smith. The case rests then upon the testimony of a single witness. This is taking the most favourable view for the pursuers; but there is another material circumstance. They chose to peril the case upon that single witness, when they had within reach the most competent evidence by the law of Scotland. They might have brought the clerk. Therefore, upon the pursuers' proof alone, I must consider this verdict as being equivalent to one pronounced upon no evidence at all; and for this reason I would grant a new trial. Now, the defender's evidence as to the handwriting just leads to a complete confirmation of my previous views. This is a matter of great importance. We sit here in a very different capacity from our jurisdiction in the Criminal Court, where a verdict is liable to no review. In that case, it is the established and invariable practice to have the documents handed about for judges and jury to use their own eyes, and form their own opinion, from inspection. I do not pretend to say whether this be expedient or not; but the question just is, whether, when the opportunity of reviewing a verdict occurs, we may not use our own eyes. Suppose the case had been sent to a jury upon these documents alone, and they had found, by simple inspection, that the signature was genuine—that a motion for a new trial, on the ground of error, had followed such a verdict—in such a case, I would have been much puzzled, considering the admitted law and practice of Scotland, to arrive at the opinion that we might not take the documents under our eyes, and judge for ourselves. It may seem hard, that the opinion of a whole jury should be controlled in such a matter by that of a few Judges; but still, until it is definitively settled by legislative authority that such a procedure is not competent, I must use my own discretion, and form my own opinion. Therefore, I will look at the documents, though I by no means intend to rest my opinion entirely upon that inspection. I consider it my duty to say, that, in my opinion, the signatures are not written by the same person. I adopt exactly the Lord Chief Commissioner's mode of judging. I look to the general character of the handwriting, and I see, besides, most material differences in the letters. I do not think the signature is hers, and I am of opinion that the verdict was on no evidence at all, and contrary to what there was.

LORD GLENLEE.—We are not in a case at the instance of Harper for improving a probative writ. This case comes from the House of Lords, on an issue which the pursuers were bound to prove. Now, setting aside all objections to the competency of the evidence, which I do, but without meaning to neglect the fact that Smith is but a single witness, I cannot help thinking that his evidence as it stands is most defective. The letter he saw subscribed might have been put into the fire, and another substituted. Where is the identity here? The letter produced is not

connected with the letter subscribed throughout the whole evidence.—(Here his No. 245. Lordship took a view of the evidence.)—The defender has certainly not waived any objection to the servant's credibility. It is also clear that the agent had had some communicating with the lady before she saw her with the papers in her possession. Now this interferes with the identification. But suppose Smith had completely identified the letter, his evidence required legal corroboration. I do not think that the evidence ex comparatione is sufficient to do away with direct and positive evidence of signature, if we had it; but not having that, I am of opinion that the verdict should be set aside as without evidence.

LORD JUSTICE-CLERK.—I am not prepared to say that the verdict absolutely astonished me. I certainly would have differed had I been on such a jury, but I admit that that is no proper criterion of the present question. All that I shall say is, that while I do not think that what has fallen from a majority of your Lordships in any way interferes with the general rule as to verdicts, yet this is one which ought to be set aside. I think a new trial ought to be granted, both on the ground of that verdict having been contrary to evidence, and also to the justice of the case. It was imperative upon the pursuer to prove every one of these issues precisely and separately.—(His Lordship here made some remarks upon the proof). This, however, I did put to the jury, that one witness is not sufficient by the law of Scotland, unless corroborated. There is one very material circumstance to attend to in this evidence. The pursuers brought no one to prove the lady's handwriting; they never ventured to put the question, Is that her handwriting? though her writing was produced for other purposes, and there were persons familiar with her handwriting. The servant had been thirty years in her service, and not a question is put to her upon this matter—then the clerk is withheld—and in the exercise of that sound discretion which becomes us, I am clear that there ought to be a new trial.

THE COURT accordingly set aside the verdict, and granted a new trial.

H. INGLIS and DONALD, W.S.—J. G. BARR, S.S.C.—GORDON and BARLOW, W.S.—Agents.

JOHN BELL, Pursuer.—*Ivory.*
HIS CREDITORS, Defenders.—*Cowan.*

No. 246.

Cessio Bonorum—Circumstances under which the Court refused to direct part of an officer's half-pay to be paid to his creditors on granting a cessio.

BELL, a purser in the royal navy, applied for the benefit of cessio. His half-pay amounted to £55 per annum, out of which he had to support a wife and child. His creditors claimed a moiety of the pay, but made no allegations of fraud or concealment of funds. The Court unanimously refused to interfere. Being the last day of the Session, the pursuer was brought by the macer from jail, on a verbal order of the Court, to take his oath, and the cessio granted.

J. DICKIE, W.S.—A. C. HOWDEN, W.S.—Agents.

No. 247.

WILLIAM PAUL, Pursuer.—*Rutherford.*BRITISH COMMERCIAL INSURANCE COMPANY, &c. Defendants.—*M'Neil.*

Mar. 10, 1832.
Paul v. British
Commercial
Insurance Co.
&c.

Proof—Process.—A witness having been examined on commission, and the evidence sealed up to lie in retentis until the day of trial; and a motion being made in the interval for a renewal of the commission to re-examine the witness, who, it was alleged, would now depone more distinctly upon certain points than at the previous examination—motion granted, under special instructions to submit the proposed interrogatory to the Court, and reserving all objections to the competency of the new evidence when used on trial.

Mar. 10, 1832.

2d DIVISION.
Jury Court.
R.

In this case evidence had been taken on commission to lie in retentis. *M'Neil*, for the defender, stated that a lady, residing in England, had been examined on commission on the part of his client, and that her evidence was sealed up. In her deposition, the lady had spoken doubtfully on some points, particularly in reference to dates, and it was now understood that she was able to speak with certainty upon the same points. He therefore moved their Lordships to renew the commission for a re-examination of this lady.

Rutherford, for the pursuer, opposed this motion, upon the usual arguments against the re-examination of a witness whose testimony has been exhausted.

LORD CHIEF COMMISSIONER.—I would wish to be informed by the Clerk, what is the usual practice in such cases, which must have frequently occurred.

Jury Clerk.—I am not aware of any case of the kind.

LORD CHIEF COMMISSIONER.—It has been decided, that if a witness has been examined, and goes away and mingles with the public, he cannot be re-examined in that matter. But that is not the case here. This is evidence never read, but lying sealed up in retentis. The party claims to have a more special interrogatory put. Why should a commission for that purpose not be granted? At the trial the relevancy will be judged; and if the new answer is pure, it will be received, just as in the ordinary case of *viva voce* examination. Even in such a case, I was inclined to consider the calling back a witness for re-examination as a matter which remained in the discretion of the Court; but when attempting to do so lately, I was corrected in reference to the law of Scotland upon this point, and I abstained in consequence. But this case, I think, is of a different description.

LORD JUSTICE-CLERK.—I cannot possibly entertain a doubt that it is incompetent by the law of Scotland to call back a witness for re-examination who has been dismissed. The law of England may be different, but here the motion would not be tolerated, unless the witness had been recommitted for the purpose. I confess I have a repugnance to this motion being granted. I am not inclined to sanction the principle of permitting a re-examination upon the taxing of the memory. Where is the line to be drawn? The proper remedy is to cancel the deposition in *toto*, and bring the lady.

LORD MEADOWBANK.—I agree with your Lordship. It is said, that from some circumstances the lady's memory is refreshed; now, if that has been by means of the testimony of some one else, the proof offered is not admissible; if, on the

other hand, the lady has refreshed her memory with the aid of written documents, No. 247. then there is another remedy and a better mode; diligence will be granted to recover those written documents. But as a different opinion has been expressed by the Lord Chief Commissioner, it may be proper to consult the other Judges.

Mar. 10, 1832.
Paul v. British
Commercial
Insurance Co.
&c.

LORD CRINGLETON.—I agree with Lord Meadowbank.

LORD CHIEF COMMISSIONER.—I take the general rule to be this—that every thing should be admitted that can throw light upon the cause. I can see no danger in the proposition. In renewing the examination, of course, a cross interrogatory would be allowed.

Cullen v.
Ewing.

Having advised with the other Judges, the Court expressed an opinion that the re-examination should be allowed, but that the interrogatories proposed should be submitted to the Court. They were accordingly given in, and the motion was granted—the new evidence to be sealed up, and lie in retention, reserving all objections to its competency.

INGLIS and DOXALD, W.S.—JAMES T. MURRAY, W.S.—Agents.

JURY SITTINGS.

Mrs CULLEN, or M'KENZIE, Pursuer.—*Robertson—Wilson.*

No. 248.

WILLIAM EWING, Defender.—*Cunninghame—Russell.*

Proof—Agent and Client—Process.—1. Issues being taken specially whether slanderous words were used in each of three several conversations with A,—held that the pursuer was not entitled to examine B as to the use of these expressions in a conversation with him alone, and on a different occasion.

2. An issue being taken whether the defender, “on or about 18th November 1828, lodged a paper in process,” containing slanderous words, and the paper produced, bearing date the “18th February 1828,”—direction given that there was no evidence to support a finding for the pursuer under this issue.

3. It being alleged that false and calumnious allegations relative to the pursuer were made by the defender to his law-agents in a previous process with another party,—held that the pursuer was not entitled to prove such allegations by these agents.

4. Circumstances in which, under an issue whether slanders were uttered falsely, calumniously, and maliciously, in a paper entitled “Answers to Condescendence,” the pursuer having produced the answers, but not the rest of the process, and the defender having produced no part of the process, and objected that the jury could not try the issue, and particularly the pertinency of the statements in the answers, upon such partial production,—direction given that the slanderous statements were to be held irrelevant.

5. A party having uttered several judicial slanders against another, this held sufficient corroboration of a single witness deponing to similar extrajudicial slanders to go to the jury.

No. 248.

Mar. 14, 1832.
Jury Court.
Lds. President
and Gillies.

B.

Cullen v.
Ewing.

ACTION of damages for slander by the pursuer, Mrs Cullen, against Ewing. In her summons, she alleged that she maintained herself and two daughters by keeping a boarding, or lodging-house in Edinburgh; that in December 1825, one Archibald Wight became a boarder or lodger in the house; that he had been connected in the business of coal-dealing with Ewing; that these parties having quarrelled and separated, Wight raised an action of damages before the Court of Session against Ewing, in the course of which, certain statements (afterwards embodied in the issues) were made use of by Ewing in his pleadings relative to the pursuer, which were false, slanderous, and malicious; and that he had farther made similar statements extrajudicially to one Thomson, and to his law-agents.

Ewing denied the slander.

The following issues were sent to trial:

" 1. Whether, on or about the 12th day of May 1827, the defender did lodge, or cause to be lodged, in a process then depending in the Jury Court, a paper or pleading, entitled, Answers for William Ewing, Esq., to the Condescendence for Archibald Wight, containing the following words, or words to the following effect, according to the meaning hereinafter set forth, viz.—‘ He’ (meaning the said Archibald Wight) ‘ was habitually addicted to gambling and drunkenness, and frequently spent days and nights in this and other kinds of profligacy, and having gone to reside with a married woman of the name of Cullen,’ (meaning the pursuer,) ‘ then living apart from her husband, he fraudulently supplied her with coals from the depot, for which no payment has ever been made by either of them,’ (the defender meaning thereby that the pursuer was a party to the alleged fraud, by receiving or resetting coals which she knew to have been unfairly or fraudulently procured by the said Archibald Wight, from the defender’s depot.) And whether the whole, or any part of the said words are of and concerning the pursuer, and are false and calumnious, and were maliciously inserted, or maliciously caused to be inserted, in the said paper, to the loss, injury, and damage of the pursuer ?’

" 2. Whether, on or about the 2d day of June 1827, the defender did lodge, or cause to be lodged, in the said process, a paper or pleading, entitled, Revised Answers for William Ewing, Esq. to the Revised Condescendence for Archibald Wight, containing the following words, or words to the following effect, according to the meaning hereinafter set forth, viz.: ‘ He (meaning the said Archibald Wight) ‘ was habitually addicted to gambling and drunkenness, and frequently spent days and nights in this and other kinds of profligacy, and having gone to reside with a married woman of the name of Cullen, then living apart from her husband, he engaged in a fraudulent transaction with this female to disappoint her landlord of his right of hypothec, while in the employment of the defender,’ (the defender meaning thereby that the pursuer became a party to a fraudulent transaction, for the purpose of disappointing or defrauding her land-

lord of his right of hypothec over her furniture, for payment of his rent.) No. 248.
And whether," &c.

Mar. 14, 1832.
Cullen v.
Ewing.

" 3. Whether, on or about the 6th of September 1827, the defender did lodge, or cause to be lodged, in the said process, a paper or pleading, entitled, Re-revised Answers for William Ewing, Esq. to the Re-revised Condescendence for Archibald Wight, containing these words, or words to the following effect, according to the meaning hereinafter set forth, viz.: ' And of this date (November 9, 1825), sold a quantity of coals to Mrs Cullen, a married woman' (meaning the pursuer), 'with whom he' (meaning the said Archibald Wight) 'cohabited' (meaning thereby lived in a state of adultery), 'during the whole period of his employment in the defender's service; that he' (meaning the said Archibald Wight) 'had engaged in a fraudulent transaction with this person, on or about the 21st of November, to defeat the landlord's right of hypothec, by clandestinely carrying and concealing the furniture of the house,' (the defender meaning thereby that the pursuer had become a party in a fraudulent transaction to defeat her landlord's right of hypothec over her furniture, by furtively carrying away and concealing the same, with the assistance of the said Archibald Wight.) And whether," &c.

" 4. Whether, on or about the 18th day of November 1828, the defender did lodge, or cause to be lodged in the said process, a paper or pleading, entitled, Re-revised Answers for William Ewing, Esq. containing the following words, or words to the following effect, according to the meaning hereinafter set forth, viz.: ' That, in like manner, on or about the 9th of November 1825, the pursuer did deliver over to Mrs Cullen, residing in Roxburgh Place, Edinburgh,' (meaning the pursuer,) 'a quantity of coals belonging to the defender, in extinction of a debt due by the pursuer to the said Mrs Cullen, or for some other unlawful consideration.' (The defender meaning thereby that the pursuer, for some unlawful consideration, received or resetted coals from the said Archibald Wight, she knowing the same not to belong to him, but to the defender, and to have been unfairly or fraudulently procured by the said Archibald Wight.) And whether," &c.

" 5. Whether, on the North Bridge, Edinburgh, in the end of November, or month of December 1825, or January 1826, and in presence and hearing of John Thomson, slater in Edinburgh, the defender did falsely and calumniously say, that the pursuer kept an improper and disorderly house, (meaning a bawdy-house,) in which the said Archibald Wight was living and cohabiting (meaning living in adultery) with her; that he, the said Archibald Wight, and the pursuer were keeping a bawdy-house in Roxburgh Street; that she fed him on roast ducks, and other good cheer to supper, to make him useful to her, (meaning thereby that he might be able to administer to her, the pursuer's, carnal and licentious appetite;) that the pursuer was burning his, the defender's, coals in her bawdy-house; that he, the defender, would disappoint the pursuer of a few nights of

No. 248. Wight, by having him apprehended and put in jail; or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer."

Mar. 14, 1832.
Cullen v.
Ewing.

Two other issues, 6 and 7, in the same terms, but at different times and places, then followed, and another, 8, "Whether, in the chambers of Messrs Campbell and Mack, writers to the signet in Edinburgh, on one or other of the days of November or December 1825, or January 1826, in presence and hearing of the said Messrs Campbell and Mack, the defender did falsely and calumniously say" (as in the preceding issue.)

No issues in justification were taken. Damages laid at £2000.

At the trial, the pursuer put in four papers, entitled, answers by the defender Ewing, to condescendence, and three revisals of the condescendence, by Wight, in his action against Ewing. One of these bore date 18th of February 1828, instead of 18th of November, as stated in the 4th issue. The pursuer also adduced John Thomson, who deponed to the use of the words, as laid in the 5th, 6th, and 7th issues. The pursuer next adduced one Diddup, who was proceeding to state a conversation between Ewing and himself, in his (Diddup's) counting-room, at which Thomson was not present, when

Cuninghame, for the defender, objected that each issue was specially laid; that this witness was not called in support of the issues relative to judicial slander; nor in support of the last issue, as to words spoken in the chambers of Campbell and Mack; and that every other issue related to words "in the presence and hearing of John Thomson."

Robertson, for the pursuer, contended, that he might adduce this proof in evidence of the malice of the defender, and of the animus with which the judicial calumnies were uttered.

LORD PRESIDENT.—Had the pursuer taken a general issue, she might have led this proof. But issues of a special and limited character are taken, and this proof is not in support of any of them.

LORD GILLIES.—The pursuer's issues are of a character so special, that we cannot allow the proposed examination.

Objection sustained.

Diddup was then examined as to the general character of Mrs Cullen, and whether he had ever heard it aspersed, except by the defender; and evidence was further adduced of the fact of her keeping a boarding and lodging-house—the respectability of her lodgers—that one of her daughters was a governess in an academy, &c. She then tendered the evidence of Mack, S.S.C., a partner of Campbell and Mack, in support of the 8th issue.

Russell, for the defender, objected that, at the date when the slanderous words were said to have been used, Campbell and Mack were the defender's law-agents, and it was to them, in that character, that his whole communication regarding Wight or Mrs Cullen had been made, and that the necessary confidence between agent and client was a bar to the proposed examination.

Robertson, for the pursuer.—We shall prove by this witness, that the agent warned the defender of the irrelevancy of the slanderous statements which were made



in his legal papers, and that the defender insisted expressly on their insertion. This proof is admissible in support of the first four issues, that such statements were maliciously made.

Mar. 14, 1832.
Cullen v.

LORD PRESIDENT.—The communication into which the pursuer would enquire, Ewing. is strictly confidential ; it could not be laid open without a breach of confidence.

LORD GILLIES.—It is quite confidential ; and no man could freely go to his agent, and advise with him, if such an examination as this were allowed.

THE COURT therefore sustained the objection, observing that, in these circumstances, the 8th issue should not have been taken by the pursuer.

The defender led no evidence.

Cunninghame, for the defender, in addressing the jury, submitted to the Court that there was no evidence of the judicial slanders to go to a jury. It was necessary, from the latitude allowed to a litigant in making averments, even regarding third parties, that the jury should be enabled to form an opinion of their pertinency to the cause, in the course of which they were made, as well as of their falsehood, to make them capable of judging whether such statements were malicious. But the pursuer had produced only parts of the process, in which the statements of Ewing regarding her were made ; and these parts were merely relative papers, being entitled Answers to a Condescendence, or to Revisals of the Condescendence. These condescendences, at least, should have also been produced ; for it would be as reasonable to take a leaf out of a book, and lay it before the jury without the rest of the volume, as to send these answers to them without the rest of the process. Besides, without these, the jury could not judge whether they were pertinent or not.

Regarding the issues relating to the conversations with Thomson, he submitted that there was no legal evidence of these, Thomson being a single witness, and no other party corroborating him. Where two or more witnesses speak, each to a separate act of defamation by the same individual, these may afford legal evidence of the whole acts ; but where the reiterated acts of defamation are left on the testimony of one witness, there is no legal proof of any of them.

THE LORD PRESIDENT, in charging the jury, observed that it was necessary, in judicial discussion, to permit considerable latitude to litigants in making averments, in so far as these were pertinent to the cause. In Wight's action, Ewing might pertinently state whatever would vindicate himself, or mitigate the damages ; and accordingly, if he believed that Wight had stolen any of his coals, he might aver it with impunity, because it was pertinent, and believed to be true. But though he might have stated this as to Wight, and even have added that Wight gave them to his landlady in payment of his board, &c. ; yet, whenever he stated that Wight's landlady kept a brothel, or took the coals as the price of prostitution, he made averments which had no pertinency to the cause in which they were made. These statements regarding the landlady were entirely gratuitous, because they were irrelevant ; they were not a privileged slander, and the jury would deal with them on that footing. No evidence had been led in justification, and there did not appear to be any ground for what was called "probable cause."

In regard to the objection, that the slanderous conversations with Thomson were proved by only one witness, it would have been a good objection had that witness been unsupported. But the judicial slanders, of similar tenor, and directed against the same party, were a corroboration of Thomson, sufficient to constitute a compe-

No. 248. tent evidence by the law of Scotland, which was fit to go before a jury that they might say whether it convinced them.

Mar. 14, 1832. His Lordship called the attention of the jury to the fact, that the 4th and 8th issues were unsupported by evidence ; adverted to the character of the pursuer as unimpeached ; her situation in life ; the injury which her means of livelihood, by keeping boarders or lodgers, must sustain from any thing destructive of her fair reputation ; and observed, that, though the random sum concluded for in the summons, might probably be thought too high, still it was not a case, in his Lordship's opinion, for mere nominal damages.

Young v. Cunningham. The Jury found a verdict for the pursuer, on all the issues except the 4th and 8th ; damages, £200.

Defender's Authorities.—Porteous, Dec. 12, 1781 (13937) ; Robertson, July 5, 1815 (3 Dow, 273) ; Forteith, Nov. 18, 1819 (F.C.) ; Forteith, March 20, 1821 (2 Murray, 463) ; Davidson, May 12, 1821, (*Ante*, I. 3.)

W. DALRYMPLE, S.S.C.—WOTHERSPOON and MACK, W.S.—Agents.

No. 249. JAMES YOUNG, Suspender.—Sol.-Gen. Cockburn—Cunninghame.
JAMES CUNNINGHAM, Charger.—D. F. Hope—Maitland.

Proof—Witness.—Terms of instructions given to a party to act as shower to viewers, which were found to disqualify him afterwards as a witness.

Lease.—Question whether a party had violated the terms of a lease.

Mar. 15, 1832. SUSPENSION and interdict by Young, tenant of part of the lands of Handaxwood, including Levenseat, the property of Mr Hare, to have Cunningham, tenant of the limestone on the estate, interdicted from working a particular rock in his (Young's) farm. The suspension set forth, that a lease of the limestone on the estate had been granted to Cunningham, "reserving always to any of the other tenants on the lands of Handaxwood, belonging to the said James Hare, junior, full power and liberty to raise and burn any limestone which they may find on their respective possessions, for their own use allenarly, but on no account to interfere with the workings hereby let to the said James Cunningham;" that he (Young) had recently discovered a rock of limestone within his farm, and situated beyond Cunningham's boundary ; that he was in the course of working it, and he had gone about forty feet in the above direction, exhausting the dip of the rock as he went along, when, in October 1829, Cunningham, in violation of the above clause, began to work in the same line with the suspender's workings, so as to stop the suspender proceeding farther in a westerly direction ; and had tirred away the earth to the very edge of the suspender's workings, and put a stop to his farther operations.

Cunningham denied these allegations, subject to the admissions in the following issues, which were sent to a jury :—

Jury Court.
Lords Justice.
Clerk and
Cringletie.

R.

" It being admitted that the pursuer (Young) is tenant of part of the No. 249. lands of Handaxwood, including Levenseat, the property of Steuart Hare, Mar. 15, 1832. Esq.; and that, by a lease dated the 14th day of August 1819, No. 8 Young v. Cunningham. of Process, the late Dr Hare, junior, the predecessor of the said Steuart Hare, let to the defender (Cunningham) the limeworks at Levenseat, as lately possessed by John Weir, with the full liberty of the limestone quarry, under the reservation therein mentioned in favour of the Wilsontown Company's trustees, reserving always to any of the other tenants on the lands of Handaxwood, belonging to the said James Hare, junior, full power and liberty to raise and burn any limestone which they may find on their respective possessions, for their own use allenarly, but on no account to interfere with the workings hereby let to the said James Cunningham :— Whether, in violation of the terms and conditions of the said lease, the defender, in or about the month of October 1829, wrongfully quarried, or wrongfully caused to be quarried, certain limestone on or near the south side of Levenseat aforesaid, to the loss, injury, and damage of the pursuer?"

A view was ordered, and John Weir was named by Young as his shower. To that person the subjoined paper was given by Young (who got it from his agent), with reference to the view;* and it was acted on. Thereafter,

* "Directions to James Young, to be communicated to the shower of the subjects in dispute.

" 1. Point out the open cast or level, and state to the viewers whether it has been properly carried on. If improperly made, state the effect thereof, if any, on the operations of the lime-works.

" 2. Point out the quarries worked by Cunningham, and state whether there is abundance of limestone there to supply the kilns for several years, and how long.

" 3. Ascertain whether this abundant supply is independent of any recent operation of piercing a dyke or trouble, and thereby getting into a new field of limestone.

" 4. Point out the nature of this dyke, and whether it was difficult to work through it.

" 5. Ascertain and point out how far to the southward the mining operations have been carried.

" 6. Point out the mineral line, stated in Mr John Weir's declaration to run 'from the front wall of the old toll-house in a straight line past the mines.' Show the pit-stones, if there were any placed, to mark said line.

" 7. Show whether the quarry in dispute is to the south or north of this line.

" 8. Point out the distance between the present lime-works, and, in particular, the southern extremity of the mines, from the quarry in dispute.

" 9. Point out the operations of the different parties in said quarry, and direct the attention of the viewers to this question,—whether these operations were calculated to produce an interference by the one party with the works of the other.

" 10. Show to the viewers the depth of the tiring at the quarry in dispute, and point out whether or not this depth would have been increased by working into the hill.

" 11. State what occurs with reference to the trial pits recently made by Cunningham, whether they indicate abundance of lime in that quarter.

" 12. Show the point fifteen chains to the north of Levenseat.

" 13. Point out whether there are other places in the property, besides the lime-works and the quarry in dispute, where limestone could have been procured."

No. 249. on the cause coming on for trial in January last, when Weir was tendered as a witness, the defender objected, that, in respect of these directions, no fair view had been taken. The Judges then presiding (Lords Justice-Clerk and Gillies) were of opinion that the view had been irregularly taken. A juror was then withdrawn, and parties prepared for another trial.

Mar. 15, 1832.
Young v. Cunningham.

On again trying the same issue, Young tendered Weir, whereupon,

Maitland, for Cunningham, objected, that the instructions formerly given, especially the 6th and 9th, and the part Weir had formerly taken, rendered him incapable of impartial testimony, and disqualified him on the ground of agency, having at the view given evidence to the jury in regard to matters important to the point to be tried. It was understood that, on the former trial, it had been decided that Weir was not an admissible witness.

Sol.-Gen. Cockburn, for Young.—Weir was a bona fide shower when he received these instructions. He is now no longer a shower, and he is tendered as a witness, in which character he received no instructions. It was an irregularity in the view, as disqualifying the jury, which put an end to the former trial: there was no decision that Weir was an inadmissible witness.

LORD JUSTICE-CLERK.—My note at the former trial simply bears, “These instructions vitiate the whole case.” I have no hesitation in saying, that neither Lord Gillies nor myself said any thing formerly to decide the question now raised. We held that the view had been vitiated, and that put an end to the trial, by the withdrawing of a juror. But now the objection is taken, that though Weir was meant by Young to be used as a witness, he was employed by him as an agent. I apprehend it is well founded, and that such instructions were given to him, and acted on by him, as converted him into an agent. In the 6th instruction, he is told to “point out the mineral line, stated in Mr John Weir’s declaration”—referring to the previous precognition of this man himself—“to run from the front wall of the old toll-house in a straight line past the mines.” This might be very proper direction to an agent of the party, but not to a witness. Then the 9th instruction is to point out the operations of the different parties, and whether there is a probability of interference. This is the very point submitted to the cognisance of the jury; and here this man is left to urge every thing in his power, in support of his view of it, to the viewers of the jury. Lastly, by the 11th instruction, he is told to “state what occurs with reference to the trial pits recently made by Cunningham, whether they indicate abundance of lime in that quarter.” This is another point of vital importance; and on looking to the tenor of these, and of the whole instructions, I am satisfied that Weir is disqualified as a witness. It is true, they were given to him in his character of shower, and that he no longer bears that character; but they were given to the same man who is now tendered as a witness, and that man is disqualified to act as such.

LORD CRINGLETON concurred.

Objection sustained.

After Young had closed his evidence,

The Dean of Faculty, for Cunningham, contended that no wrongous interruption had been proved. At all events, the workings were not in violation of the terms and conditions of his lease, but were on a lime rock contained within the lease, and therefore the jury must find for him.

THE LORD JUSTICE-CLERK, in addressing the jury, stated, that in construing No. 249. the lease in reference to the workings of Cunningham, he was satisfied that these were not in violation of the terms and conditions of the lease; and his Lordship Young v. Cunningham directed them that, in terms of the issue, they could not find for Young, unless there had been such violation.

Mar. 15, 1832.

THE JURY accordingly found for Cunningham.

Edinburgh and Glasgow Canal Co. v. Johnston.

W. Mackay, W.S.—J. Mowbray and A. Howden, W.S.—Agents.

EDINBURGH AND GLASGOW UNION CANAL COMPANY, Pursuers.—*Skene* No. 250.

—Whigham.

GEORGE JOHNSTON, Junior, Defender.—*Sol.-Gen. Cockburn*—
A. Maconochie.

Reparation.—Question, whether a party had suffered injury by the fault, negligence, or want of skill of another.

AN action was brought by one May Rodgers against the Canal Company, and Johnston, tenant of the Redhall quarry, alleging, that on the 24th of June 1829, while travelling as a passenger in one of the boats belonging to the Canal Company, it came into collision with a boat belonging to Johnston, on board of which there was a crane for raising stones; that being loose, it swung violently round when the boats came into collision, whereupon she was struck and dangerously wounded by it; that this was caused by the gross negligence or want of skill either of the Canal Company, or Johnston, or of them equally, and therefore concluding for damages. She obtained decree against them, jointly and severally, for £300, 14s. 5d. of damages and expenses.

In the meanwhile, the Canal Company raised an action against Johnston, alleging, that if any injury had been suffered, it had been caused by the fault, negligence, or want of skill of Johnston, or his servants, and therefore concluding for relief from the above action. This Johnston denied; and he averred that the injury was caused by the fault, negligence, or want of skill of the Canal Company, or persons in their employment.

The following issue was sent to trial :—

“ It being admitted, that, during the year 1829, the defender, George Johnston, was proprietor of a certain boat used for the purpose of conveying stones along the Union Canal, from Redhall quarry to the city of Edinburgh; and that the pursuers, the Union Canal Company, were, during the same period, proprietors of another boat, for the purpose of conveying passengers along the said canal :

“ It being also admitted, that one May Rodgers was, on the 24th of June 1829, a passenger on board the said boat, the property of the pursuers, and on the said day sustained certain injuries, for which, on the 22d day of January 1831, she obtained decree, finding the pursuers and

Jury Court.
Lords Justice-
Clerk and
Cringletie.
R.

No. 250. defender, conjunctly and severally, liable in the sum of £300, 14s. 5d. as damages and expenses, on account of the said injury, and reserving all Edinburgh and questions of relief:

Mar. 15, 1832.
Glasgow Canal
Co. v. Johnston.

Hagart v.
Inglis.

"Whether the said injury was caused by the fault, negligence, or want of skill of the defender, George Johnston, or of any person or persons in his employment, for whom he is responsible; or by the fault, negligence, or want of skill of the pursuers, the Union Canal Company, or of any person or persons in their employment, for whom they are responsible?"

Previous to the jury being sworn, the Lord Justice-Clerk asked whether any of them held stock in the Canal Company, which was answered in the negative.

Before any witness was adduced, a jurymen stated that he was unwell. The Court, of consent of parties, allowed him to leave the box, and another jurymen was taken. The trial proceeded, and after much contradictory evidence, which elicited no point of law, the jury found, "that the injury was not caused by the fault, negligence, or want of skill of the defender, George Johnston, or of any person or persons in his employment, for whom he is responsible; nor by the fault, negligence, or want of skill of the Union Canal Company, or of any person or persons in their employment, for whom they are responsible."

J. and L. DAVIDSON and SYME, W.S.—A. JOHNSTON, W.S.—Agents.

No. 251.

ROBERT HAGART, Pursuer.—D. F. HOPE—Maitland.
GEORGE INGLIS, Defender.—Sol.-Gen. COCKBURN—Sandford.

Reparation.—Circumstances in which the keeper of a livery and sale stable was found liable in the value of a horse which died while under his charge on sale.

Mar. 16, 1832.

Jury Court.
Lords Justice-
Clerk and
Cringletie.
R.

HAGART raised a summons before the Sheriff of Edinburgh, (afterwards brought to the Court of Session by advocation,) against Inglis, a livery and commission stable-keeper in Edinburgh. He set forth, that after having bought a horse from Inglis, at a public sale by him, he allowed it to remain in Inglis's stables at livery: that afterwards wishing to dispose of the horse, he employed Inglis to sell it at £60: that on the 29th of October 1830, he received a message from Inglis that the fox-hounds were to be at Arniston Gate (about eight or nine miles from Edinburgh) on the following day, and that as Inglis was to be there himself, it would be a good opportunity to allow the horse to be taken out, to be seen, with a view to his being sold: that he agreed to the horse being taken out to Arniston, with the view of being seen and sold, relying upon Inglis taking proper care, or causing proper care to be taken, of the horse: that Inglis knew, or at least ought to have known, that the horse was not in a prepared condition for undergoing a day's hunting, or being

worked like other hunters in the field; and it was his duty, in taking out the horse to be seen for sale, to have prevented any improper treatment of the same; but instead of doing so, he grossly neglected and violated his duty: that Inglis went out to join the hounds at Arniston, along with Simon Templeman, a jockey or horse-dealer, on Saturday the 30th of October, when Templeman rode the horse; and before they reached Arniston it was remarked that the horse was a good deal sweat-ed, arising from his not being in a hunting condition: that nevertheless Inglis and Templeman joined the hounds; and after several runs, and rather a severe day's work, even for horses in condition, Inglis and Templeman returned to Edinburgh in the course of the Saturday afternoon, or evening, with the horse, which, from not being in condition, and from being so much over-ridden, died in an hour or two after reaching Inglis's stables: that Inglis, upon seeing the state in which the horse was, attempted, or caused some other person to attempt, to bleed it; but it was in such a state, from not having been in hunting condition, and from having been over-worked, that the blood would not flow, and he died almost im-mediately." He therefore concluded for the value of the horse.

Inglis stated several circumstances in justification of his conduct, but his defence resolved into a denial that the horse had died through his fault or negligence, or that he was liable for the value of it.

The case was sent to a jury on the following issue:—

"It being admitted that the defender keeps livery and sale stables in Rose Street, Edinburgh, and that in the month of July, 1830, a horse, the property of the pursuer, was placed in the said stables for the purpose of being sold, and that the said horse died in the said stables in the custody of the defender, on the 30th day of October, 1830;—Whether the said horse died through the fault or negligence of the defender, and whether the defender is indebted and resting owing to the pursuer in the sum of £60, or any part thereof, as the price or value of the said horse?"

At the trial, it appeared from the evidence of the pursuer, that Inglis and Templeman, (who was riding-jockey of the Duke of Leeds,) went to the hunting-field together; that Templeman rode the pursuer's horse; that it was not in hunting condition; that a gentleman skilled in horses warned Templeman, in presence and hearing of Inglis, on the road, that from its condition he ought to take care how he rode him, and that it would not require very hard riding to kill the horse; and a veterinary surgeon deponed that the death of the horse was occasioned by over exertion in that day's hunting.

The defender admitted the value of the horse, and led no evidence to contradict the opinion of the veterinary surgeon as to the cause of death, but he called witnessess, for the purpose of establishing, 1st, That the horse had been taken to the hunt with the knowledge and approbation of Hagart, for the purpose of obtaining a purchaser; and, 2d, That Templeman had rode it with moderation. The defender's groom stated, that

Mar. 16, 1832.
Hagart v.
Inglis.

No. 251: he went in his master's name to the pursuer, to obtain permission for Templeman to ride the horse; that the pursuer enquired who was to accompany him, and whether the place where the hounds were to be thrown off was advantageous to display the horse for sale; and that on being told that the defender was to accompany Templeman, and that the place die.

Mar. 16, 1832.
Hagart v.
Inglis.

Home v. Lun- Home told that the defender was to accompany Templeman, and that the place was advantageous, he gave permission; but stated that his object was to sell the horse. Templeman deposed that Inglis gave him no particular directions, that he was not told to restrict his riding to showing the horse for sale, but that he was allowed to hunt at his own discretion, which he did moderately, and without apparent distress to the horse, and that he thought the pace of the hounds slow.

LORD JUSTICE-CLERK to the Jury.—The evidence that the horse died in consequence of fatigue in hunting is complete, and virtually admitted by the defender. The horse was standing in the defender's stables, avowedly for sale. The pursuer, before allowing it to be hunted, asked who was to accompany Templeman, and if the place was advantageous for showing off the horse. He expressly said his object was to sell the horse. On the other hand, Templeman states that he got no instructions or restrictions, but was allowed to use his own discretion in riding the horse. Upon the law of the case, I am clear that the keeper of a livery and sale stable has a duty and responsibility in reference to the horses committed to his charge, from which he cannot shake himself free by transferring it to his groom. He is answerable for the conduct of every person about his stables. The defender has no right to plead ignorance of the condition of the horse; he was bound to know it. So, assuming the facts to be proved, I have no doubt that Inglis is liable in law for the value of the horse.

The Jury found for the pursuer.

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—ALEXANDER STEVENSON, W.S.—Agents.

No. 252.

J. F. HOME, Pursuer.—D. F. HOPE—Skene—Mylne.
 REV. WILLIAM STOW LUNDIE, Defender.—Sol.-Gen. Cockburn—
 Robertson.

Reparation.—Damages found due for falsely alleging that a party was the author of a calumnious letter.

Mar. 19, 1832.

Jury Court.
Lds. President
and Gillies.
B.

THE pursuer raised an action of damages against the defender, setting forth, that the defender's sister, Mrs Compton, the wife of an English clergyman, resided with the defender; that the separate residence of Mr and Mrs Compton had lately induced some idle or malicious person to write and send to Mrs Compton an anonymous letter, under the signature of Amicus, in these terms:—“ December, 1830.—Madam,—Don't be surprised at the receipt of this; it is intended for your good, and it is hoped will not be thrown away. Allow me to inform you, that, for years past, your conduct in forsaking your worthy husband, has been the speech of the country, nay, the ridicule and scandal of the neighbourhood. It is the table-

talk of every house,—the whisper of every company,—the indelicacy, No. 252. indecency, cruelty, and want of feeling of Mrs Compton, in abandoning Mar. 19, 1832.
her husband's house and society, and leaving the poor man to pine alone Home v. Lun. in misery and solitude by himself. Be assured such conduct, on your die.

part, will have a very bad effect, and can only tend to render both your husband and your brother contemptible, and is considered to proceed, on your part, not only from want of sense, but, what is worse, from want of virtue. It is holding every rule of society at defiance ;—don't be so blind to common sense as to persist. Take my advice as a friend—return to the society and house of your husband, and remember that ‘ those whom God hath joined together, let no man put asunder.’ Return, therefore, to your husband without delay,—suffer him no longer to be scandalized and degraded among his neighbours on your account. Let not this advice be lost—return to your duty, and you will again be respectable and happy. It is well known, that your best of brothers makes you a large allowance from his income ; is it not therefore, to say the least of it, unworthy and unbecoming of you, to hang a burden upon him, and to bring him into contempt, as well as yourself and Mr Compton ? For shame ; let there be an end to this,—if you don't you will hear farther from (Signed) Amicus ;” and further setting forth, that the defender had, on various occasions (which were specified, and afterwards embodied in the issues,) falsely alleged that the pursuer was the author of this letter ; and therefore concluding for £10,000 of damages.

The defender admitted that he had imputed the authorship to the pursuer, denied the falsehood, and pleaded the veritas in justification.

The pursuer took seven issues, which were (with the exception of persons and times) the same as the following :—

“ It being admitted that the letter or writing, No 3 of process, at the instance of Mr and Mrs Compton against the pursuer,¹ contains calumnious matter, calculated to injure the character and feelings of the said Mrs Compton,—

“ I. Whether, at Spittal-House, on or about the day of December 1830, and in presence and hearing of the Reverend Mr Compton, and James Hunter of Wellfield, writer in Dunse, or either of them, the defender did, falsely and calumniously, say that the pursuer was the author of the said letter, or that it was written and sent by the pursuer, or that the pursuer caused the said letter to be written and sent to the defender's sister, or that he sent the said letter to the defender's sister, knowing the contents thereof, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer ?”

Or,

“ Whether the pursuer is the author of the said letter or writing, or

¹ These parties had brought an action of damages for the slander against the pursuer.

No. 252. whether the pursuer, knowing the contents of the said letter, transmitted the said letter, or caused the same to be transmitted, to Mrs Compton?"

Mar. 23, 1832. Home v. Lun- At the trial, no point of law occurred; the defender did not lead evidence in support of the issue in justification, and the jury found a verdict for the pursuer—Damages £500.

Craigie v.
Scobie.

J. FORMAN, W.S.—H. MACQUEEN, W.S.—J. GRANT, W.S.—Agents.

No. 253.

JAMES CRAIGIE, Pursuer.—*Shene—Maidment.*
WILLIAM SCOBIE, Defender.—*Sol.-Gen. Cockburn—Brown.*

Bill of Exchange—Proof.—Where all the three co-obligants in a bill are dead, it is competent, by facts and circumstances, to prove the genuineness of the signature of one of them by mark.

Mar. 23, 1832. CRAIGIE raised an action against Scobie, as representing the deceased Catherine Scobie, his grandmother, and concluding for payment of a bill Lds. Meadow- for £50, “dated the 7th day of February 1817, payable at the term of bank and Mac- Martinmas, then first, drawn by George Moir upon, and accepted by, kenzie.

Catherine Scobie, William Mores, and Jean Sim, and endorsed by the saids George Moir and Mary Scobie to the pursuer, for value, with interest,” &c. He also libelled on a decree in absence obtained before the Sheriff of Perthshire in 1822. All the parties to the bill were dead, and what purported to be Catherine Scobie’s signature, was merely a mark, with these words added—“This is Cathron Scobie mark.” The defender did not admit that the mark was exhibited by Catherine Scobie; and he further alleged, that she was at the time facile and aged, was two years thereafter placed under interdiction, and that the interdictor had not been called as a party to the Sheriff Court process. He therefore pleaded,

1. That the bill in question not having been subscribed by Mrs Scobie, was not binding upon the defender as her representative.
2. That the decree before the Sheriff of Perthshire being in absence, was not sufficient to constitute the debt.
3. That the decree was null, from the interdictor not being made a party to the action; and,
4. That supposing it could be proved that Mrs Scobie put the mark upon the bill, she was incapable of binding herself effectually at the period in question, in consequence of her facility of temper and infirmities of age.

The Lord Ordinary pronounced this interlocutor:—“Finds that the plea of nullity of the decree of the Inferior Court, in respect that the interdictor was not a party to it, supposing it a well-founded plea, can only competently be discussed in a process of reduction *ex capite interdictio*nis, and that the same form must be adopted to establish the incapacity of Mary Scobie to bind herself, as it is stated she did, by the bill founded on in the decree; but finds it competent, in the circumstances of

the case, to discuss the other objections to the bill, as the warrant of the No. 253. decree in absence, by way of exception and defence, and appoint the cause Mar. 23, 1832. to be called for that purpose." To this judgment the Court adhered Craigie v. (ante, X. 6.) Scobie.

On the case returning to the Lord Ordinary, the following issue was sent to a jury :—" It being admitted that the defender is heir and representative of the late Mrs Catherine Scobie, residing in Auchterarder, and that by a decree in absence, pronounced by the Sheriff of Perthshire, on the 28th day of June 1822, the said Catherine Scobie was found liable in payment to the pursuer, James Craigie, in the sum of £50 sterling, with interest and expenses, contained in the bill of exchange, dated the 7th day of February 1817, No. 4 of process ;—Whether the said bill is the bill of the said Mrs Catherine Scobie ; and whether the defender, William Scobie, is indebted and resting owing to the pursuer in the said sum of £50, contained in the said bill, with interest and expenses ?"

It appeared in evidence on the trial, that Mrs Scobie was in the habit of signing bills by mark ; that she was quite capable of conducting her affairs at the date of the bill in question ; that she had several years before come under obligations on behalf of her son-in-law (the drawer), or otherwise assisted him ; and that she all along admitted her liability for the bill.

The defender pleaded, that although it were proved that Mrs Scobie could not sign her name, and was in the practice of signing by a mark, such signature was not binding, unless the adhibition of the mark were seen and proved by witnesses, or admitted by the party ; that although Mrs Scobie might have admitted the debt, she never had admitted the signature of the particular bill on which alone the action was rested ; and that the circumstances in which the alleged mark had been adhibited, were different from those of other bills produced, and very suspicious.

LORD MEADOWBANK, in charging the jury, held it unnecessary to consider of decide on the general question regarding the necessity of witnesses to the adhibition of a mark, for all the three parties whose names appeared on the bill in question were dead. That event could not prevent the bill from bearing faith. And the signature fell to be proved by facts and circumstances, which appeared in the present case to be conclusive in its favour.

LORD MACKENZIE concurred.

The Jury found for the pursuer.

No. 254.

**GYE and COMPANY, Pursuers.—D. F. Hope—Maitland.
SAMUEL J. HALLAM, Defender.—Sol.-Gen. Cockburn—More.**

Mar. 24, 1832.

Gye, &c. v.
Hallam.

Proof—Master and Servant.—Held under a general issue of indebted and resting owing, in a question between a merchant and his manager, 1. That in order to prove the manager's defence that a deficiency in the stock arose from mistakes or accidental losses, it was necessary to prove that these occurred in that particular house, before general evidence could be led to show that they were usual in the same business elsewhere. 2. That where the power of a manager was fixed by contract, no general evidence to show the practice as to the nomination of inferior servants by the manager was competent.

Mar. 24, 1832. GYE and Company, merchants in London, raised an action against the

Jury Court.
Ld. Cringleto established a branch of their business as merchants in the city of Edinburgh and Medwyn.

burgh, under the name or designation of 'The London Genuine Tea Company,' and intrusted the management of the said branch of their business to Samuel James Hallam, who was formerly one of their clerks, and who is now residing at No. 11, Waterloo place, Edinburgh: That having thus opened a branch of the business in the city of Edinburgh, in the manner before-mentioned, and having placed the said Samuel James Hallam as their managing clerk therein, the pursuers, from time to time, transmitted to him large quantities of teas, coffees, sugars, and other articles of merchandise, in order that the same might be disposed of for their behoof by him as their managing clerk: That the said goods were regularly accompanied with invoices, which were received by the said Samuel James Hallam, who not only disposed of the said goods from time to time, and received the price or prices thereof, but the said Samuel James Hallam did also, in his character of managing clerk as aforesaid, receive, at sundry times, considerable sums of money from agents and other persons who were indebted to the pursuers: That the said Samuel James Hallam continued to act as managing clerk of the pursuers, in the branch of their business before described, from the month of August 1827, down to the 30th day of November 1829; during which period he made various remittances of cash to the pursuers, being part of his, the said Samuel James Hallam's, intromissions as managing clerk aforesaid, but there is still a considerable balance in his hands belonging to the pursuers; they therefore concluded that he should be ordained "to render just count and reckoning to them or him for his, the said Samuel James Hallam's, intromissions as managing clerk aforesaid, and to make payment of the balance that should appear to be due thereupon."

The defender admitted that in July 1827 he had been appointed manager, and received teas during that year, and 1828 and 1829; but stated that in September 1829 the general management had been taken from him, and while each clerk in the establishment was appointed manager in his own particular department, the defender was confined to the duties

of cash-keeper ; that on this occasion he settled accounts with the pur- No. 254.
 suers ; that he was removed in November thereafter, and on that occasion ^{Mar. 24, 1832.}
 took stock along with Mr Tress, a person sent by the pursuers, and ^{Gye, &c. v.}
 accounted to him for his whole intromissions, and he denied that he owed ^{Hallam.}
 any balance.

The claim was subsequently limited to £120, and the following issue
 was sent to a jury :—

" It being admitted, that during the years 1827, 1828, and 1829, the
 pursuers, Gye and Company, tea-merchants in London, transmitted to
 Edinburgh certain quantities of tea, and employed the defender, along
 with certain other persons, to sell the same, and that the defender was
 employed to keep, and did keep books, and did receive certain sums of
 money for the pursuers ;—

" Whether the defender is indebted and resting owing to the pursuers
 in the sum of £120, or any part thereof, as the value of stock not account-
 ed for by him, or of monies received by him on account of the pursuers,
 and not accounted for ? "

The case was in a great measure special, and the only points of any importance
 were the following :—

1. The pursuers pointed out by an accountant particular errors in the books,
 which made up the sum in the issue. The defender complained of such special
 evidence without warning, and contended, that at any rate he could not be bound
 for all loss appearing on the books, without a contract to that effect.

2. The defender having adduced the partner of another tea establishment in Edin-
 burgh, and put a question regarding losses in his own and other such establishments,
 without having proved either that the sum in the issue arose out of accidental losses
 by mistake or otherwise in trade, or that it was usual with the pursuers to experi-
 ence such losses, they objected that the question was incompetent at any stage of
 the evidence, because the establishments and rules were different, and could not
 control one another ; and at any rate the defender must first prove the actual occur-
 rence of such mistakes in the establishment of the pursuers, as a foundation for a
 question regarding any other.

LORD CRINGLETIE said, that the Court thought general evidence of losses in
 such trade not relevant at that stage. There would, indeed, be no end to such
 evidence, and it did not bear upon the case. But it would be quite relevant to
 bring proof regarding the taking of the stock, and so bottom the general question.

3. The defender also attempted to lead evidence as to the general practice in al-
 lowing the manager to nominate those under him. To this it was objected, that
 the special situation of the defender was already proved, and that the responsibility
 must arise solely out of the special contract.

Objection sustained.

The Jury found for the pursuers.

CAMPBELL AND MACK, W.S.—THOMAS DARLING, S.S.C.—Agents.

No. 255.

Mar. 24, 1832.
Keith v. Smart.ALEXANDER KEITH, Pursuer.—*Skene—Buchanan.*ALEXANDER SMART, Defender.—*Keay—H. J. Robertson.*

Fraud—Sale.—Under an issue, whether a purchaser of bank stock had been induced to make the purchase by false and fraudulent representation, or fraudulent concealment on the part of the seller, “as to the credit and solvency of the bank,” not necessary to prove actual insolvency, as at the date of the sale.

Mar. 24, 1832. ALEXANDER KEITH, merchant in Montrose, on the 29th May 1826, purchased from Alexander Smart, merchant in the same place, and one of the Directors of the Montrose Bank, three shares of the capital stock of the bank, and a fourth share on the 29th July thereafter. In 1829, the bank having been dissolved in a state of insolvency, Keith brought a reduction of the assignations to these shares, on the allegation that he had been induced to make the purchase by false and fraudulent representations or concealment, on the part of Smart, as to the credit and solvency of the bank. Smart denied these allegations, and the case went to a jury upon the following issues :—

“ It being admitted that, in the month of May 1826, the defender was proprietor of certain shares of the stock of the banking company carrying on business under the name of the Montrose Bank :

“ Whether, on or about the 29th day of the said month and year, the pursuer was induced, by the false and fraudulent representations, or the fraudulent concealment, of the defender, as to the credit and solvency of the said company, to purchase three of the said shares ?

“ Whether, on or about the 29th day of July 1826, the pursuer was induced, by the false and fraudulent representations, or the fraudulent concealment, of the defender, as to the credit and solvency of the said company, to purchase one of the shares first aforesaid of the said stock ?

A proof was led, which did not, however, go to establish that the bank was actually insolvent at the date of the sale.

Keay, for the defender, maintained that, under the issues, the pursuer was bound to prove that, *de facto*, the bank was insolvent at the time of the sale.

THE LORD JUSTICE-CLERK, however, instructed the jury that this was not necessary under the issue.

The defender took an exception on the point.

Verdict for the pursuer.

JAMES ARNOTT, W.S.—FOTHERINGHAM and LINDSEY, W.S.—Agents.

C A S E S

DECIDED IN

THE COURT OF SESSION.

SUMMER 1832.

JAMES GUTHRIE, and Others, Advocators.—*Jameson—A. Wood.*
JOHN COLVIL and D. R. ANDREWS, Respondents.—*D. F. Hope—Cowan.*

No. 256.

Jurisdiction.—The Magistrates of a burgh are not entitled to exercise jurisdiction in a question between their treasurer and other parties, relative to an alleged violation of the rights of the burgh, and where the question resolves into the legal construction of the deeds conferring these rights, and possession of these rights by use and wont, is not specifically alleged.

THE town of Kilmarnock was erected, on the 12th of January 1591, into a burgh of barony by a Crown charter, in favour of Thomas Lord Boyd, subsequently ratified in Parliament. In 1700, his successor, William Earl of Kilmarnock, the superior, granted a disposition in favour of the burgh, which, after describing the constitution and the mode of electing bailies, contains this clause, “with power to the s^{ds} bayllies to hold and affix courts within the bounds of the sd town, and to decide, determine, and cognosce in all actions and causes, both civil and criminall, that shall happen to be raised and pursued before them, and to give furth and pronounce de'cts and sentences thereintil, and the same to due and lawfl execution cause be put, and to uplift and receave the fynes, awards, and amerciaments of Court, and to apply the samen to the use, utiltie, and profit of the sa toun and communtie yr'of, in manner a'ment.—With power likeways to the sd mag'rats and town-counsell pr'nt and to come, to make and create burgesses of the sd burgh of Kilmarnock, secluding and debarring all others from any merchandising, trade, or mechanisme, except these that shall receive burgess tickets from them for that effect; and excepting likeways, these who shall procure herelb feus of any part of the houses, yards, and incorporat acres of land

May 12, 1832.
1st Division.
Ld. Corehouse.
D.

No. 256. to be incorporat with the said toun and incorporation of Kilmarnock; all
 May 12, 1832. qch are hereby declared to be also free burgesses of the sd burgh, as these
 Gathrie &c. v. who receive burgess tickets in manner for'd for that effect; excepting
 Colvil, &c.

likeways, such particular trades and incorporations, in favours of whom
 our predecessors have formerly granted the s^ds immunitiess and priveledges
 a'wrin,—and generally with power to the s^ds bayllies, thesaurer, and
 counsell of the sd town, p'nt and to come, to do and act in every affair re-
 lative to the sd toun, sicklike, and als freely, in all respects as any other
 bayllies, thesaurer, and counsellors of any other free burgh of barony
 w'tin this kingdome are known to do, have done heretofore, or be the
 laws of this kingdome, may do at any time coming."

This deed was confirmed by the Crown, and ratified by the Earl on
 obtaining majority, with this declaration, " That the foresaid privilege of
 trade, whether in merchandize, mechanicks, or brewers, is only meant to
 be communicat to such feuars, so long, allenarly, as they continue in the
 right of their feus, and no longer ; and that clause, debarring the s'ds feuars
 in the caice for'd, and all others, except such as shall be created burgesses
 by the sd bayllies and counsell of the sd burgh, is hereby par'larily, but
 prejudice of the generality for'd, ratified and confirmed."

The superiority was afterwards acquired by the Duke of Portland.

On the 27th of October 1829, a petition was presented to the Magis-
 trates, in name of " John Colvil, treasurer for the burgh of Kilmarnock,
 on behalf of the community, and of David Ramsay Andrews, writer in
 Kilmarnock, procurator-fiscal of the burgh, for the public interest," setting
 forth the disposition by the Earl of Kilmarnock in 1700, " that in contra-
 vention of the said grant, and use and wont of the burgh," the advocates
 had " for some time past carried on their respective trades, merchandisings,
 or mechanisms within the said burgh, without having received burgess
 tickets, entitling them so to carry on merchandise, trade, or mechanism
 within the burgh : That carrying on merchandise, trade, or mechanism,
 within burgh, without having obtained a burgess ticket, is not only a
 violation of the grant in favour of the said burgh, bat a violation of the
 present stamp act, 54 Geo. III. c. 184: And although the petitioners
 have often required the said David Mitchell, &c. respectively, to obtain
 burgess tickets, as persons carrying on merchandise, trade, or mechanism
 within the burgh, or cease carrying on such business within the burgh,
 they refuse to do so." They therefore prayed the Magistrates to fine
 and amercite each of the advocates " in the sum of £5 sterling, or such
 other sum as to your Honours shall seem proper, payable to the said
 David Ramsay Andrews, to be applied to the use of the burgh, or as
 your Honours shall direct; and farther, to intendit, prohibit, and dis-
 charge each of the said David Mitchell; &c. from carrying on merchandise,
 trade, or mechanism within the said burgh, in time coming, until they
 shall each provide themselves with burgess tickets, in terms of said grant,
 and act of Parliament."

In defence, the advocates stated, that they had acquired rights to feus No. 256. within the burgh, in virtue of which several of them were infest; that they were therefore entitled to the benefit of the exemption in the disposition; that as this was a question between them and the Magistrates, and must resolve into a discussion as to the construction of the disposition, and the Magistrates had a direct interest, they were not entitled to act as judges, and therefore the advocates objected to their jurisdiction. On the other hand, the respondents alleged, that the advocates had acquired merely personal rights to their feus—had not completed them by entering with the superior, and so had not brought themselves within the description of heritable feuars; that although some of them were infest, yet “in practice, it is only such as hold under the superior, that are held as having heritable feus, and therefore the advocates were not entitled to the benefit of the exemption.” No specific averment was made that such had been the practice, but merely that such was considered to be the construction of the grant.

May 12, 1832.
Guthrie, &c. v.
Colvil, &c.

The Magistrates repelled “the dilatory defences, and sustained action in respect of the decision of the Court of Session in a similar process, Ferguson and Others v. Magistrates and Town Council of Kilmarnock, 30th July 1761, and other authorities.” Thereafter they pronounced this interlocutor:—“Repel the defences pled on the merits, and fine and amercite each of them in the sum of £4, 4s., for carrying on trade and merchandise within burgh, without having entered as burgesses, or being the immediate vassals of the Duke of Portland, or the Town Council; and decern and ordain them to make payment of the said sums to the petitioner, David Ramsay Andrews, for the use of the burgh: Further, the baillies interdict, prohibit, and discharge the said Hugh Wallace, James Guthrie, and Robert Lamont, from carrying on merchandise, trade, or mechanism within the burgh, in time coming, until they shall either be legally admitted burgesses, or produce evidence of their being either original feuars of grounds within the territories of Kilmarnock, or entered vassals of the superiors.”

The case having been brought before this Court by advocation, the Lord Ordinary, “in respect the cause involves questions depending upon the construction of charters granted to the burgh of Kilmarnock, and that there is no distinct averment in the record, that the respondents have been in the actual and undisputed possession of the rights they claim under those charters, sustained the objection to the jurisdiction of the Magistrates of Kilmarnock, advocated the cause, assailed the advocates, and found them entitled to expenses, subject to modification.”*

* * Note.—Whether persons infest in subjects within the burgh of Kilmarnock, but not holding immediately of the superior, or persons who have purchased feus, paid the price, and entered into possession, but who have not completed any feudal title, are free burgesses of the burgh, by virtue of the exception contained in the

No. 256. Colvil and Andrews having reclaimed, the Court, being equally divided, ordered Cases, with a view to obtain the opinions of the other Judges.

May 12, 1832.
Guthrie, &c. v.
Colvil, &c.

Pleaded for the advocates—

The question truly is, What is the construction of the disposition by the Earl of Kilmarnock? In order to limit the privilege, and so increase the funds of the burgh, the Magistrates maintain, that those only are entitled to the benefit of it who have entered with the superior, while the advocates contend that this is not necessary, but that a sasine is sufficient. Although the action is raised in name of the treasurer, yet as he is the officer and representative of the Magistrates, the case is truly one at their instance. But it is both contrary to principle and to authority, and more especially to the decision in *Towers v. Templeton*, to sustain the jurisdiction of Magistrates in a matter involving the construction of their own title-deeds. The case is not like those founded on by the respondents, which related to questions between tacksmen of the dues of the burgh, and parties refusing to pay them. In such cases the jurisdiction of Magistrates has, in respect of immemorial usage, been sustained, although this is, in some degree, an encroachment on principle. But that class of cases can afford no authority for making a farther encroachment on the principle. On the contrary, the inclination of the Court has been rather to restrain that jurisdiction. In the present case, the respondents have made no specific allegation that the construction for which they contend is settled by use and wont. They merely state that they, or their advisers, construe the deed in their own favour, and that such has been the practice. But this is not equivalent to an averment that such practice has been acquiesced in by third parties, and acted on accordingly. Besides, the fine imposed is exorbitant, and is not warranted either by the deed or by practice.

Pleaded for the respondents—

Although the burgh is one of barony, yet, from the terms of its charters, it possesses power and jurisdiction equivalent to those of a royal burgh. But it has been settled by a series of decisions, that the Magistrates of royal burghs are entitled to judge in all questions relative to the violation of the established privileges of the burgh, and that it is not relevant to say that they may indirectly have an interest. This was so decided in the cases of *Manson, M'Intosh, and Harvey*. But the present question

charter 1700, and therefore entitled to carry on trade or merchandise without a burgess ticket, are questions of some difficulty, depending upon the construction of that charter. The Magistrates do not aver, that persons in those situations have always been excluded in practice. A question also is raised, Whether the Magistrates have a power to fine to the amount they have done, which also depends upon the construction of the charter, and the possession following upon it. This case strongly resembles that of *Towers against Templeton*, mentioned in the pleadings, which came from the same burgh."

is, simply, whether the advocates have violated the privileges of the burgh? and although it is said that this involves the construction of the disposition, yet the Magistrates were entitled, in order to the decision of the cause, to exercise their judgment in relation to that construction; and besides, it was offered to be proved, that, by use and wont, those parties were alone entitled to the benefit of the exemption, who had entered with the superior.

May 12, 1832.
Guthrie, &c. v.
Colvil, &c.

LORDS JUSTICE-CLERK, GLENLEE, CRINGLETIE, MEADOWBANK, MACKENZIE, COREHOUSE, MEDWYN, FULLERTON, and MONCREIFF, returned this opinion:—
 “ We are of opinion, that the interlocutor of the Lord Ordinary is right. In expressing this opinion, we do not mean to throw any doubt on the authority of the decisions, by which it has been held, that the Magistrates of a burgh are competent judges in many causes relating to the levying of customs, or the privileges of free-men. Notwithstanding the interest which, as trustees for the community, they have in such questions, their jurisdiction to try them has been recognised by so long a course of practice, that it must be considered as legally established. Our opinion in the present case rests on the particular nature of the question on which the merits of it wholly depend. The original summons, indeed, being expressed in very general terms, which do not disclose the real question intended to be tried, may have an apparent competency, as seeming to be merely a simple claim against unfreemen for carrying on trade, without having obtained burgess tickets, and paid the dues of entry, contrary to the acknowledged privileges of the burgh. But the defence stated, and the record subsequently made up clearly showed, that the question really to be tried and determined was a question as to the construction and effect of the charters of the burgh. This is the true nature of the cause, as referred to in the Lord Ordinary’s interlocutor; and we think, that the question of jurisdiction in regard to it must be considered in the same manner, as it must have been, if the summons had set forth the actual matter in controversy, and concluded to have it found, that by a just construction of the charter, the holders of property by feu rights in the situation of the defenders, were not entitled to the privileges of free-men. We are of opinion, that this is the true character and substance of the present cause; and that the Magistrates of the burgh have no jurisdiction to try an action of such a nature. The Magistrates of a burgh have jurisdiction in actions of abstracted multures from the town’s mill. But if such an action were brought, for the purpose of establishing for the first time the burgh’s right to a particular species of thirlage, and the defence were, that they had no such right by their titles, it would be clearly incompetent for the Magistrates to consider or determine such a question.

“ The case would at least have been more doubtful, if there had been a distinct averment and offer of proof on the record, of an established usage, either of persons in the situation of the defenders having been required to enter, and having in fact entered as burgesses, or of their having been constantly excluded from the exercise of trade. But we see no such averment on the record; the passage quoted from a paper of replies in the case of the respondents, being a mere statement of an abstract opinion held as to the effect of the charter, and not an offer to prove any thing specific as matter of fact.

“ As we observe it stated in the case for the respondents, that they have raised an action of declarator for trying the question as to the effect of their charter, there

No. 256. will be full opportunity in that action for discussing every question, whether of fact or law, which may be involved in the case."

May 12, 1832. Gathrie, &c. v. Colvill, &c. The Lords President and Gillies, who were formerly for adhering, concurred in this opinion; and Lords Balgray and Craigie, who had dissented, were understood now to agree on the special grounds stated by the consulted Judges.

Burbidge, &c. v. Sturrock.

THE COURT accordingly adhered, and found additional expenses due.

Advocators' Authorities.—Towers, June 3, 1828 (*ante*, VI. 906); Robertson, Nov. 21, 1823 (*ante*, II. 611).

Respondents' Authorities.—Ferguson, July 30, 1761 (1831); M'neon, Dec. 17, 1795 (2015); Harvey, Nov. 17, 1826 (*ante*, V. 14); M'Intosh, Jan. 16, 1828 (*ante*, VI. 238).

DONALDSON and CAMPBELL, W.S.—GAIRDNER and ROBERTSON, W.S.—Agents.

No. 257. BURBIDGE and Co., and MANDATORY, Advocators.—*Robertson—W. Bell.*
WILLIAM STURROCK, Respondent.—D. F. Hope—Penney.

Sale—Expenses.—Where a wholesale dealer raised an action against a retail dealer for the price of goods, within six months from the date of the invoice, and the defendant pleaded that he was entitled, by invariable custom of the trade, to a longer credit, and proved an usual, but not an invariable custom—found (the price having been paid pending process), that he was entitled to expenses, subject to modification.

May 12, 1832. BURBIDGE and Co., wholesale merchants in London, raised an action before the bailies of Edinburgh, against Sturrock, perfumer there, for the amount of an account of goods furnished by them to him. There was no express agreement betwixt the parties as to the term of credit, and the action was raised within six months after the date when the goods were delivered. Sturrock admitted his liability for the price of the goods, but alleged that, "by the invariable practice of the trade, a purchaser of goods of the description of those sued for, is entitled to twelve months' credit from the date of the invoice;" and insisted that the action ought to be dismissed as premature, with expenses. Pending the proceedings, the admitted term of payment arrived, and the money was paid, under reservation of the question of expenses, into which the case now resolved. A proof was allowed, the result of which is comprehended in the following interlocutor, pronounced by the Bailies: "Find it instructed by the proof, that the usual practice of the trade, in regard to fancy articles of the description in the account libelled on, was for the furnisher to seek payment at the end of six months after the order was given; and, if the payment was then made, to allow a discount of 5 per cent, and if the payment was not then made, that no discount was allowed: find it proved that this was the general (though not universal) practice, even with regard to furnishings to a party upon a first order, unless some other stipulation was made at

2d Division.
Ld. Fullerton.

the time the order was given, or the party who gave the order was informed at the time that the invoice price was to be paid within the six months: find, in the circumstances in which the order was given by the defender, and there being no mention in the invoice as to the term of payment, that the defender was justified in supposing that the goods were furnished on the usual terms, and at the usual credit: find that the pursuers raised this action before the expiry of six months from the date of the order, and that they have not assigned any sufficient or satisfactory reason for doing so: find that the defender did not object to the amount of the account, but only to payment being demanded before the expiry of the usual credit, according to the usual practice of the trade, in regard to similar articles; and, in respect it appears from the record that the principal sum sued for has been paid, therefore, and for the reasons assigned in the preceding findings, and the demand of payment having been made prematurely, and the pursuers having denied the practice, in consequence of which the whole expenses have been occasioned, assoilzie the defender; find the pursuers liable in expenses of process," &c.

Burbidge and Co. advocated, and the Lord Ordinary pronounced this interlocutor: "Finds that this was an action brought by the advocates for payment of the price of certain goods furnished to the defender, a retail dealer in such goods: finds that the defender, while admitting his liability for the price libelled, demanded to be assoilzied, in respect that, 'by the invariable practice of the trade, a purchaser of goods of the description of those sued for, is entitled to twelve months' credit from the date of the invoice,' and that the action was brought before that period of credit had expired: finds that this averment of usage having been denied by the pursuers, a proof was allowed in the Inferior Court: finds that, during this investigation, the term of payment, as admitted by the defender, having arrived, the money was paid, and received under the reservation of all questions of expenses: finds, that it is admitted by the defender, that there was no express agreement as to the term of credit; and further, upon considering the said proof, finds it not proved, that in transactions of the description in question, there is any invariable practice and usage of trade in regard to the credit allowed on the purchase of such goods: therefore, advocates the cause, recalls the interlocutors complained of, repels the defence, and decerns: finds the advocates and pursuers entitled to their expenses both in this and in the Inferior Court," &c.

Sturrock reclaimed.

LORD CRINGLETIE.—The whole question is as to the expenses, which I think ought to be given to neither party, as both were to blame in the litigation. The proof established, that if payment was made at the end of six months after the date of the order, discount of 5 per cent was to be allowed, but if made on the expiry of the twelve months, payment was to be in full. Now the action was raised before the expiry of the six months, when, if payment had been made, discount would have been allowed. But the defender, on the other hand, claimed to be assoilzied,

No. 257.
May 12, 1882.
Burbidge, &c.
v. Sturrock.

No. 257. on the plea that he was entitled to a twelvemonth's credit as a matter of invariable practice, which he failed to establish. I think neither party entitled to expenses.

May 12, 1882. Burbridge, &c. v. Sturrock. LORD GLENLEE.—Both parties appear to have been a good deal to blame, in so far as regards these expenses, which is the only question before us. Whose fault was it that the proof was led so far? That is the consideration. Certainly the action was premature, and if the defender had confined himself to this plea—"You have raised an action before the expiry of the ordinary period of six months, when I am ready to pay you, receiving discount," his defence would have been sound; but he goes to a condescendence, the leading feature of which is an allegation of his right, by invariable practice, to the full twelvemonth's credit. When the money was paid, why did Sturrock go on in such a wild attempt as to prove that twelve months was the natural and usual term of credit in transactions of this sort? He failed in a great part of the proof undertaken by him. I am inclined to give expenses to neither party.

LORD MEADOWBANK.—It is of some importance to attend to the dates of the proof as led. The last diet of taking the defender's proof was prior to the expiry of the period when the account must be paid. The defender had then closed his proof, and he immediately made payment. Now, in the absence of all special agreement as to credit, the question just comes to be, are there termini habiles, to say, by presumption of law, what sort of agreement the parties must be held to have entered into. I think the weight of the proof is in favour of the defender's plea. We are out of the ordinary rule of law, for it is not pretended that payment could be claimed on delivery. The proof establishes that payment is usually made in such cases on one of two terms, and the question is which. Now, is there any evidence to show that the option as to these terms rests with the seller? No; the necessary inference from the proof is just this,—that the purchaser has the option of paying at the end of six months, receiving discount, or to make payment in full at the end of twelve months. But the pursuers bring their action at a time when, it must be admitted, that they had no right to make any demand whatever; and I cannot see how the defender has been to blame. He undertakes to prove the invariable practice. This phrase may not be well selected; it ought to have been the usual or general practice, which I think he has instructed; and is the party who denies the general practice not the party to blame? I think the pursuers alone were to blame, and that the defender is entitled to his expenses.

LORD JUSTICE-CLERK.—Certainly I cannot concur in this interlocutor, which gives all the expenses to the pursuer. No doubt, and that is the chief difficulty which presents itself to me, the defender undertook to prove the invariable practice to be twelve months credit, which he has not established. Had the proof allowed been only applicable to this statement in the defences, the defender would have been tied down; but it is applicable to the whole condescendence, and there it is averred that the invariable practice is payment at one of the two terms, with and without discount. Now the defender has proved the usual custom to be so, but not the "invariable;" therefore I think he is entitled to his expenses, but under modification.

LORD GLENLEE.—I still think expenses ought to be given to neither party.

LORD CRINGLETIE.—So do I; but I am unwilling to divide the Court on such a question, and, provided the modification be very severe, I have no objections to granting expenses to the defender.

THE COURT accordingly altered, and allowed the defender expenses, subject No. 257.
to modification.

May 12, 1832.
Burbidge, &c.
v. Starrock.

A. M. MOFFAT, Solicitor.—SMITH and KINNEAR, W.S.—Agents.

A. B. v. C. D.

A. B. Pursuer.—D. F. Hope—Monteith.

No. 258.

C. D. Defender.—Cunningham.

Pactum Illicitum.—Partnership.—An agreement, by which a country agent undertook to employ an agent in Edinburgh in the business of his clients, and make advances to him, and stipulated for a share of the profits, and that the agreement should be kept secret—Held illegal, and not actionable.

THE pursuer, a writer in Glasgow, raised an action of count and May 12, 1832.
reckoning against the defender, a writer in Edinburgh, for the purpose 2D DIVISION.
of enforcing implement of an agreement betwixt them of the following LD. Fullerton.
tenor :

“ 1. A. B. from confidence in C. D., agrees instantly to advance him the sum of £100 sterling, to admit him an agent in the Supreme Court; which sum, with the legal interest thereof from the 12th day of November next, C. D. engages himself to repay within two years from this date. A. B. farther engages to place at the disposal and command of C. D., for the purpose of enabling him to conduct and carry on his business, the sum of £400 sterling, according as the business shall require the same, without any right to demand interest therefor. And in case A. B. shall be called upon by C. D. at any time to advance a larger sum, he binds himself to pay him at the rate of two and a-half per cent for such additional advance. These advances to subsist for five years, except in the restricted case after-mentioned.

“ 2. A. B. engages to promote the interests of C. D. as much as shall not interfere with the free exercise of his own profession.

“ 3. In return for these advances and A. B.’s influence, he shall be entitled, for the full period of five years from the 12th day of November next—restricted to two years in the event after-mentioned—to retain from his own private and from his clients’ accounts one-third share of the free profits of the same, as the same shall be pointed out by C. D.—A. B. regularly paying to C. D. his proportional, or the balances of said accounts, as the same shall, from time to time, be recovered. And C. D. separately engages, in return for the accommodation of advances, to pay to A. B., during the above period of five years, but restrictable always to two as after-mentioned, one-third part of the free realized profits of the whole other business performed and conducted by him.

“ 4. In case the parties, or either of them, shall think it of importance to them to dissolve this agreement, then, after the expiry of two years from this date, and upon giving thereafter six months’ notice, the one to

No. 258. the other, of their intention, this agreement will come to a close, in the same way as if the whole five years above-mentioned had elapsed; and in May 12, 1832. A. B. v. C. D. this case, as if the whole five years had expired, A. B. will be entitled to call upon the concern being wound up, by repetition of his advances and appropriation of any balance of his share of profits, in the same way as in common cases of copartnery—the parties suffering, in proportion to their respective shares, the possible loss occurring from bad debts; and the claims of either party in the concern shall be preferable to any private debt.

“ 5. This agreement shall be private betwixt the parties, C. D. throughout appearing the sole ostensible person, having full power to transact with clients or others in such manner, and on such terms and conditions, as to him may seem expedient, without any control on C. D.’s part on his management in one respect or another, except by his private advice, and whether any of his clients, in certain circumstances, ought not to receive reasonable indulgence as to charges, and indulgence in payment.

“ 6. In case of any dispute, legal proceedings upon one part or another are disclaimed, the parties hereby agreeing to submit any difference to the Dean of the Faculty of Advocates for the time, with power to him to call for the writ or oath of C. D., in place of all other proof, as to the purity of his management and correctness of his books, but the same shall be open for his inspection; which books C. D., for the first two years, engages he shall keep free of expense to A. B., but thereafter he shall be entitled to charge a reasonable proportion to the said A. B.’s interest for the keeping of the books and accounts. ‘The accounts to be regularly rendered at least once each session.

“ Lastly, For more effectually carrying these minutes into effect, the parties will be ready, in the course of the winter, to enter into a valid agreement, extended in regular form, and with such other additional clauses as may occur, to meet the true spirit of this agreement.

“ If any serious loss or misconduct shall happen or take place to any of the parties, the arbiter shall be entitled to judge whether, in such event, this agreement should not be void and terminate.”

Besides alleging that the contract had never been completed, the defendant pleaded in defence, that “ the agreement, even if it had been completed or executed in due form, would not have been legal.”

The Lord Ordinary pronounced the following interlocutor:—“ Finds that, by the agreement libelled, the pursuer, an agent in Glasgow, undertook to employ the defender, an agent in Edinburgh, in the business of his clients, and, in return, stipulated for a third part of the profits derived by the defender from that business: Finds that it was also part of the agreement that it should be kept secret: Finds that such an agreement was illegal: And, therefore, sustains the plea of pactum illicitum: assolizes the defender from the conclusions of the action, and decrees: Finds the defendant entitled to expenses.”

The pursuer having reclaimed,

No. 258.

LORD JUSTICE-CLERK.—I have formed a very clear opinion in this case. Even *A. R. v. C. D.* May 12, 1832.
had the point been before us for the first time, it would have been the duty of the Court to oppose itself to such proceedings, which just amount to sacrificing the interests of the public for private ends. One important part of the duty of an agent frequently is, to advise his client not to go on with an action; but if a compact is entered into of the nature of that before us, the agents become so interested in the profits of litigation, that the interests of the client would most indubitably be set at nought. I can easily understand why the clause as to secrecy was introduced. The reason is obvious. Had the agreement been known to the world, these agents would have lost every client they possessed; such is my opinion, had we now to form one upon the question for the first time. But when I look at the case of Brashe,¹ I have no hesitation in saying, that the very principle of that decision must rule this case. The ground upon which the Court went is most distinctly expressed, and quite applicable,—“that it was improper for an agent in this Court to make profit of the proceedings before an Inferior Court; and that it was improper in a solicitor, before an Inferior Court, to enter into an arrangement, by which papers to be given into Court by him, were to be drawn by others, though he was bound to certify that they were drawn by himself.” After this decision, the idea must at any rate have been removed from the mind of every respectable practitioner, that such an agreement as the present one could possibly be sustained.

LORD GLENLEE.—That is exactly my opinion.

LORD CRINGLETIE assented.

LORD MEADOWBANK.—I am entirely of the same opinion. I do not think there is a shadow of doubt in the case, either as regards public or private interests.

THE COURT accordingly adhered.

A. Hill, W.S.—Charles F. Davidson, W.S.—Agents.

Single Bills.

WORKMAN, Reclaimer.—*G. G. Bell.*

SMITH and MUIR, Respondents.—*Shene.*

No. 259.

Process.—Reclaiming note not marked by the principal clerk in proper time, refused as incompetent.

A RECLAIMING note for Workman, boxed at the box-day of the Christmas recess, being objected to as not marked by the principal clerk in proper time, it was stated in excuse, that on the box-day it was taken to the fee-fund office after the office had been shut, and had to be taken to the officer's own house to be fee-fund-ed; and that when brought back to the Register House, the closet-keeper's office was shut, which prevented its being marked, but no accusation was made of the officers having shut their offices before the regular hours. The Court refused the note as incompetent.

May 12, 1832.
2d Division.

No. 260.

JOHN C. FARQUHARSON, Complainant.—*Pyper.*

May 15, 1832. JOHN THOMSON (TRUSTEE of MASON, BAIRD, and Co.), Respondent.—
 Farquharson
 v. Thomson.
Keay.

Bankrupt.—1. Circumstances in which a ranking by two separate parties on the sequestered estate of the drawer of two bills relating to one and the same debt, was sustained. 2. A payment made by one of two obligants posterior to the sequestration of the estates of one, does not preclude the creditor from ranking for his full debt to the effect of receiving full payment.

May 15, 1832. Lockwood and Co., manufacturers at Huddersfield, early in 1810, sold, through their agents, Mason, Baird and Co. of Aberdeen, a quantity of goods to John Robertson and Co., merchants in that town. Patrick Baird

1st DIVISION.
 Lt. Moncreiff. §. was a partner both of Mason, Baird, and Co., and of Robertson and Co. On the 22d of January, Mason, Baird, and Co. drew a bill for £1492, 14s. 9d., bearing to be "for value in cloths to Quebec, from George Lockwood and Co.," payable 60 days after date on Robertson and Co., which they accepted.

Thereafter, on the 12th of February, another bill for £1492, 4s. 8d., "for value in woollens to Quebec," was drawn by Mason, Baird, and Co. upon Robertson and Co. This bill Patrick Baird, as a partner of the latter company, accepted under the signature of Robertson and Co. It was stated on both sides, that the drawing and accepting of this bill was a fraudulent act on the part of Patrick Baird. It was endorsed by Mason, Baird, and Co., and transmitted to Lockwood and Co., who again endorsed it to Brook and Co. The first bill was within 60 days of the bankruptcy of Mason, Baird, and Co., endorsed by them "per procuration of Lockwood and Co." to Andrew Davidson, who afterwards endorsed it to his brother, Robert Davidson.

When the bills fell due, payment was demanded by the respective holders from Robertson and Co., who brought suspensions and a multiple-pointing, on the ground that they were liable only in once and single payment. They consigned the amount, and on the 29th of November 1810, the processes being conjoined, an interlocutor was pronounced finding them liable only in once and single payment, which was allowed to become final.

The estates of Mason, Baird, and Co. having been sequestered, and the respondent Thomson appointed trustee, claims were lodged, both by Robert Davidson, as holder of the first bill, and by Brook and Co., as holders of the other. In reference to the latter claim, the trustee made the following entry in the sederunt-book, with a view to the first dividend: "Wm. Brook and Co. entered claim for a bill drawn by Mason, Baird, and Co. on, and accepted by, John Robertson and Co., for £1492, 4s. 8d. This is exactly the same sum as the bill claimed by Robert Da-

vidson, and is also the subject of a law-plea before the Court of Session, No. 280.
and no dividend can be paid till the plea is settled."

May 15, 1832.

In the meanwhile, an action of reduction of the first bill had been brought by the trustee against Robert Davidson, on the ground that it had been granted within 60 days of the bankruptcy, and decree of reduction was pronounced, which became final.

A competition thereupon arose in the multiplepoinding between Davidson and Lockwood and Co. (who, having paid the debt to Brook and Co., had re-acquired right to the second bill); and Lockwood and Co. were preferred. Against this judgment Davidson appealed, whereupon the fund in medio was paid to Lockwood and Co., under a warrant for interim execution. The case having, however, been remitted, Lockwood and Co. were obliged to re-consign the money. A judicial reference was thereafter entered into, in which the referee, holding both parties to be onerous bona fide holders, ordained the fund in medio to be divided equally between them, and it was paid accordingly.

Previous to this, Davidson had instituted an action of reduction reductivé, of the decree reducing the first bill against the trustee; and a meeting of the creditors being held at the time when Lockwood and Co. had obtained payment of the consigned fund, it was agreed, that "as it is evident that the sole intention of raising the action of reduction at the trustee's instance, was to prevent both the bills for £1492, 14s. 9d. ranking upon the estate of Mason, Baird, and Co., and that one of these bills is now paid by the acceptors, which takes it out of the way of ranking on the estate, and that the amount of the other bill held by Mr Davidson falls justly to be ranked upon the estate, the meeting recommended to, and authorized the trustee, to withdraw any other opposition to the action of reduction sued against him by Mr Davidson, and to rank him upon the estate for the amount of that bill." Against this judgment Lockwood and Co. complained, and their complaint was sustained by this Court; but the House of Lords reversed, and found the resolution effectual.¹

Davidson received payment of the dividends effeiring to his debt; but none were paid to Lockwood and Co. They subsequently assigned their claim to the complainer Farquharson, who demanded payment from the trustee of the dividends corresponding to the amount of the debt, and also insisted for a dividend on the amount of the expenses incurred in the litigation relative to the bill. The trustee having reported the matter to the creditors, they resolved that the claim should not be allowed, and on this resolution the trustee acted.

Farquharson, several months after the resolution, presented a petition and complaint, stating that no regular sederunt-book had been kept; that

¹ 2 Shaw's Appeal Cases, 362.

No. 260. the alleged judgment sustaining the objection was written on the margin, and was not verified either by date or signature, and no intimation of it had ever been sent; and that in relation to Mason, Baird, and Co., this was not a question of double ranking, but a question of liability under two separate obligations.

May 15, 1832.
Farquharson
v. Thomson.

To this it was answered, that the petition was too late and incompetent; that the judgment referred to was in form similar to those customary on other sequestered estates, and was final; that there was only one debt, and that as Davidson was ranked under a final judgment of the House of Lords, the complainant could not also be ranked in respect of the same debt; and at all events, the payment received under the decree of the referee must be imputed in extinction pro tanto of the debt, and the ranking restricted to the balance.

The Lord Ordinary repelled the objection to the competency, and the Court adhered (*ante*, VIII. 752). Thereafter his Lordship dismissed the complaint as laid, and found expenses due.*

Farquharson having reclaimed, the Court ordered Cases.

Pleaded by Farquharson—

1. Although the transaction out of which the two bills originated was

* “ Note.—The Lord Ordinary’s ground of decision is this. It is settled by final judgment in the multiplepoinding, that Robertson and Co. were only liable in one and single payment—the effect of which is, that they were held liable only for one debt, being the price of the wool, as contained in the bill then held by Brooks and Co., as the endorsee of Lockwood and Co. It is also finally settled by the judgment of the House of Lords, that the trustee and creditors of Mason, Baird, and Co. were warranted in allowing the decree of reduction reductivé to pass in favour of Robert Davidson. The effect, therefore, was, and now is, that the full sum for payment of one of the bills, viz. that which had been endorsed to Lockwood and Co., was consigned in the multiplepoinding, and ultimately made good according to the judgment on the judicial reference; and that for the other bill, Davidson was fully ranked on the estate of Mason, Baird, and Co., and he having drawn dividends to the amount of £800 and upwards, Lockwood and Co. received an equal sum from the consigned money in the multiplepoinding. Ranking, in the case of bankruptcy, is equivalent to payment where the estate is solvent, and thus the result is, that the full amount of one of the bills was paid by the acceptors, and there was a full ranking for the other against Mason, Baird, and Co. as the endorsers. To sustain this complaint, therefore, would manifestly be to allow a double ranking for the same debt, or what is worse, a ranking for a bill against the endorser, after the acceptor has paid or consigned the full amount of it.

“ If the complainant has a claim of damage against Mason, Baird, and Co., on account of the loss produced to him by the fraud of Baird, which gave rise to the competition with Davidson, it may be a different matter. But it is impossible to allow a farther equalizing ranking on either of these bills, merely because, by the decree in the judicial reference, a portion of the consigned money was awarded to Davidson. But if any further dividends should be paid from the estate of Mason, Baird, and Co., on the claim held by Davidson, certainly the complainant will be entitled to have a moiety of any such dividends reserved and allotted to him.”

a single one, yet Mason, Baird, and Co. had come under two separate and distinct obligations, by issuing the two bills as drawers. This originated in a fraud on their part, or at least on the part of one of their partners, Farquharson and they are liable for both debts. It is immaterial, therefore, that Davidson has been ranked on the other bill.

May 13, 1832.
Farquharson v. Thomson.

2. A party is entitled to recover full payment of his debt from each and all of the obligants. A payment prior to the bankruptcy of any of them, extinguishes pro tanto the debt; but on bankruptcy, the relative position of parties is changed. Any payment made subsequent to that debt, is imputable only to the effect of not drawing more than full payment; and so long as any balance remains due, the creditor is entitled to be ranked on the whole debt, and draw dividends to the extent of the full debt.

Pleased by the Trustee—

1. There was clearly only one debt, and although two bills were granted by the fraud of one of the partners, yet this cannot burden the estate with two debts. As Davidson has been ranked, it would be unjust also to rank the holder of the other bill. This would be truly a double ranking.

2. The acceptors were the primary obligants, and a payment by them is an extinction of the debt pro tanto. But they were found liable only in once and single payment, and one-half of the fund was appropriated in extinction of the petitioner's bill. He cannot, therefore, claim on the estate for the whole bill. He must deduct the payment made by the acceptors, and claim only for the balance.

LORD BALGRAY.—The extent of litigation which has taken place in this case, tends to throw some obscurity over it. But on laying this aside, and applying some of the settled rules of law, it is attended with no difficulty. In the first place, the rights of parties claiming on a bankrupt estate must be judged of as at the date of the bankruptcy or sequestration. Second, all payments made prior to bankruptcy, must be imputed in extinction pro tanto of the debt, and the claim restricted accordingly. But if payments be received from co-obligants posterior to the bankruptcy, they are not to be so imputed. The creditor is entitled to rank for his full debt, to the effect of receiving 20s. in the pound. Third, wherever a claim is made on a sequestered estate, the trustee is the primary judge; and when he gives his judgment on the claim, he must subscribe and communicate it to the parties, just as in the case of judgments pronounced by any court of law. I do not regard this as a case of double ranking. It is a question sui generis, and we must look to the whole circumstances. The Lord Ordinary has evidently had great difficulty, and I think he has arrived at a wrong conclusion. It is clear, and the fact is admitted, that a gross fraud was committed by Mason, Baird, and Co., or at least by one of their partners, for which they are responsible; and it is also fixed, that both Lockwood and Co. and Davidson are to be considered as onerous bona fide holders of the bills drawn by Mason, Baird, and Co. Whether the acceptors, Robertson and Co., would have been liable in payment of both bills, is a question which cannot now be raised, because it has been finally decided that they are liable only in once and single payment. Mason, Baird, and Co. are, however, liable for each bill as drawers, and it is no answer to say, that there was only one transaction, because

No. 260. the creation of these two bills was an act of their own, and therefore, quod them; there are truly two debts. They are clearly liable to Lockwood and Co. for the price of the goods which they sold, and they are also liable to Davidson, from whom they received value in respect of their endosseration of the other bill. It is true that Robertson and Co. have paid the amount of one of the acceptances, but then Lockwood and Co. have only got payment of one-half, and they are entitled to say, that this has been caused by the fraudulent act of Mason, Baird, and Co., who must relieve them. It has also been said, that as the acceptors have paid the full amount of the debt, it is extinguished, and consequently that no claim can in respect thereof be made on the estate of Mason, Baird, and Co. But to the extinction of a debt there must be two parties. A debtor may pay to a putative creditor, but this will not extinguish the debt as to the true creditor. Although, therefore, Robertson and Co. may be discharged, the debt still remains effectual against Mason, Baird, and Co. in a question with Lockwood and Co.

LORD GILLIES.—I concur entirely with Lord Balgray, and on reviewing the whole circumstances, I think the Lord Ordinary has taken an erroneous view. The case has originated out of a fraud by one of the partners of Mason, Baird, and Co., and it is clear that neither that Company, nor their creditors, can take advantage of that fraud. Lockwood and Co. claimed to be ranked, and were ranked, for the full debt on the estate of Mason, Baird, and Co., subject to a declaration, that there was a law plea in dependence relative to the same debt with Davidson. On judgment being pronounced preferring Lockwood and Co., and on their receiving payment under a warrant for interim execution, the creditors assuming that this was an extinction of the debt, ordered Davidson to be ranked in respect of his bill, and it is said that the trustee on the same ground rejected the claim of Lockwood and Co. This judgment is neither dated nor signed; but, independent of this objection, Lockwood and Co. were obliged to reconsign the money, so that the reason of the judgment ceased to have effect, and the ranking remained in its original terms. The question, therefore, comes to be, whether, in respect of the payment made under the decree of the referee, that ranking can be effected, and I am of opinion that it cannot.

LORD CRAIGIE concurred.

LORD PRESIDENT.—It is a mistake to suppose that there is here a double ranking. If there had been only one bill, and two parties had been claiming to be ranked in respect of that bill, then a question of double ranking would have been raised. But there are here two bills—two obligations—and two debts by Mason, Baird, and Co., and as these debts are not extinguished, that company cannot stand on the decree of the referee.

THE COURT accordingly pronounced this interlocutor:—“ Alter the interlocutor reclaimed against, recall the judgment of the trustee complained of, and find the petitioner, as assignee of Messrs Lockwood and Co., entitled to receive and draw the dividend of £371, 18s. 7d., set apart under the first scheme of division, as referring to the claim lodged by Messrs Brook and Co., at that time in the right of Lockwood and Co.’s debt, together with the bank interest that shall have arisen and become due thereon, and decern: Find the petitioner also entitled to such further dividends, along with the other creditors, as may, or ought to have been, set apart to answer the said debt, or as may still arise and become due upon the said

May 15, 1832.
Farquharson
v. Thomson.

claim, with bank interest from the dates of such dividends becoming due No. 260. respectively, until such dividends shall, with the sums already received by Lockwood and Co. from Robertson and Co., to account of the said debt, Farquharson. amount to the sum claimed under theforesaid bill. Quoad ultra, remit to v. Thomson. the Lord Ordinary to hear parties farther, and to proceed as to him shall Smith, &c. seem just, in disposing of the other parts of the cause, and of the question of expenses.

Complainant's Authorities.—2 Bell, 430; 54 Geo. III. c. 137, 45, 46; 2 Bell, 339, 523, 428.

McGOWAN and ROY, W.S.—J. and A. TAWS, W.S. Agents.

ELIZABETH SMITH and Others, Petitioners.—*Rutherford.*

No. 261.

Trust.—Bankrupt.—A trustee under a deed of settlement, who became bankrupt, and whose estates were sequestered, ordered to denude of the trust estate (in which he was infest) in favour of a judicial factor.

THE late James Catto left a trust-disposition and deed of settlement, May 15, 1833. under which George Allan was nominated and accepted as trustee. After 1st Division. B. being infest in the heritable property, his estates were sequestered under the bankrupt act. He afterwards sold part of the property by public roup; but before the price was paid, the petitioners (who had an interest in the trust-deed) applied to the Court to appoint a factor on the estate, to ordain Allan to convey the property in favour of the factor, with powers in terms of the trust-deed, and to interdict him from receiving payment of the price of those parts which had been sold. The Court immediately granted interim interdict, ordered service, and thereafter appointed intimation to be made to the trustee on the sequestered estate; and no appearance being made, they “decerned and ordained the said George Allan to execute and deliver all necessary deeds and conveyances for denuding of and making over the heritable subjects vested in or conveyed to him by the trust-disposition of the said James Catto, in favour of James Edmond, as factor on the said trust estate, with power to him to sell and dispose thereof in terms of, and for accomplishing the purposes of, the said trust-disposition.”

INGLIS and DONALD, W.S.—Agents.

JAMES LAWSON, Advocate.—*Pyper.*
MRS WEDDERBURN OGILVY, Respondent.—*H. Bruce.*

No. 262.

Landlord and Tenant.—A stipulation that a tenant should, in case of deviating from a prescribed system of rotation, pay an additional rent of £10 yearly, sustained.

No. 262. THE late James Ogilvy, of Ruthven, father of the respondent, let the lands of North and South Grange, in May 1806, to the advocate Lawson May 16, 1832. 1st DIVISION. Lord Newton. S. for twenty years, by missives. At a subsequent period, and conformably to an obligation contained in the missives, a regular lease was executed, by which it was, inter alia, provided, "That the farm should be divided into three parts or divisions, two of which are the southmost and northmost; and the third division comprehends Parkend and Fentonhill,—the southmost and northmost divisions being each of them put into seven fields, these two divisions shall be cropped exactly similar;—that is to say, one field the first year in clean fallow, or drilled green crop; second year, wheat, oats, or barley, sown down with a sufficient quantity of ryegrass, red and white clover seed, and shall remain in grass the three subsequent years, which grass may be cut the first or second year, in the option of the tenant, and shall thereafter remain in pasture until the field or division is again ploughed up in the rotation; and when broken up, two corn crops may be taken, one of oats, and another of barley; but if the ground be not suitable for barley, both crops may be oats, and so on, regularly and yearly, throughout the other six fields; by which method of cropping, there will be always during the lease, and at the expiry thereof, in each of the two divisions, one field in clean fallow, or drilled green crop; three of said fields in sown grass; and the other three in corn crop." The tack further declared, "That as the several tack-duties before mentioned were stipulated only on condition of the tenant's adopting the rotations and methods of cropping before specified, and adhering strictly thereto during the lease; therefore, in case the said James Lawson and foresaids shall, at any time during the lease, deviate therefrom, in any respect, without the consent of the proprietor, in writing, the tenant shall be bound, as he hereby obliges himself, to pay to the said James Ogilvy, and his foresaids, the sum of £3 sterling of additional money rent, over and above the rent before specified, for each acre, or proportionally, for any part of an acre, on which the said deviation shall have taken place, previous to the last three years of the lease; and £10 sterling of additional yearly rent for each acre, and proportionally, for any part of an acre, on which the said deviation shall have taken place, for the last three years of the tack; which additional rent shall not be considered as penalty, but as pactional rent, and shall be payable at the terms, and along with the money-rents before stipulated."

In 1826 Lawson broke up a field, consisting of 14 acres, which had been in grass only for two years, and took a crop of oats. He also in the following year (being the last of his lease) reaped another crop.

The respondent having succeeded to the estate, raised an action before the Sheriff of Forfarshire, concluding for payment inter alia of £140 of additional rent for the field of 14 acres, during the year 1826, and a simi-

lar sum for the year 1827. The Sheriff decreed in terms of the libel, No. 262, and issued the subjoined note.*

Lawson having brought an advocation, the Lord Ordinary remitted Lawson v. simpliciter, but found no expenses due. Against this judgment Lawson Ogilvy. having reclaimed, the Court ordered cases.

Pleased by Lawson.—1. Although the sum claimed is denominated additional rent, yet being truly an exorbitant penalty, it is subject to modification under the equitable powers of this Court. He never intended to violate the system laid down in the lease, but from inadvertence laboured the field in question in place of another of 11 acres, which had been three years in grass.

2. Supposing it were to be regarded as additional rent, still it never was intended that he should pay so large a sum for more than the year which broke in upon the system, and therefore he ought not to be found liable in the additional rent for 1827. This was so held in the similar cases of Johnston and Suttie.

Pleased by Mrs Ogilvy.—1. The lease fixes a particular system, for the purpose of bringing the lands into a proper state of tillage; and while the tenant had it in his power to deviate from that system, it was expressly stipulated that if he should do so he must pay an additional rent. This was a proper contract, and it is not within the power of the Court to alter or modify the bargain of parties. It is neither true nor relevant that the advocator laboured the field by mistake.

2. The clause is express that the additional rent shall be paid yearly, and the cases of Johnston and Suttie do not apply, because in them the deviation occurred during the last year of the lease, and the claim was for the additional rent, not only of that year, but of the preceding years, during which no contravention had taken place.

LORD BALGRAY.—There was clearly a deviation, and I think the tenant was fully aware of it; he therefore must pay the stipulated additional rent.

LORD PRESIDENT.—When I formerly considered this case, I thought the tenant not liable for more than the additional rent of one year; but I am now satisfied that the payment of that rent for the one year does not liberate him if he persevere in the deviation during the subsequent years. Almost all the agricultural experiments under which the country has derived so much advantage, have originated on the part of the landlords, and effect can only be given to them successfully by preventing deviations. I do not think that the tenant is entitled, on payment of the additional rent, to continue the deviation. The purpose is to prevent the prescribed system from being violated, and the landlord may therefore prevent it. But if the tenant do violate, he must pay the additional rent, in terms of the contract.

* There appears to be no doubt that the defender deviated from the prescribed rotation as to the field in question, for crop 1826, and also for crop 1827, and must pay the additional rent for both years; that rent is no doubt high, but still it is rent, not penalty, and this Court must adhere to the bargain between the parties.

No. 262. **LORD GILLIES.**—I am of the same opinion. The clause here is, however, strangely worded, because, if the tenant deviate for one year, he must pay the additional rent not only for that year, but for all subsequent years, although he do not deviate. In the present case we are relieved from giving any opinion as to the effect of such a clause, because the fact is, that the tenant did deviate.

May 16, 1832.
**Lawson v.
Ogilvy.**
**Anderson, &c.
v. Pott, &c.**

LORD CRAIGIE.—We have decided in similar cases that the additional rent must be paid, and it is of importance that we should not depart from that rule.

THE COURT accordingly adhered.

Advocator's Authorities.—M'Intosh, Feb. 1, 1788 (No. 5, Appendix, Tack); Johnston, Feb. 22, 1639 (10,037); Suttle, July 10, 1828 (S. and D. 1122.)

Respondent's Authority.—Bell on Leases, 202, Note.

D. GRANT, W.S.—R. SMITH, W.S.—Agents.

No. 263. **ANDERSON, CHILD, and CHILD, Pursuers.—Greenshields.**
POTT and M' MILLAN, Defendants.—Forsyth.

Arbitration.—Judicial Reference.—Question, Whether competent to require from referees explanation of an ambiguous award pronounced by them, waived in respect the Court thought there was no ambiguity in the award.

May 16, 1832. IN the process of forthcoming, mentioned ante, VII. 499, at the instance of **Anderson, Child, and Child**, late merchants in Liverpool, against **Ld. Mackenzie**. **Pott and M' Millan**, merchants in Glasgow, cautioners in the loosing of

F.

certain arrestments used by the former in the years 1805 and 1807, of a vessel named the Union, and the freights of the cargo of another, named the Diana, belonging to one Wood, the Lord Ordinary had, at an early stage of the proceedings, granted interim decree for £500, which was paid accordingly. After some farther procedure, a remit having been made to the Lord Ordinary to ascertain the amount of the funds, the parties agreed to a judicial reference, as the best mode of having this effected. The Lord Ordinary having interposed his authority thereto, the referees, after a minute investigation, issued an award in these terms:—

“ In pursuance of the authority herein contained and given to us, We, the undersigned, appointed Mr Peter Ellis, of Lloyd's Coffeehouse, in the city of London, merchant, to be the oversman; and farther proceeded, in the presence of the aforesaid oversman, to read and examine carefully the various papers, documents, and vouchers put in and submitted to us; and having well considered and weighed the same, together with the whole case referred to us,—Do determine and award, that the within-named Messrs Pott and M' Millan are liable to account for, and pay to the pursuers, for Abiel Wood's part or share of the freight of the ship Diana, aforesaid, the sum of £342, 18s. 1½d., say, Three hundred and forty-two pounds eighteen shillings and three halfpence, and no more.

“ And we farther determine and award, that the within-named vessel,

Union, was, at the time of the arrest, of the value of £395, say, Three hundred and ninety-five pounds, and no more. All which we hereby report to the Lord Ordinary, as required of us." No. 263.

When this award came to be applied, the pursuers contended that the sums there mentioned were to be paid over and above the £500 already paid under the interim decree, and that interest on the sums found due was carried by the award, as a necessary consequence; while the defenders maintained that these sums were found by the referees to constitute the whole amount of freights and value of the vessel arrested, in extinction pro tanto of which the £500 must be imputed, and that interest not being specially found due, could not, under the award, be decreed for. The Lord Ordinary pronounced this interlocutor:

"Remits the cause to the referees and oversman, in order that they may explain, first, Whether they intended that the sums for which they found Measrs Pott and M'Millan were liable to account, were to be in addition to the sum of £500 sterling paid under the interim-decree of this Court, or not; and second, Whether they had any, and if any, what intention, with regard to interest on the capital sums which they found to be due."

The pursuers thereupon reclaimed, and contended, first, That there really was no ambiguity; and, second, that it was incompetent to require referees, who had pronounced their award, to explain it by any further deliverance. The Court declined entering into this latter question, being satisfied that there was no ambiguity in the award; and their Lordships accordingly, without stating which of the two constructions contended for they put upon it, recalled the Lord Ordinary's interlocutor, and in respect there was no ambiguity in the award, remitted to his Lordship to apply the same.

W. PATRICK, W.S.—A. BAYNE, S.S.C.—Agents.

R. AITKEN and Others, Advocators.—*Skene—Pyper.*

No. 264.

J. REID, (for Trustees of Statute Labour, Glasgow,) Respondent.—
Jameson—Monteith.

Trust.—Expenses.—Circumstances where a party having been allowed a proof that certain trustees would have had a free fund in their hands wherewith to satisfy claims, if they had managed the trust funds properly, and having failed to establish the fact, found liable in the expenses.

THE Trustees of the Glasgow Statute Labour Fund became bound to May 16, 1832. Aitken, and certain other proprietors of houses in Glasgow, that the expense incurred for certain improvements in that city, and advanced by those proprietors, should "be paid from the statute-labour conversion, when, and as soon as the state of the funds will permit, but not sooner than five years." After the expiry of that period, Aitken, &c., raised the pre-

May 16, 1832
Anderson, &c.
v. Pott, &c.
Aitken, &c. v.
Reid.

2d Division.
Lord Medwyn.
R.

No. 264. sent action before the Sheriff against the trustees, for fulfilment of their obligation. The trustees maintained that the claim was not exigible under the contract, until there should be a free fund over the expenditure to pay the debt. Aitken, &c., met this plea by an averment, that the monies levied by the trustees "have, or should have yielded," a balance sufficient to liquidate the debt, after payment of all expenses.

Aitken, &c. v.
Reid.

The Sheriff found, "that there is no fund or balance in the hands of the trustees, which can warrant a decree in this action for the sum concluded for," and assoilzied; "but in respect it is set forth by the pursuers, that the defender ought to be in funds sufficient for payment of the debt due by them," he reserved action at their instance against the trustees, calling them to account for the application of the trust-funds. The Court, on the 10th February 1829,¹ recalled this interlocutor, advocated the cause, and, with reference to the pursuers' averment, before answer, remitted to the Lord Ordinary to "allow an investigation into the state of the defender's funds since the date of the contract." The case having returned to the Lord Ordinary, his Lordship remitted to an accountant, who gave in a report of the trust expenses and management, concluding with this deduction: "From the above view it appears that, in 1826, when this action was brought, the debts which may be considered as having a preference to that of the advocates', could not be paid out of the funds of the trust." Thereafter certain payments to account of the claim were tendered by the trustees; and the Lord Ordinary, of consent, decerned for payment of certain sums; and as to expenses, pronounced the following interlocutor: "Having resumed consideration of the debate, advocates the cause; of consent, alters the interlocutor submitted to review, decerns for payment of the sum of L.393, 12s., together with the legal interest thereof from 29th June 1818, and till payment, and grants warrant to, and authorizes the advocates to uplift, pro tanto, the sum deposited in the Royal Bank of Scotland, to answer the claim on 11th November last, and finds no expenses due, either in this Court or the Inferior Court, prior to the interlocutor of 10th February 1829, except the expenses of the record in this Court: Finds the advocate liable in the expenses due subsequent to said interlocutor, and in the expense of the record, and appoints an account thereof to be given in; and remits to the auditor."^{*}

Both parties reclaimed as to expenses, but the Court refused both notes, and adhered.

LORD JUSTICE-CLERK.—I can see no grounds for altering the Lord Ordinary's

¹ Ante, VII. 390.

* "NOTE.—The Lord Ordinary has, in addition to hearing the parties, attentively examined the process from its commencement. One striking feature in it is this, that both parties, at the debate, distinctly stated their acquiescence in the views of

judgment. The advocates failed to prove the averment which they were allowed to prove in terms of their coadherence, and must pay the expense. I think the accountant was quite right, and there appears to have been no unnecessary expense incurred by the trustees in their management.

The other Judges concurred.

May 16, 1832.
Aitken, &c. v.
Reid.

Crawford, &c.
v. Bennet.

D. GRANT, W.S.—CAMPBELL and MACDOWALL, W.S.—Agents.

Mrs CRAWFORD and Others, Petitioners.—*Skene—Jameson—Shaw.* No. 265.
Wm. BENNET, (Crawford and Co.'s Trustee,) Respondent.—*D. F. Hope
—Brown.*

Process.—Circumstances in which a record was allowed to be opened up, on payment of expenses.

THE late John Crawford died leaving a large fortune, and nominating his widow and three sons to be his executors, by a deed executed in 1811. These sons traded under the firm of Crawford and Co., intromitted with the father's estates, and having become bankrupt, a sequestration was awarded, and Bennet appointed trustee. Claims were lodged by the widow and younger children, founded on a mutual trust-deed by the spouses in 1808, and the deed of 1811, and in respect thereof, to be ranked preferably as creditors of the father. The trustee having pronounced a judgment adverse to this claim, they presented a petition and complaint, which was remitted to the Lord Ordinary, and a record was prepared and closed. In this record the petitioners founded only on the deed 1811; but on cases being ordered, they referred to that of 1808, and an antenuptial contract there mentioned, but now amissing; and an ob-

1st Division.
B.

the Lord Ordinary, in his Notes of 22d July last, which bear, that the advocates' claim was not legally well founded when the process was instituted. There is no appearance that there was any investigation of accounts required by them, which was improperly refused by the trustee; and the judgment of the Sheriff, and of the Lord Ordinary, when the reasons of advocacy were repelled, proceed on a distinct statement of the respondent, not explicitly denied by the advocates. The claim for expenses on their part, therefore, seems utterly untenable. As, however, on going to the Inner-House, they obtained an alteration to the effect of entering into an investigation of the accounts, to show that they ought to have obtained payment, by which the Court indicated a somewhat different view of the contract from that maintained by the respondent, the Lord Ordinary feels himself warranted in relieving them of that part of the expenses. But he sees no ground for doing more. They must be liable for the expense of maintaining their right to demand payment when, by the terms of their agreement, the period for paying it had not arrived, which they did even after the accountant's report was given, and in the debate upon it on 9th July. They are not entitled to found on payment being now tendered, as this is not because it is legally demandable, but because it is practically convenient."

No. 265. *jection having been made to this, the Court ordered the case to be withdrawn, and a new one applicable to the record lodged. They then explained that from peculiar circumstances they had not been fully aware of their rights, that the record had been prepared in that state of ignorance, and offering to pay expenses. This was resisted; but the Court opened up the record, allowed an amended record to be prepared on payment of the expenses incurred since the date of the closing of the record, and remitted to the Lord Ordinary to proceed accordingly.*

THE COURT were of opinion that it was competent to them to allow the record to be opened up, and that under the circumstances this should be allowed on payment of the expenses subsequent to closing the record.

Petitioners' Authorities.—Melville, Dec. 12, 1828, (7 S. and D. 186); Lothian, March 3, 1829, (7 S. and D. 525); Ferguson, Jan. 26, 1830, (8 S. and D. 390); M'Donald, Sept. 21, 1831, (Ante, IX. App.); Hamilton, Nov. 15, 1828, (7 S. and D. 21); Henderson, Jan. 22, 1829, (7 S. and D. 303.)

J. THORBURN, S. S. C.—J. BALFOUR, W.S.—GIBSON-CRAIGS, WARDLAW, and DALEKILL, W.S.
Agents.

No. 266. JAMES WYLD and Co., Advocators.—*Rutherford.*
ARCHIBALD RICHARDSON, Respondent.—D. F. Hope—W. Bell.

Sale—Landlord and Tenant—Statute.—Intimation of a sale and order of delivery of spirits to the Excise storekeeper of a warehouse, situated within the premises of a distiller, in which spirits have been deposited under the 4 Geo. IV. c. 94., does not affect the landlord's hypothec for the rent of the premises.

May 17, 1832. By the 4 Geo. IV. c. 94, for the purpose of enabling distillers to warehouse spirits distilled by them, without payment of duty till it shall be necessary to remove them, it is provided as follows (§ 64):—“That

F. it shall and may be lawful for every distiller, or maker of spirits in Scotland and Ireland, respectively, licensed under this act, to warehouse any spirits distilled in the distillery of such distiller, without payment of the duty of excise chargeable thereon, according to the provisions of this act, and under and subject to such rules and regulations as the commissioners of Excise, or any two of them, shall from time to time direct or order, in any warehouse provided or approved of by the commissioners of Excise: Provided always, &c. that there be marked on each end of each cask, &c. the number of gallons of spirits contained therein, at the time of the sending of such spirits out of the distillery, for the removal thereof to the warehouse.”

By § 67, it is enacted, “that when, and as often as any distiller licensed under this act, shall intend to warehouse spirits, he shall give two days' notice in writing, to the officer or officers of Excise in charge of

the distillery of such distiller, and also to the Excise storekeeper in charge No. 286.
 of such warehouse, of such his intention, in which notice shall be set forth May 17, 1832.
 the mark, number, and content in gallons of each cask which such distiller Wyld, &c. v.
 intends to warehouse, and the day, and hour of the day, on which such Richardson.
 distiller intends to commence the removal of such spirits out of the store
 of such distiller to the warehouse ; provided always, that no removal of any
 spirits for such purpose shall be allowed without a permit, according to
 law."

By § 70, it is enacted, " that immediately on the arrival of such spirits under permit, as aforesaid, at the warehouse, the proper officer shall gauge and take an account of the contents of every cask, and the strength of the spirits contained therein, and shall enter an account thereof in a book to be by him kept for that purpose, and thereupon the storekeeper shall receive the same without delay into the warehouse, and shall deliver to the distiller, or person requiring the same, for the use of such distiller, a receipt for such spirits, specifying the number of the different casks, &c. with the day of the month and year when such spirits were warehoused, and any mark which may have been put on such spirits by such distiller, for distinguishing the spirits to be his property."

§ 72 enacts, that " if any distiller warehousing spirits, or other proprietor thereof, shall desire to take out the same for home consumption, it shall and may be lawful for such distiller or proprietor so to do, on paying to the collector of excise for the district, the full amount of the duty, &c. ; and upon production of the collector's receipt for such duty to the storekeeper, it shall be lawful for him to discharge the cask or casks mentioned in the collector's receipt, and to deliver a permit for the conveyance of the same to the distiller or proprietor thereof, or to such place as such distiller or proprietor shall direct or require."

By § 77, it is enacted, " that it shall be lawful for the distiller or proprietor of any such spirits so to be lodged in any warehouse aforesaid, in the presence of the storekeeper, who is hereby required to attend at all reasonable times for that purpose, not oftener than once in twenty-four hours, to view, examine, and show for sale such spirits, or any part thereof."

By § 78, it is enacted, that " upon all spirits which shall be warehoused in any warehouse under the provisions of this act, &c., there shall be chargeable, and charged and paid to the collector of excise, to the use of his Majesty, &c. warehouse rent, at the rate of one penny British currency per week, for every forty gallons of such spirits, and so in proportion for any smaller quantity ; and such rent shall be a lien on such spirits, and such spirits shall not be delivered out of such warehouse until such rent is paid."

Ralph Strachan, who carried on a distillery in Leith, in premises held by him in lease from the respondent Richardson, had a cellar within

No. 266. these premises set apart for the deposition of spirits on which duty had not been paid, the only key of which was kept by the Excise storekeeper. A quantity of spirits, which had been distilled by Strachan, and permitted from his general stock, was deposited in this cellar under the statute. On the 27th April, 1830, Wyld and Co. purchased from Strachan fourteen puncheons of these spirits, and, on the 4th May, fourteen more; and they obtained from Strachan orders for delivery, which they intimated to the Excise storekeeper. Thirteen of these puncheons were removed by Wyld and Co. at different times, but while fifteen remained in the warehouse Strachan became bankrupt, and his trustees prevented their removal. Twelve puncheons were sold by the Crown, in payment of the duties of other spirits due by Strachan. Richardson, the landlord, having, in security of the rents due to him, applied to the Sheriff of Edinburghshire, for sequestration of the goods within the premises, including the remaining three puncheons of spirits, and the usual warrant having been granted, Wyld and Co. presented a counter petition, praying to have the warrant recalled, as to the three puncheons, and to find that they alone were entitled to possession of them.

In support of this petition, Wyld and Co. contended that spirits, in the bonded warehouse, were in the exclusive custody of the Excise storekeeper, and the distiller, though entitled to obtain possession on payment of the duties, had no sort of control over them; that the statute evidently contemplated a change of property from the distiller to third parties, by the use of the terms "*distiller or proprietor*"; and, according to the ordinary rules of common law, the transfer of property was completed by intimation to the custodier, who, after such intimation, held them for the purchaser, subject always to the claim of the Crown for the duty.

To this it was answered, that the spirits were not removed out of the premises of the distiller, but transferred from his general stock to his bonded stock, to the effect only that they could not be taken out without payment of the duties; that consequently, while they so remained, no sale could effectually transfer the property, as there was no change of possession, which continued to be that of the distiller himself, although for revenue purposes the Excise officer had the custody of the warehouse; and that, accordingly, the Crown had seized twelve of the puncheons sold to Wyld and Co., not for the duties on these puncheons, but for those due on other spirits, which could not have been done had the property been transferred from the distiller to Wyld and Co. As, therefore, the property still remained with Strachan, and the spirits were within the premises, the landlord was entitled to sequester them for payment of the rent of these premises.

The petition by Wyld and Co. having been conjoined with the process of sequestration, the Sheriff, on grounds which it is unnecessary

May 17, 1832.
Wyld, &c. v.
Richardson.

to recite, refused the petition. Wyld and Co. having brought an advo- No. 286.
cation, the Lord Ordinary remitted simpliciter, adding the subjoined note.*

The Court adhered, subject to a qualification, that Wyld and Co. were entitled to an assignment of the hypothec over other articles in the dis-tillery belonging to the bankrupts.

May 17, 1832.
Wyld, &c. v.
Richardson.

LORD JUSTICE-CLERK.—My difficulty as to altering is founded on the precise words of the act of Parliament. This statute gives important accommodation to the distiller, to have part of his stock, with the duties unpaid, placed in this ware-house within his own premises. The spirits so deposited the storekeeper enters in his books, and it is provided, that if the distiller desire to take them out, it shall be lawful for him to do so, “on paying to the collector of excise for the district the full amount of the duty,” and that on a receipt being produced to the storekeeper, it shall be lawful to him “to deliver a permit for the conveyance of the same to the distiller or proprietor thereof.” Till the duties be paid there can be no removal, and the spirits must remain in the premises, and so are as completely under the con-trol of the landlord as any other property within it. The payment of duties, &c. are all preliminary to removal, and, apart from all the rules of common law, this

* “**NOTE.**—As the Lord Ordinary does not entirely concur with the Sheriff in all the grounds upon which he rests his judgment in this case, he would have advo-cated the cause, and put the decision on the grounds on which he thinks it should be rested. But as it has been conjoined with a process of sequestration in the Inferior Court, the Lord Ordinary is unwilling to bring the parties away from that Court, so peculiarly applicable to such summary processes, and therefore contents himself with explaining the grounds of his opinion in a Note.

“The Distillery Act, 4 Geo. IV. c. 94, which authorizes a bonded warehouse with-in the premises of the distiller, for depositing spirits prior to the payment of the duties, is for the benefit of the distiller, and the purchaser from him, and contains no allusion to the landlord’s right, and of course neither abridges nor affects it in the smallest degree, when the distillery happens not to be the property of the dis-tiller himself. There is no provision made, as in the case of a public bonded ware-house, relative to what shall operate as a transfer of the property prior to actual delivery; but this is left on the footing of the common law. Now the right of the landlord to sequester for his rent, whatever subject once belonging to the distiller, has not been transferred to a purchaser, is unquestioned; but it is argued that, having purchased the whisky, and paid the price to the distiller, and obtained from him an order of delivery, the intimation of this order to the Excise officer who kept the key of the warehouse, (it is said the only key,) made the officer custodier for the purchaser, and transferred the property to him. But it seems clear, that upon the principles of the law of Scotland, without actual delivery, for symbolical de-livery is here out of the question, the property could not be transferred; and as a proof of this, it is not denied that no less than eleven puncheons, which were exactly in the same situation as the three sequestered by the landlord, were seized and sold by the Excise, without objection on the part of the advocates, for a debt due by the distiller to the Crown. If it had been wished to withdraw the puncheons now claimed from the landlord’s claim for rent, it was necessary to have paid the duties on them, and removed them from off the premises.”

No. 266. statute must be complied with, and I therefore concur in the views taken by the Lord Ordinary,

May 17, 1832.
Wyld, &c. v.
Richardson.

Easton v.
Longlands.

LORD GLENLEE.—In the case of *Maxwell v. Stevenson*,¹ which was on the Customhouse acts, the question was, whether the goods warehoused could be transferred without observance of certain regulations pointed out in the statute. The Court thought there was no transference, because these regulations had not been complied with. But that judgment was reversed on the general ground, that what had been done there was sufficient to transfer at common law, and without regard to the statute at all. This creates some difficulty with me. By the law of Scotland, although actual apprehension be in general necessary, yet exceptions are allowed in certain sorts of cases. It is not plain to me, however, that the present comes within them, for I am not satisfied that if the distiller had himself paid the duties he might not have been entitled to get the spirits, notwithstanding the intimated order of delivery to the purchasers; or suppose he had sold to a second purchaser, and given him an order, and that this second purchaser had paid the duties and got delivery, could the first purchaser have reclaimed the spirits as his property? I have great doubts if he could. Then if the distiller were not totally and entirely divested, (as in the view of the Excise he was not, since they seized part of the spirits sold for other duties,) I cannot see how the landlord's hypothec can be avoided. Still I am a good deal staggered by the case of Stevenson.

LORDS CRINGLETIE and MEADOWBANK were for adhering.

J. R. STODART, W.S.—P. COUPAR, W.S.—Agents.

No. 267.

JOHN JAMES EASTON, Suspender.—*Robertson.*
DAVID LONGLANDS, Respondent.—*Monteith.*

Landlord and Tenant—Dovecot.—Held, in passing a bill of suspension and interdict, that it is not relevant to justify a tenant in shooting his landlord's pigeons, to allege that they are destructive to his farm.

May 18, 1832.

1st Division.
Bill-Chamber.
Ld. Corehouse.

S.

IN 1818 Longlands took a farm, part of the estate of Kersie Bank, belonging to the suspender, for 19 years. The suspender was qualified, in terms of the statute, to have a dovecot; and at this time, and for a great many years previously, there was a dovecot situated not far from the farmhouse. Longlands alleging that he had frequently sustained great loss by the pigeons picking up the grain which he had sown on his fields, and that of late their numbers had so increased as to render his labour unavailing, caused several of them to be shot, for the purpose of driving them from his fields. On a remonstrance being made, he stated that he would forbear, provided the suspender would be at the expense of a herd to protect the fields; but this was declined. A bill of suspension and interdict was then presented, founded on the statutes relative to dove-

¹ March 2, 1830, ante, VIII. 618, reversed in the House of Lords, April 4, 1831, ante, IX. Appendix, No. 22.

cots, and praying for an interdict, prohibiting Longlands, and all others No. 267. in his service, "from shooting or otherwise destroying the pigeons of the said dovecot, belonging to the said John James Easton, in time coming." May 18, 1832.
Easton v. Longlands.

In defence, Longlands maintained that he was entitled to protect his property from devastation by destroying the pigeons, that this had been found lawful in the analogous case of rabbits, and that the statutes were not intended to apply to such a case, but only to prevent pigeons being shot without any proper cause for doing so.

The Lord Ordinary passed the bill, and granted interdict.

Longlands reclaimed.

LORD BALGRAY.—The only question before us relates to the passing of the bill, and the question raised is one of a very important and general nature, and on that ground alone the bill should be passed. If, however, I were called on to give a judgment, I would hold that the tenant was not entitled to shoot the pigeons. Both Voet and Heineccius lay it down that they are to be regarded as property, and they are recognised as such in no less than four acts of Parliament. I believe that these acts originated in this. In remote times there was in the spring seasons a scarcity of fresh animal food, and the clergy appear to have introduced dovecots with the view of making a provision for this want. The effect, however, was injurious to the country, and the statute 1617 was passed as a restraint on proprietors. To entitle them to the enjoyment of this property, and to have it protected, it was required that they should have lands adequate to the production of ten chalders of grain. The suspender has that qualification, and therefore is entitled to have his property protected. An idea prevails in the country that a pigeon which is six miles distant from its dovecot may be shot, because it is supposed to have then lost the *animus revertendi*, and the quality of property. But this is quite erroneous. The case of rabbits is different. They dig and burrow into the land, and as the proprietor could not be permitted to do this, neither will his rabbits be permitted.

LORD PRESIDENT.—The respondent cannot complain of hardship, because he took his farm in the full knowledge of the existence of the dovecot.

LORD CRAIGIE.—It was the business of the respondent to employ a herd, not that of the landlord.

THE COURT accordingly adhered.

Suspender's Authorities.—Statute 1503, c. 74; 1567, c. 16; 1617, c. 19; 1697, c. 270; Murray, Jan. 19, 1797 (7628.)

Respondent's Authorities.—3 Ersk. 6. 28; Balfour, 491; 2 Bank. 367; Brodie, July 2, 1752, No. I. App. Dovecot; Moncrieffe, Feb. 13, 1828 (6 S. and D. 530.)

J. MURKIE, S.S.C.—J. HENDERSON, S.S.C.—Agents.

No. 268.

ROBERT KING, Suspender.—*Robertson—J. Paterson.*

May 18, 1832.
 JAMES HUNTER and Others, (for the Greenock Bank,) Chargers.—*Key*
King v. Hunter, &c.
 —*Pyper.*

Meditatione Fuga.—Held, in passing a bill of suspension, that an oath of verity by a party applying for a meditatione fuga warrant, is an essential requisite.

May 18, 1832. On the 27th of February 1832, a petition was presented to the Sheriff of Renfrewshire, in these terms:—“The petition of James Hunter of Hafton, John Scott, John Scott, junior, Charles Cunningham Scott, Alexander Thomson, George Robertson, junior, all of Greenock; and William Smith of Liverpool, bankers, copartners, carrying on business under the firm of the Greenock Bank Company; humbly sheweth, that Robert King, maltman, distiller, and farmer at Largs, is justly indebted and owing to the petitioners the sum of £1800, conform to account herewith produced. That the petitioners are informed that the said Robert King is about to leave the kingdom and go beyond seas, for the purpose of defrauding the petitioners of payment of their said just debt, whereby the following application becomes necessary.

“ May it therefore please your Lordship to take the oath of one of the petitioners, to the verity of the facts above set forth; and, thereafter, grant warrant for apprehending and bringing the said Robert King before you for examination; and, thereafter, grant farther warrant for imprisoning him in the jail of Greenock, as in meditatione fuga, therein to remain, till he find security, to answer to the issue of any action or diligence of the law, to be raised or executed against him, at the petitioners’ instance, within six months of the date of the bail-bond, in common form.” The Sheriff “ appointed the petitioner to make oath to the facts therein stated, and to condescend upon the grounds and nature of his information.” Thereafter, James Hunter Robertson, who was one of the partners of the Greenock Bank, but had not been made a petitioner, emitted an oath, whereupon the Sheriff issued a warrant for the apprehension of King. On considering a declaration by King, he granted warrant to commit him to prison until he should find caution in the usual terms. King was accordingly imprisoned, and, after he had remained there for some time, he presented a Bill of Suspension and Liberation, stating that he was merely a cautioner for the debt; and contending, that as no oath of verity had been emitted by the petitioners, but only by a person who was not a petitioner, the warrant was illegal.

To this it was answered, that an oath of verity was not essential where there was other evidence satisfactory to the mind of the Judge; that two previous similar applications had been made against the suspender, in

both of which Mr Hunter Robertson was a petitioner, and had emitted No. 268. oaths of verity ; that the present one had been prepared in much haste while the others were not at hand, and his name had been accidentally omitted : But the fact was undoubted that he was a partner of the Bank, and the suspender had admitted enough in his declaration to supersede the necessity of any other evidence.

May 18, 1832.
King v. Hun-
ter, &c.

The Lord Ordinary passed the bill, and issued the subjoined note.*

The chargers reclaimed, but the Court, without hearing the counsel for the suspender, adhered.

LORD BALGRAY.—This is a remedium extraordinarium, and I would be sorry to see any of the checks upon it loosened. It is the duty of the party applying to make the oath, and the party complained on is entitled to have that oath. The suspender was a cautioner, and the debt might have been paid by the principal obligant ; so that, independent of the fixed rule, that there must be an oath, he was entitled to have the fact deponed to that the debt was still subsisting.

LORD CRAIGIE.—It is true, that among us this is a new remedy, but it was long known and acted on in other commercial countries ; and even with us it is

* “ Note.—There may have been good grounds in this case for obtaining a meditatio fugae warrant against the suspender ; but the Lord Ordinary entertains a doubt if it was regularly issued. The respondents, James Hunter, and others, styling themselves copartners, carrying on business under the firm of the Greenock Bank Company, presented a petition to the Sheriff of Renfrewshire, setting forth that the suspender was indebted to them in the sum of L.1800, conform to account produced, and that he was in meditatione fugae, and praying for a warrant to apprehend him, &c. in common form. On that petition, the Sheriff pronounced an interlocutor, appointing the petitioner (meaning probably the petitioners, or any one of their number) to make oath to the facts stated in the petition ; but neither did the petitioners, nor any of their number, nor any person bearing to be their attorney or mandatory, make oath to that effect. James Hunter Robertson emitted an oath, but he was not a petitioner, nor alluded to in the petition. The interlocutor of the Sheriff, therefore, was not obtempered ; and there is no oath by any person entitled to appear in the proceeding to the verity of the debt. The respondents say, that the oath is not an essential part of the form, if other satisfactory evidence is produced to the Judge ; and that the suspender, when examined, admitted the debt to be due. Assuming that an oath in every case is not necessary, a point far from being clear, while the Sheriff’s interlocutor, appointing the respondents to depone, stood unrecalled, it does not appear that he himself could dispense with that form. But it is more material to observe, that there is no admission in the suspender’s declaration, that the debt is due, though he admits that he signed the documents referred to in the account. On the contrary, he had presented a Bill of Suspension, of a charge given on one of them, viz. a bill for L.500 ; and a sist had been granted in the Bill-Chamber, and was in force at the time the meditatio fugae warrant was applied for. The competency, therefore, of granting the warrant, without an oath to the verity of the debt, and without a direct admission to that effect on the part of the alleged debtor, is questionable. A train of decisions proves, that the law of Scotland is jealous of this remedy, which is so liable to abuse, and will not overlook any irregularity or looseness in the procedure.”

No. 268. now a remedy as common as the ordinary civil diligence. It is not a statutory proceeding, and I think that we are to go to the substance, and not to be prevented from doing justice by a mere omission in point of form. The debt is admitted, and therefore there is complete evidence of its subsistence. Besides, the suspender did not object to the want of an oath at the time the warrant was issued.

May 18, 1832.
King v. Hunter, &c.

Osborne v.
Brown.

LORD GILLIES.—I concur entirely with Lord Balgray. This is not a civil, but a criminal proceeding; and it will not do to say, that in matters of this sort we are to disregard established forms. I am quite satisfied that there must be an oath by the party making the application, and here there is no such oath. In the present question we cannot look at the declaration. It may, however, be a very different matter for consideration, whether this party be entitled to damages.

LORD PRESIDENT.—I am of the same opinion. The party must not only swear to the verity of the debt, but that he believes the debtor to be in *meditatione fuge*. If we are to dispense with this form, then this will be a precedent for dispensing with some other form, and so all form will be frittered away. I cannot accede to such a proposition.

Suspender's Authorities.—2 Bell, 559; Prat, June 30, 1826 (4 S. & D. 780.)

Charger's Authorities.—Wright, Feb. 6, 1782 (8553); Dean, Jan. 27, 1803 (11765.)

C. FISHER—D. GRANT—Agents.

No. 269.

JANE A. OSBORNE, *Advocator.*—*Cunninghame.*
WILLIAM BROWN, *Respondent.*—*Shene—A. Wood.*

Discharge—Condition.—Circumstances in which a party found not entitled to avail himself of a condition of nullity of a discharge in a certain event, he not having complied with another relative condition.

May 18, 1832.
1st DIVISION.

ON the 8th of November, 1811, William Osborne and John Gregg granted a bill to James Brown for L.525, payable twelve months after date. Osborne was the true debtor, and Gregg cautioner. When the bill fell due it was dishonoured, and in January 1814, Brown obtained a decree against both Osborne and Gregg. Osborne became bankrupt, and offered a composition of 10s. per pound to his creditors on condition of a discharge. Brown and the other creditors acceded, but Gregg was no party to that arrangement. Bills having been granted by Osborne, and cautioners for the composition, Brown subscribed, on 10th June 1814, a discharge in favour of Osborne, “with this express declaration and condition only—first, that this discharge shall only have effect on the said composition-bills being paid, and no otherways; and second, that by subscribing these presents, the said James Brown is not to be any ways prevented from aging against John Gregg of Greenockmains, a joint obligant with the said William Osborne, to the extent of the balance still due the said James Brown, and any expenses he may incur, and from having right to recover payment thereof from the said John Gregg, any more than if he had not subscribed these presents, or accepted the said composition; otherwise, that if the con-

trary should turn out to be the case,—if such a question should be agitated at law by the said John Gregg, then the said James Brown's signature hereto shall be void and null, in the same manner as if it had never been adhibited; and we, the said William Osborne or his cautioners, shall receive back said composition so paid, under deduction of the expenses which the said James Brown may be put to in trying said question with the said John Gregg, if such question should be agitated, the payment of said composition, except as is above excepted, being in such a case vacated, and declared to return.” The composition-bills were duly paid.

No. 269.

May 18, 1832.
Osborne v.
Brown.

In November 1814, Brown charged Gregg for payment of the balance, after deducting the composition; and in the meantime Gregg had got a decree of relief against Osborne, on which he executed inhibition. Gregg being unable to pay any part of the debt, Brown, in 1816, raised an action against him, concluding for a transfer of the decree of relief, and of the inhibition. In defence, Gregg pleaded that Brown had liberated him by accepting payment of a composition, and discharging Osborne, but stating that he was ready to execute a transference, on Brown granting him a discharge. Brown did not accede to this, or repay the composition, and at this time nothing farther appeared to have been done. But on his death, and after that of Osborne his heir, the respondent obtained an assignation in 1828, from Gregg, to the decree of relief and inhibition, whereupon he raised an action before the Sheriff of Ayrshire, founding on the assignation, and concluding against the advicator, as the representative of Osborne, for payment of the balance, after deduction of the composition. In defence, the advicator rested on the discharge, and pleaded that, as Gregg had raised the question of his liability, Brown should have repaid the composition; and that not having done so, the discharge must receive effect. Besides, the respondent sued as assignee of Gregg, and as Gregg never paid any thing, he had no claim of relief.

To this it was answered, that the purpose of the qualification in the discharge was to prevent Gregg, as a cautioner, from pleading that he was thereby liberated; that if he stated such a plea, then, in order to obviate it, the composition was to be returned; but it was never intended that thereby Osborne should be free from payment of the debt; that it was of no importance that the composition was not returned, because Brown would have been entitled instantly to have recovered it back, with the balance of the debt.

The Sheriff decerned in terms of the libel; but, in an advocation, the Lord Ordinary assailed the advicator, with expenses, and issued the following note.*

* “The case is this:—Brown, the respondent's father, agreed to accept a composition of 10s. in the pound, from his debtor, Osborne, with sufficient caution, qualified with the condition that his claim against Gregg, a co-obligant in the bond, should be preserved, and if Gregg stirred the question at law, whether he was liberated by

No. 269. The Court adhered.

May 18, 1832.
Osborne v.
Brown.

LORD BALGRAY.—There was here a novatio debiti, a new contract; and we must interpret it on a principle of bona fides. It was just to this effect—the right to go against the cautioner was reserved, and if the cautioner founded on the discharge, then the composition was to be repaid, in which case, decree would have been got against the cautioner, and he, in his turn, would have obtained decree of relief, and a new arrangement would have been made; but the composition was repaid; and now, when the original parties are dead, and matters changed, the present action is brought. It is impossible that we can sustain it.

The other Judges concurred.

GREIG and MORTON, W.S.—BOWIE and CAMPBELL, W.S.—Agents.

Brown's acceptance of the composition, that the agreement should be null, and that the composition-money should be repaid to Osborne and his cautioners, deducting the expense of the lawsuit with Gregg. This happened in 1814, and the composition bills were duly paid. Brown immediately afterwards charged Gregg on the bond, and Gregg in his turn charged Osborne on a decree of relief, which he had previously obtained. By doing so, Gregg stirred the question, whether he was liberated by Brown's accession; for his claim of relief depended on the circumstance whether he was bound to Brown or not. And he did this still more decidedly and expressly in 1816, when Brown brought an action against him to obtain an assignation to his decree of relief; and he pleaded in defence, that Brown, by discharging Osborne, had discharged him. In terms of the condition, therefore, the composition-contract, as with Brown, was null; and if Brown chose to avail himself of that condition, he was bound to return the composition-money to Osborne and his cautioners. The clause stipulating the return of the money was very important; for it was not intended that Brown should have all the advantages of an acceding creditor, while he was not bound by his accession, and it prevented Osborne and his cautioners from being kept in suspense, whether he was discharged or not. But Brown did not return the money: he and his representatives kept it in their pockets for fourteen years after Gregg stirred the question, and long after he had become bankrupt, without notice to Osborne or his cautioners; and then the respondent having obtained an assignation from Gregg to the decree of relief, brought the present action against the advocator. It is thought that the respondent is barred by his taciturnity, by his failure to implement his part of the condition, and by attempting to change the only title on which he received and retained possession of the money—namely, by converting a composition, in discharge of his debt, into a partial payment of it. Farther, with regard to the shape of this action, the respondent insists only as Gregg's assignee, and in right of Gregg, in a claim of relief against Osborne's representative. But Gregg was never entitled to relief from Osborne, as he paid no part of the debt to Brown, and, as is admitted, has long been irretrievably bankrupt. From what has been said, it will appear that this case is materially different from that of Smith v. Ogilvie, 22d November 1821, cited by the respondent."

JOHN HAMILTON, Suspender.—*Cunninghame.*
HENRY RUSSEL, Charger.—*Rutherford.*

No. 270.

Hamilton v.
Russel.

Pactum Illicitum—Gambling Debt—Bill of Exchange.—Plea of vitium reale sustained against the bona fide onerous endorsee to a bill granted for a gambling debt, though he was ignorant of the circumstances under which it was granted.

THE suspender, Hamilton, accepted a bill for £200 in payment of a May 18, 1832, gambling debt. Russel, the charger, was an endorsee to the bill, and a suspension of a charge at his instance having been brought on the ground of the vitium reale attaching to the bill, as granted in consideration of a game debt, Russel maintained that this plea could not affect him, as he was ignorant of the circumstances under which the bill was granted, and was an onerous bona fide holder. The Lord Ordinary ordered cases, with which he made avizandum to the Court, adding the note subjoined.*

LORD JUSTICE-CLERK.—I can have no doubt that the plea of vitium reale is good. The point was most deliberately considered by the Court in the late case of Graham of Gartmore, where we followed the law as it had been laid down by Lord Mansfield. If there is to be any alteration of that law, it must occur in the House of Lords, and not here.

LORD CRINGLETIE.—I think such a bill is just a piece of waste paper.

LORD GLENLEE and **MEADOWBANK** assented.

THE COURT accordingly suspended the letters simpliciter.

Suspender's Authorities.—Stat. 9 Anne, c. 14; Maxwell, July 14, 1774, and June 15, 1775 (M. 9522 and 10,580); Thomson on Bills, 154 and 162-4; Chitty on Bills, 86; Lowes, I Starkie, 385; Webb, 3 Taunton, 6; White's Trustees (Graham of Gartmore's case), Jan. 22, 1819 (ante, V. 40, note), and Lord Mansfield's opinion there quoted; Elliott, Nov. 24, 1826 (ante, V. 40).

Charger's Authorities.—Eruk. 3. 2. 31; Crawford, Feb. 24, 1749 (875); Lambton and Co., June 21, 1799 (App. I. Bill of Exchange); Scott and Co. Feb. 27, 1812, (F. C.); Bailey, 106; Neilson, Jan. 25, 1740 (M. 9507); Stewart, Feb. 18, 1741 (M. 9510); I Bell's Com. 300, last edit.; Bayley on Bills, 416, 4th edit.; Jones. 1816, Holt's Rep. 257 and 258.

HOPKIRK and IMLACH, W.S.—**ROBERT M'INTOSH.**—Agents.

* “The Lord Ordinary has made avizandum with this case, which affords the opportunity of reviewing former judgments upon the question, How far an onerous and bona fide endorsee of a bill granted for a game debt, which circumstance was unknown to him, can enforce payment from the acceptor? as being more fit for the decision of the Court than a single judge, even in the first instance.”

No. 271.

May 18, 1832.
Caven v.
Mackie.ALEXANDER CAVEN, Suspender.—*D. F. Hope—W. Bell.*
JOHN MACKIE, Jun. Charger.—*Jameson—W. Bell.*

Partnership—Process.—One of two copartners of a dissolved company, the affairs of which had not been wound up, having paid a debt under diligence, and taken an assignation thereto, held incompetent for him to proceed with the diligence against his copartner, for his alleged proportion thereof.

May 18, 1832. In the year 1825, Caven, Mackie, and one Murray, entered into partnership as distillers, by a contract which provided that each partner should draw a share of the profits, and bear a proportion of the loss, corresponding to the capital advanced by him, and that the partnership should subsist for three years, or, in certain events, for five years. At Martinmas 1826, Murray withdrew, and Mackie acquired right to his interest in the concern.

The company gave up business in 1829, and, at Whitsunday 1830, when the five years expired, Mackie intimated in the Gazette that he had ceased to be a partner. In October of the same year, he presented a petition to the Sheriff of the county where the distillery lay, to have the implements, &c., judicially sold, which was accordingly done, and the proceeds lodged with the Sheriff-clerk; but no proceedings were adopted for winding up the affairs of the company, and bringing on an accounting between the partners. While carrying on business, Mackie had granted to one M'Tier, (who was Caven's uncle,) a bill, under the company firm, for £200, and after it had ceased to do business, M'Tier raised action on it against the company, before the Sheriff of Wigton. This action was resisted by Caven, but decree was ultimately pronounced, in virtue of which M'Tier raised letters of horning, and charged the company, and Mackie and Caven, as individual partners. Mackie having paid the amount, took an assignation to the diligence, and obtained letters of horning, under which he charged Caven for the restricted sum of £44, 8s. 10*½*d., being 8-36ths of the £200, which was, as he alleged, correspondent to the proportion of capital advanced by Caven. Of this charge, Caven brought a suspension, chiefly on the ground that, while no accounting had taken place between the partners, it was incompetent for one of them to do diligence against the other on a company debt which he had discharged; and he pleaded,—

Although a company have ceased to do business, it subsists as among the partners themselves, to the effect of winding up; and the rights of the copartners must be regulated by the ordinary rules of law regarding this contract. No one partner, however, by paying a particular debt, can acquire a right to demand from his copartners a proportion of that debt irrespective of the advances they may have made on other debts. His claim can only be for an equalization of his general superadvances, on a full accounting of the whole transactions, and for whatever balance may,

on such accounting, be ascertained to be due him; and as this can only be ascertained in a proper process of count and reckoning, it is incompetent for any one partner, by taking an assignation to a debt discharged by him, to proceed against the others summarily by means of diligence.

May 18, 1832.
Caven v.
Mackie.

On the other hand, it was pleaded for Mackie,—

As each partner is equally liable in the company debts, each is bound, after a dissolution, to advance a rateable proportion; and if one advances the proportion which should have been paid by his co-partner, he is justly entitled to take an assignation, so as to enable him to keep matters in a state of equality till a final accounting. Accordingly, in the case of M'Intyre v. Maxwell,¹ the Court allowed a partial accounting as to particular transactions, although there were others outstanding, and although there was no conclusion for a final accounting, so as to settle the respective rights of the partners in regard to the whole concern. The action there, it is true, was an ordinary action, but as a suspension affords the means of bringing on an accounting, there is nothing in the mere form of action to prevent a co-partner obtaining his relief, if the principle be admitted that he is entitled to do so; and indeed a suspension affords the means of entering into a general accounting.

The Lord Ordinary pronounced an interlocutor, which, after repelling certain reasons of suspension unnecessary to be noticed, proceeded thus:—“ Sustains this reason of suspension, that it is not competent for one partner of a company, even after its dissolution, who has been compelled to pay a company debt, to charge another partner for his proportion of it, by means of summary diligence, in virtue of an assignation, while the affairs of the company are unsettled, as between the partners, as it is established by articles 18 and 19 of the statement, is the case here, and even although the fault of this being the case may lie with the suspender; therefore, sustains this reason of suspension, suspends the letters and charge simpliciter, and decerns; finds no expenses due.”

The Court adhered.

LORD JUSTICE-CLERK.—If we were to adopt the doctrine maintained against this interlocutor, we would be sanctioning a new form of process for winding up the concerns of a partnership. One partner pays a bill, whether voluntarily or by compulsion is of no consequence, but can he proceed by summary diligence against his co-partner? The cases of co-acceptors and cautioners do not apply. The extent of the obligation in such cases is clear and defined, but here it is totally illiquid; and to allow a party to proceed in this summary manner, would be contrary to all precedent and principle, as the balance may be directly the other way.

LORD GLENLEE.—I am of the same opinion. What authority has the charger to liquidate the amount he shall claim, and proceed by summary diligence?

LORD CRINGLETIE.—I hesitate to say that the charge is not competent. There

¹ January 15, 1831, ante, X. 284.

No. 271.

May 18, 1832.
Caven v.
Mackie.ALEXANDER CAVEN, Suspender.—*D. F. Hope—W. Bell.*
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Although a company have ceased to do business, it subsists as among the partners themselves, to the effect of winding up; and the rights of the copartners must be regulated by the ordinary rules of law regarding this contract. No one partner, however, by paying a particular debt, can acquire a right to demand from his copartners a proportion of that debt irrespective of the advances they may have made on other debts. His claim can only be for an equalization of his general superadvances, on a full accounting of the whole transactions, and for whatever balance may.

judicial examination of the trustees' manager, and thereafter, with the Sheriff, a bill of advocation was presented, and a remit made for all the order for judicial examination, and to proceed in advising the Sheriff accordingly recalled this order, and allowed a proof, object of which was to ascertain whether the sheep of the two grazings estimation formed part of the stock of the farm. A proof was then led, advising which the Sheriff found that the sheep of these grazings and the farms, formed one and the same stock, and repelled the defences. It was then brought an advocation, in which Lord Fullerton, Ordinary, pronounced an interlocutor, finding that he was not bound to take the stock of these grazings, and that at the time of delivery he did not know that it was included in the stock handed over to him, and remitting the Sheriff to recall his interlocutors, and allow a proof as to the proportion belonging to these grazings. Against his Lordship's interlocutor the trustees presented a reclaiming note, but not having the full record appended, it was refused, and Lord Fullerton's interlocutor thus became final. Thereafter the cause returned to the Sheriff, who allowed a proof in terms of the Lord Ordinary's interlocutor. Birtwhistle's trustees presented a bill of advocation, stating that the matter in dispute exceeded the value of £40, and craving to have the case advocated, in terms of the 6 Geo. IV. c. 120, with a view to a trial by jury. The Lord Ordinary (Moncreiff), "in respect that a proof has already been taken in this cause by commission, or depositions in writing; and farther, in respect that the proof now ordered by the Sheriff was so ordered in obedience to an express judgment of this Court, pronounced by Lord Fullerton when that matter was fully before him, refused the bill, and found the complainers liable in expenses." This interlocutor having been pronounced upon the 9th of March, the advocates presented a second bill of advocation during the recess.

Upon the 16th March 1832, the Lord Ordinary (Meadowbank) refused this bill as incompetent; and thereafter, upon the 21st March, his Lordship, in reference to a note against giving out the certificate of refusal, "being quite clear that the second bill of advocation was incompetent," refused the prayer of the note.

Birtwhistle's trustees reclaimed.

LORD MEADOWBANK.—The ground of incompetency is well expressed in Lord Moncreiff's interlocutor of the 9th of March. It is clear, that the clause of the act quoted in the papers never meant to apply to such a case as this, where a final interlocutor of this Court goes to the Sheriff, who just repeats it, to give effect to that judgment. But there is a second objection to the competency of the bill; it was not presented within fifteen days from the date of the Sheriff's interlocutor, in terms of the third section of the 19th chapter of the act of sederunt for the Sheriff-court. This objection is alone sufficient, as was decided in the cases of Graham v. The Duke of Montrose, (V. 38.) and that of Falconar, Shiels, and Co., (V. 919.)

No. 272.
May 19, 1832.
Gill, &c. v.
M'Ra.

No. 271. must, no doubt, be a count and reckoning, but I doubt if we can say it is incompetent to bring on a count and reckoning in this way; and as to the man's fixing the amount charged for by his own authority, it happens every day. Any obligant in a bond, when he pays it and gets an assignation, is entitled to throw out of view the shares of insolvent co-obligants, and fix the amount for which he shall charge those who are solvent, so as to equalize the whole among the solvent parties. It is not incompetent for him to do so, though, in a suspension, the accuracy of his apportionment may be disputed. This is, however, no objection of incompetency, and I therefore think the partner here is entitled to bring on the accounting in this way. It opens room for the plea of compensation, but is not incompetent, and though we cannot at present find the letters orderly proceeded, it appears to me to be going too far to hold it incompetent.

LORD MEADOWBANK.—I agree with the chair. This is the case of a company not wound up, and I cannot imagine any thing more clear than that it would be attended with most gross injustice to allow summary diligence to be used. The charger is not foreclosed of his process of count and reckoning, as we only decide that diligence is not to go out against his co-partner.

J. M'CRACKEN,—CAMPBELL and M'DOWALL, W.S.,—Agents.

No. 272. JAMES GILL and Others, (BIRTHWHISTLE'S TRUSTEES), Advocators.—
Cuninghame.

DUNCAN M'RA, Respondent.—D. F. Hope—Walker.

Process.—1. Where a proof on certain points of a cause had been taken in an inferior Court, and judgment pronounced, and thereafter in an advocation a remit made with special instructions to allow a further proof, and the Sheriff had allowed a proof in terms thereof—held, that it was not competent to advocate the cause, under the provision of the act 6th Geo. IV., c. 120, § 40, with regard to the advocacy of interlocutors allowing a proof. 2. Not competent to present a bill of advocacy of a Sheriff's interlocutor, under the provision above referred to, after the expiry of fifteen days from the date thereof.

May 19, 1832.

2d Division.
Bill-Chamber.
Lords Meadowbank and
Moucreiff.

BIRTHWHISTLE's trustees raised an action before the Sheriff of Ross-shire against Duncan M'Ra, incoming tenant of the lands of Strathnashalg and Bein-a-Chaisagan, founding on missives entered into betwixt the parties, whereby M'Ra had agreed to purchase the whole stock on these farms, and had accordingly obtained delivery, and concluding for payment of the value. M'Ra alleged in defence, that stock of other grounds had been imposed upon him, besides that of the farms taken by him.

The Sheriff allowed a proof to M'Ra, that all or any of certain descriptions of sheep (being those mentioned in the agreement), not belonging to the farms in question, were delivered to him as part of the stock thereof. A proof was led accordingly, on advising which, the Sheriff-substitute found that the stock of two grazings, not included in the bargain, formed part of that delivered, and allowed a further proof of the number of sheep which these grazings maintained. An appeal was taken against this interlocutor to the Sheriff-depute, who before answer allow-

ed a judicial examination of the trustees' manager, and thereafter, with No. 272. leave of the Sheriff, a bill of advocation was presented, and a remit made May 19, 1832.
Gill, &c. v.
M'Ra. to recall the order for judicial examination, and to proceed in advising the appeal. The Sheriff accordingly recalled this order, and allowed a proof, the object of which was to ascertain whether the sheep of the two grazings in question formed part of the stock of the farm. A proof was then led, on advising which the Sheriff found that the sheep of these grazings and of the farms, formed one and the same stock, and repelled the defences. M'Ra then brought an advocation, in which Lord Fullerton, Ordinary, pronounced an interlocutor, finding that he was not bound to take the stock of these grazings, and that at the time of delivery he did not know that it was included in the stock handed over to him, and remitting to the Sheriff to recall his interlocutors, and allow a proof as to the proportion belonging to these grazings. Against his Lordship's interlocutor the trustees presented a reclaiming note, but not having the full record appended, it was refused, and Lord Fullerton's interlocutor thus became final. Thereafter the cause returned to the Sheriff, who allowed a proof in terms of the Lord Ordinary's interlocutor. Birtwhistle's trustees presented a bill of advocation, stating that the matter in dispute exceeded the value of £40, and craving to have the case advocated, in terms of the 6 Geo. IV. c. 120, with a view to a trial by jury. The Lord Ordinary (Moncreiff), "in respect that a proof has already been taken in this cause by commission, or depositions in writing; and farther, in respect that the proof now ordered by the Sheriff was so ordered in obedience to an express judgment of this Court, pronounced by Lord Fullerton when that matter was fully before him, refused the bill, and found the complainers liable in expenses." This interlocutor having been pronounced upon the 9th of March, the advocates presented a second bill of advocation during the recess.

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No. 272.

May 19, 1832.

Gill, &c. v.

M'Ra.

Kerr, &c. v.

Thomson.

LORD JUSTICE-CLERK.—I think all the objections are good; but looking at the grounds of Lord Moncrieff's interlocutor, refusing the bill, it appears to me that they are perfectly unexceptionable; it would be most inexpedient to make such an application of the clause quoted from the act of Parliament, which never contemplated the mixture and confusion of jurisdiction which that interpretation would involve.

The other Judges concurred.

THE COURT adhered.

R. RUTHERFORD, W. S.—JAMES MACDONNELL, W. S.—Agents.

No. 273.

KERR and Co., Advocators.—*Rutherford—Russell.*

DAVID THOMSON, Respondent.—*D. F. Hope—G. G. Bell.*

May 22, 1832.

1st DIVISION.

Ld. Corehouse.

B.

THIS was a question of fact. Thomson alleging that he had sent 2000 pieces of cambrics to Kerr and Company, as callenderers, and that they had not returned 512 pieces, raised an action against them, before the Sheriff of Lanarkshire, for restitution of these goods, or for payment of their value. Kerr and Company denied that they had received the alleged quantity; but, on advising a proof, the Sheriff decerned against them; and, in an advocation, the Lord Ordinary remitted simpliciter, and the Court adhered.

Inglis and Donald, W. S.—J. Burnside, W. S.—Agents.

Single Bills.

No. 274.

A. GIBSON, Reclaimer.—*D. F. Hope.*

H. STEPHENSON and Others, Respondents.—*Rutherford.*

Process.—Papers, which afterwards, and without alteration, formed the record in a cause, having been appended to a reclaiming note presented before closing the record, held sufficient in a second note, presented after closing, to refer to the papers as previously appended to the first note.

May 19, 1832.

2d DIVISION.

AFTER the papers in this case were prepared, Gibson having declined to close the record, the Lord Ordinary decerned against him. He then presented a reclaiming note, having the prepared papers printed and appended, and being now ready to close, the Court remitted to repon him, and close accordingly. The record was then closed on the papers, as printed and appended to the reclaiming note, without any alteration; and, after some discussion, the Lord Ordinary pronounced an interlocutor unfavourable to Gibson, who presented a reclaiming note, to which he did not append the record, but merely the interlocutors closing it, with a reference to the papers of which it was composed, as formerly printed with the previous note. To the competency of this note, it was objected on the part of the respondents, that these papers did not form the record when printed, the reference was not sufficient. The Court, however, held the reference quite sufficient, there having been no alteration in the papers before closing the record, and repelled the objection.

J. WIGHT, W. S.—PEARSON, WILKIE, and ROBERTSON, W. S.—Agents.

THOMAS B. BUCHANAN, Advocate.—*D. F. Hope—Brown.*
A. and T. YUILLS, Respondents.—*More—Crawford.*

No. 275.

May 22, 1832.
Buchanan v. Dunn,

Process.—Expenses.—1. An omission to put the name of the pursuer's agent on the service copy of a summons in the Inferior Court, does not infer nullity of the process, but only a fine on the pursuer; 2. Expenses awarded against a party unsuccessfully defending a judgment of an inferior Judge.

On a verbal report by the Lord Ordinary, as to whether the omission to endorse the agent's name on the service copy of a summons in the Inferior Court, inferred a nullity of the process, or only a fine, the Court instructed the Lord Ordinary to remit to the Sheriff to alter his interlocutor dismissing the process, and to impose a fine of 5s. upon the pursuer, for the neglect.¹ The Lord Ordinary accordingly remitted, and found expenses due in this Court.

The respondents reclaimed, both on the above point, and particularly on expenses, contending, in regard to the latter, that as the judgment of the Sheriff was in their favour, they ought not to be subjected in expenses; and in support of this proposition, they referred to the late case of Hartford and Company in the House of Lords.

The Court adhered.

MOWRAY AND HOWDEN, W.S.—R. HAMILTON, W.S.—Agents.

MARY DUNN, or MASON, Pursuer.—*Whigham.*
JAMES MERRY, Defender.—*D. F. Hope—Moir.*

No. 276.

Process.—Where a party brought an action of reduction of several deeds, and a record was closed, issue joined, and verdict found as to one of the deeds, and the case, quoad ultra, was depending, and the pursuer thereupon brought a reduction-improbation of the deeds not falling under the verdict on the head of falsehood, &c., found that this process must be staved till either the original one was decided or abandoned.

THE pursuer brought an action of reduction against the defender, of a contract in 1787, of articles of roup in 1790, and of a sasine in favour of the defender's father in 1791, on various grounds, but particularly that the contract was not her deed. A record was closed, and an issue sent to a jury, whether the contract was not her deed, and a verdict was found for the defender. He was therefore assolved from this part of the case, and parties were appointed to be heard, quoad ultra. The pursuer then raised an action of reduction-improbation of the articles of roup, of a disposition consequent thereon, and on which the above sasine followed, and of the

¹ See ante, p. 235.

No. 276. *sasine* itself. The grounds of reduction were the same as in the former case, with the addition that the deeds were false, feigned, &c.

May 19, 1832.

Dunn, or Ma-
son, v. Merry. The defender stated, as a preliminary defence, that as this was substantially an action similar to the one in dependence, it was excluded by the plea of *lis alibi pendens*; and at all events ought to be sisted till the original action was either decided or abandoned. The pursuer, on the other hand, insisted that it ought to be remitted to, and conjoined with, the former action.

The Lord Ordinary pronounced this interlocutor, accompanied with the subjoined note.* "In respect that, in the previous action of reduction, a record was long ago closed, and an issue for trying all the matters of fact, on which the pursuer then demanded an issue, was settled and was tried, and that a verdict was returned thereon and applied by the Court; and in respect that the present action of reduction and improbation calls for two of the same deeds, which were those called for, and as to which no judgment has yet been pronounced; and that the pursuer's interest to reduce the third deed here called for, depends on the reduction of the articles of roup embraced by both actions: Sists process until that previous action shall either be finally decided or shall be abandoned by the pursuer, and to this effect sustains the preliminary defence; but, *quoad ultra*, finds the action competent, and repels the plea of *lis alibi pendens*."

The pursuer reclaimed, but the Court unanimously adhered.

JAMES TAYLOR, S.S.C.—T. and T. DARLING, W.S.—Agents.

* "It seems to be too late to attempt to add to the former reduction. The reduction-improbation is certainly a different case, and, in the point of *falsehood*, could not be barred by any result in the simple reduction. But, after the other case has gone so far, to allow this new action to go on along with the first, would, in effect, be precisely to allow an amendment of the libel, not only after the record was shut, but after complete *litiscontestation* on the shut record, by issue, trial, and verdict. There could be no reason for not giving an issue on the articles of roup and *seisin*, except that no question of fact was supposed to be involved in the reduction as to them, other than that which affected the contract. But the present summons is plainly intended to make a new case of *fact*, which must end in a new trial, if not otherwise barred. It seems to the Lord Ordinary to be clearly within the rule provided by the statute, for the abandonment of the first action in a manner equivalent to the English non-suit; and he does not think that the pursuer is entitled to avoid the penalty of costs, by the device of calling the action supplementary. It is quite different from the case where, before the record was closed, and while, in ordinary circumstances, an amendment of the libel was still competent, the Lord Ordinary allowed an improbation to be conjoined with a simple reduction."

ROBERT RUSSELL, Petitioner.—*Marshall.*
JOHN DAVIDSON, Respondent.—*Sol.-Gen. Cockburn—W. Bell.*

No. 277.

May 22, 1832.
 Russell v. Da-
 vidson.

This was a complaint by one factor on an estate against another, for delivery of certain papers and effects. No point of law arose, and the papers having been given up, the Court under the circumstances dismissed the complaint, but found no expenses due.

1st Division.
 H.
 Edin. & Leith
 Shipping Co. v.
 Downe, &c.

THOMSON and ELDER, W.S.—**J. DAVIDSON**, S.S.C.—Agents.

EDINBURGH and LEITH SHIPPING COMPANY, Pursuers.—*Keay—L'Amy.* No. 278.
DOWNE, BELL, and MITCHELL, Defendants.—*D. F. Hope—Buchanan.*

Agent and Principal—Partnership—Reparation.—1. Circumstances in which the breach of a commission-contract by a principal, held not justified by the embarrassed circumstances of the agent. 2. It being provided in a contract of copartnery, that all the agents should be obliged to find security, and certain of the partners having been employed as agents under a special agreement, which contained no stipulation to that effect,—held that these agents were not bound to find security.

In 1809, the Edinburgh and Leith Shipping Company entered into a contract with Downe, Bell, and Mitchell, wharfingers in London, whereby, on the one hand, the Shipping Company bound themselves, that for seven years, or until a year after notice to resile subsequent to the lapse of six years, all their vessels trading to London should frequent Downe's wharf, occupied by Downe, Bell, and Mitchell, and that these parties should, for the same period, be entitled to collect their freights at a certain commission; and, on the other hand, Downe, Bell, and Mitchell bound themselves to receive all such vessels at their wharf, and to exclude all others, and to perform the duties of agents free of all expense other than the commission. By the contract of copartnery of the Shipping Company, in which all the partners of Downe, Bell, and Mitchell, held shares, it was provided, "that the agents for the Company at London and other places shall give security to the satisfaction of the directors;" but no stipulation to this effect was introduced into the contract between the Shipping Company, and Downe, Bell, and Mitchell. For some time, the contract was acted upon; but in October 1813, the Shipping Company despatched Mr Walker, one of their managers, to ascertain the state of the account with Downe, Bell, and Mitchell, with power to take upon himself the management of the Shipping Company's agency in London, till some other arrangement should be adopted. Walker demanded of Downe, Bell, and Mitchell, security to the extent of £2000, as a condition of their being permitted to continue the collection of freights. This Downe, Bell, and Mitchell refused, and in February 1814, the Shipping

2d Division.
 Ld. Mackenzie.
 T.

No. 278. Company, on a notice of only two days, removed all their vessels from Downe's wharf to another higher up the river, called the Glasgow Wharf, to which they thereafter exclusively sent their vessels, and they also superseded Downe, Bell, and Mitchell in the collection of the freights. For this breach of contract, Downe, Bell, and Mitchell raised an action of damages, while the Shipping Company also raised a counter action, on the allegation that Downe, Bell, and Mitchell had failed duly to implement their obligations under the contract. The main grounds on which the Shipping Company rested their defence, and founded their own action, were as follows :—

1. That Bell, one of the partners of Downe, Bell, and Mitchell, was at the date of the contract, a sequestered bankrupt undischarged, and that this circumstance had been concealed.
2. That Downe, Bell, and Mitchell were in such embarrassed circumstances as to be incapable of properly conducting the business intrusted to them as wharfingers and agents ; and, in particular, that they had refused bills drawn on them by the Shipping Company, when they had, or ought to have had, freights in their hands to answer them, and had neither collected nor transmitted the freights as they were bound to do. That, in these circumstances, they were at least bound to have found security, the more especially as the contract of the Shipping Company, of which they were partners, expressly stipulated that the agents in London should find security ; and that not having done so, the Shipping Company were entitled to withdraw from the wharf ; and,
3. That they had, without the consent of the Shipping Company, raised the rate of their wharf charges.

After a good deal of procedure, issues were prepared, with a view to a Jury trial ; but the cause being considered by the Jury Court unfit for that mode of ascertaining the facts, was re-transmitted, and a proof allowed by commission, with diligence to recover writings. A very extensive proof was accordingly gone into, the general results of which the Court held to be as follows :—

1. That although at the date of the agreement Bell was a sequestered bankrupt undischarged, he was resident at Leith, where the business of the Shipping Company was carried on, was a partner of their own company, and that the directors were cognisant of his circumstances.
2. That Downe, Bell, and Mitchell, although under circumstances of much embarrassment in regard to money matters, had carried on their business as wharfingers for several years after the withdrawal of the Shipping Company's vessels, had ultimately paid all their creditors in full, and had in no respect failed in their duty in regard to the wharfing department ; and that in regard to the agency branch, although they had refused certain drafts drawn on them by the Shipping Company, there was no evidence that they were then in funds, or ought to have been so, by the collection of freights, while it appeared that the Shipping Com-

pany at times drew on them for their own accommodation, when they could not expect they should have funds to answer their drafts. No. 278.

3. That there was no evidence of the rates charged by Downe, Bell, and Mitchell, being higher than the ordinary rates of other wharfs, and that no complaint appeared ever to have been made prior to the withdrawal of the vessels on this head, or of any neglect in the wharfinger department.

May 22, 1832.
Edin. & Leith
Shipping Co. v.
Downe, &c.

It further appeared, from a letter of one Ellet, (now deceased,) a confidential agent of the Dundee and Perth Shipping Company, that Walker, the manager above mentioned, had stated to him, that the only cause of complaint on the part of the Shipping Company was the falling off of passengers ; that this they attributed to the situation of Downe's wharf being so far down the river ; that they had some intention of removing their business, but that the contract with Downe, Bell, and Mitchell stood in the way ; that they were to take the opinion of counsel whether they were not entitled to be free in respect of a change of partners ; that by drawing closely, Downe, Bell, and Mitchell had been prevented getting into arrears, and that " excepting a demand or two for renewals," the Company " had no cause to complain on cash matters."

The Lord Ordinary pronounced this interlocutor :—" In the action at the instance of Downe, Bell, and Mitchell, against the Edinburgh and Leith Shipping Company, Finds it proved that the defenders did, by contract, become bound, that for seven years after the 11th of October 1809, all vessels employed by the defenders in the conveyance of goods and passengers between London and Leith, should resort to, and be berthed at the pursuers' wharf ; and that the pursuers should collect all the freights of goods carried by the said vessels, and receive a certain commission thereon : Finds, that nevertheless the defenders, upon the 1st of February 1814, withdrew their vessels from that wharf, and did not thereafter allow the pursuers to collect the said freights : Finds no circumstances proven which are sufficient to justify the said breach of contract ; and, therefore, finds the said defenders liable in damages to the pursuers for the same ; but, before modifying the same, appoints the parties to be further heard respecting the amount of damages only : In the action at the instance of the Edinburgh and Leith Shipping Company against Downe, Bell, and Mitchell, assizes the defenders simpliciter, and decerns."

The Shipping Company reclaimed.

LORD JUSTICE-CLERK.—The question is, whether, under this written contract, the Shipping Company were justified in abruptly breaking off, and I can see no grounds for their having done so. The idea of Bell's bankruptcy entitling them to break off is preposterous ; and, besides, he was a partner of their own Company, living in Leith, and they knew his circumstances. In the same way, it is of no consequence that Downe, Bell, and Mitchell are said to have been embarrassed. This might have been so had it prevented them from fulfilling their part of the contract, but there is no pretence for that. I have as little difficulty as to that

No. 278. part of the proof showing that they repeatedly required that the Shipping Company
 May 22, 1833 should provide for bills passed on them. They said, if we can collect freights sufficient, we will answer them, and they do so openly throughout, and though two bills
 Edin. & Leith Shipping Co. v. were returned, that in the circumstances afforded no ground of objection ; and, Downe, &c. besides, such objection was not taken at that time. The material fact is, that no person ever was impeded in the sending of goods, &c. Their conduct, as wharfingers, was unexceptionable, and nothing is even alleged to the contrary. It is only as to the collection of freights that complaint is made, and looking to the practice of the trade, I think they were perfectly justified in saying, unless we are in funds we won't answer bills, and in fact be your bankers in London. There is just one other point—the refusal to find security. Now, there is not a word in the contract requiring this ; and it is no answer for the Shipping Company to say, that it is provided in their own contract of copartnery that agents shall find security. The directors may be liable to their copartners for not stipulating this, but it can't impose a burden on the wharfingers, when no stipulation to that effect was inserted into the agreement with them. On the whole, I see nothing to justify their conduct, though I see the cause of it in the letter of Ellet. Downe's wharf was lower down than others, particularly the Glasgow wharf, which was better situated for catching passengers, and it was from their anxiety to have the advantage of it that all this arose ; but having unjustifiably broken the contract, I am clear for adhering.

LORD GLENLEE.—It appears to me in this light. There can be no sort of doubt that Downe, Bell, and Mitchell were in sadly labouring circumstances, and though their duty as wharfingers might notwithstanding be duly discharged, the far more important duty of collecting freights might be very imperfectly done in consequence. Then if an agent be in that condition, that, according to events we see occur every day, his employers are exposed to risk, it might be reasonable for them to ask caution, or raise an action to put an end to the contract on that ground. The Shipping Company here, however, take on themselves to break at once. It is said the pursuers never failed in regard to their part of the contract, but I am not sure of that, and therefore would have wished to see the accountant's report, to know whether they had funds when they refused the bills ; and I am much struck by what appears from some of their own letters, where the expense of renewed bills is to be borne by Downe, Bell, and Mitchell, which could not be unless they ought to have paid the first. Neither is it enough to say, that the freights were outstanding ; according to usage they do not lie over more than three months ; and if they allowed them to lie over beyond that without suing for them, so that they become desperate, they are answerable as in the case of a factor. I could have come to a more certain opinion if we had had the report of an accountant, as to whether the people had remitted all they had, and I feel the defect of materials for judging, and therefore would have remitted to an accountant, to see how the balance stood ; though, if your Lordships are satisfied, of course it will be unnecessary.

LORD CRINGLETIE and **LORD MEADOWBANK** concurred in the opinion of the
LORD JUSTICE CLERK.

THE COURT accordingly adhered.

REV. JAMES SHAND, Claimant.—H. J. Robertson.
JAMES BLACK, (Shand's Trustee).—Neaves.

No. 279.

May 24, 1832.
 Shand v. Black.

In a multiplepoinding, the claimant was preferred to certain shares of the Aberdeen Assurance Company, held in name of a bankrupt, Shand, for his behoof; but the Lord Ordinary found no expenses due.

May 24, 1832.

1st Division.
 Lord Newton.

D.

The Court, however, under the circumstances, altered, and found expenses due.

J. SHAND, W.S.—J. Ross, S.S.C.—Agents.

JOHN HUNTER, Pursuer.—Keay—W. Bell.
GEORGE'S TRUSTEES, Defenders.—Shene—Robertson.

No. 280.

Bill of Exchange.—Circumstances in which an endorsee of a bill, found not to be an onerous bona fide holder.

HUNTER raised an action on a bill drawn and endorsed by Macdonald, and accepted by George and Reid, against the trustees of George (now dead), for payment of the amount. In defence, the trustees founded on a letter by Macdonald to Reid, promising to retire the bill when due, and alleged that Hunter (who was Macdonald's brother-in-law) had got the bill from Macdonald after the execution of a trust-deed in favour of creditors, and under other circumstances, which showed that he could not be a bona fide holder.

May 24, 1832.

1st Division.

S.

Ld. Corehouse.

Hunter v.

George's

Trustees.

The Lord Ordinary found that, "in the circumstances of the case, as admitted by the pursuer, he is not entitled to the privileges of a bona fide and onerous endorsee; but, in respect that the defenders do not found upon the letter from Macdonald the drawer, to Reid, as conclusive evidence that the bill was an accommodation to the drawer, in so far as George was concerned, but refer to books and other documents on these subjects," remitted to an accountant to examine and report.

Both parties reclaimed. The pursuer, on the ground that the report of the accountant might establish the oneroity of the transaction, and therefore, that in that event he was entitled to recover—and the defenders maintaining that the letter was conclusive evidence of the bill being an accommodation to Macdonald; that the admitted facts identified the pursuer with him, and therefore that they were entitled to absolvitor.

The Court adopted the argument of the defenders, altered, and assolved, with expenses.

J. HUNTER, W.S.—A. DUN, W.S.—Agents.

No. 281. JAMES BROCK, (Colin Gillespie's Trustee,) Advocate.—*Rutherford—Ivory.*

May 24, 1832.
Brock v.
Brocket, &c.

ANDREW BROCKET, and Others, (James Gillespie's Trustees,) Respondents.—*D. F. Hope—More.*

Proof—Right in Security.—The transfer of certain shares in a Company established by Act of Parliament, which declared the entry in the Company books the only test of property, having been entered in the books, and being there specified as a transfer in security, held that it lay on the party in whose favour it had been granted, to prove that the security was general and not special, by production of the deed of transfer itself, and interdict granted against a sale, till he should so produce it.

May 24, 1832. THE Cranstonhill Water-works Company of Glasgow is established by
 2d Division.
 Lt. Medwyn. T.
 Act of Parliament, whereby it is inter alia provided, that every deed of
 conveyance, by which shares in the Company may be transferred, "shall
 be kept by the said purchaser or purchasers, for his, her, or their security,
 after the clerk or clerks to the said company of proprietors shall have en-
 tered, in a proper book or books to be kept for that purpose, a memorial
 of such transfer and sale, for the use of the said Company;" and "that a
 certificate, taken from the said books, shall be admitted, in all courts
 whatever, as evidence of the title of such proprietor, his or her executors,
 administrators, and assigns, to the share or shares therein specified; but
 the want of such certificate shall not hinder or prevent the owner of any
 of the said shares from selling or disposing thereof." And further, "That
 all and every person and persons whose names shall, at any time hereafter,
 stand in the said Register-book, or list of proprietors of the said Company,
 either as a proprietor or proprietors of one or more share or shares in the
 said undertaking, whether as subscribers, or as successors, exécutors, ad-
 ministrators, or assignees of subscribers, shall be deemed and taken to be
 the proprietors of the several shares standing in the said books in their
 respective names."

Several shares in this Company were held by James Gillespie, who, in 1811, granted to his brother, Colin Gillespie, a transfer, of which the following minute was entered in the books of the Company:—"In virtue of an original deed of assignment, dated the 18th day of February, 1811 years, by James Gillespie of Finnieston, in favour of Colin Gillespie of Glasgow, merchant, of 28 shares of capital stock of the Cranstonhill Water-works, Nos. 93 to 112 inclusive, and 440 and 447, also inclusive, in the said undertaking, to be held by him in security only, the said 28 shares are hereby assigned, in security, as aforesaid, into the name of the said Colin Gillespie, for which credit is given in the books of the Company of Proprietors of the said Water-works, at the Company's Office, Glasgow, this 22d day of February, 1811."

In 1821, the estates of Colin Gillespie were sequestered under the bankrupt statute, and in 1826, James also having become insolvent,

executed a trust-deed for behoof of his creditors in favour of the respondents, Brocket and others. The deed of transference from James to Colin could not now be discovered, but Colin's trustee, founding on the minute in the Company's books, was proceeding to take steps for bringing the shares to sale, as the property of Colin, when James's trustees presented a petition to the Sheriff of Lanark, setting forth that the transfer, along with a relative bond of relief, had been granted in special security of an obligation come under by Colin, to guarantee to John Mair and Son, of London, advances they had agreed to make to James, under a cash-credit bond, to the extent of £1000, and that the advances of Mair and Son had been fully repaid, and the bond for the cash-credit cancelled, and therefore praying to have Colin's trustee ordained to exhibit the deed of transfer and bond of relief, and in the meantime to interdict him from selling or disposing of the shares. In opposition to this, Colin's trustee answered, that the transfer was granted generally in security of all debts or obligations on the part of Colin in favour of James, and that the latter was indebted to the former in a considerable amount; and he pleaded that the minute entered in the books of the Company was the sole test of property in the shares, and sufficient to establish his right without production of the deed of transfer itself. To this it was answered, that the minute bearing expressly the transfer to be in security only, it lay on the party in whose favour it was granted, and who ought to be in possession of the deed itself, to prove by production of it, that it was in general security of all obligations. The Sheriff granted interdict in the meanwhile, and allowed a proof, which established to his satisfaction that the transfer had been in special security of Colin's obligation to Mair and Son, and that the cash-credit bond granted by these parties had been cancelled, and their advances extinguished. He therefore pronounced this interlocutor, adding the subjoined note.*—“Finds it proved, that the transfer of shares in question was granted by James to Colin Gillespie as a special security; with reference to, and for relief of the bond of guarantee by Colin Gillespie to Messrs Mair, Son, and Thomas, of London: Finds no proof that Colin Gillespie was ever called upon to advance any sum, under the said bond of guarantee, for the said James Gillespie: Therefore, continues the interdict; finds the defenders liable in expenses.”

No. 281.

May 24, 1832.
Brock v.
Brocket, &c.

* “The conclusion for production of the deed of transfer appears unnecessary. Under the clause in the act of Parliament referred to, the right of the assignee to receive and retain possession of that deed when recorded in the books of the Company, is a privilege, and not an obligation, either towards the cedent, or any third party. If the defenders wish to sell the shares in question, which they conceive to be their property, it will become both their interest and their duty to produce the deed of transfer, and, along with it, to show that their constituent, Colin Gillespie, was in advance for his brother James, under the bond of guarantee to Mair, Son, and Thomas. This was also the proper defence to the present application for interdict.”

No. 281. Colin's trustee thereupon brought an advocation, in which the Lord Ordinary pronounced the following interlocutor, adding the subjoined note:—"Having considered the closed record, and heard counsel thereon, advocates the cause: Finds that, by a deed of assignment, dated 18th February 1811, James Gillespie assigned to Colin Gillespie twenty-eight shares of the stock of the Cranstonhill Water Company, 'to be held by him in security only.' Finds, that the respondents state that this was granted in relief of a special obligation undertaken by Colin, as cautioner for a cash-credit for James, with Mair, Son, Thomas, and Co. of London; and that the bond for the said cash-credit has been cancelled: Finds, that the advocates, who maintain that it was a general bond, in security and relief of debts which Colin had undertaken, or might undertake for James, must produce said bond, which ought to be in their hands, in support of said averment; and, as they have failed to do so, or to prove the tenor of it, continues the interdict, and decerns; Finds expenses due."

Colin's trustee reclaimed.

LORD GLENLEE.—I have no notion that we can hold the security to be general, when the deed of transfer and bond of relief are not produced. It seems pretty clear that they must have been given up when the cash-credit bond to Mair and Son was cancelled; but at all events, we never can allow the sale by the party who ought to be in possession without production.

The other Judges concurring—

THE COURT adhered.

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

* "As this is simply a summary process of exhibition and interdict, and the advocates plead so strenuously this point of form, the Lord Ordinary has confined the interlocutor to these points, with such findings only as are necessary for supporting the conclusion. The respondents went more into the merits than necessary in the Inferior Court; but this was only following the example of the advocates, who not only entered at large in the answers to the petition, into the case, but joined issue with the respondents in leading a proof on the merits, adducing proof on their side also. Under these circumstances, the Lord Ordinary feels himself warranted in giving expenses, as if he had simply remitted. Under these circumstances, he does not think himself called upon to give any special interlocutor as to the points established in the proof."

No. 282.

May 24, 1832.
Yates's Trus-
tees v. Yeats, &c.YATES'S TRUSTEES.—*Murray.*JACOB YEATS.—*Jameson—Brown.*H. JOHNSTON and J. PATISON for Leith Bank.—*Anderson.*LOCKHART'S TRUSTEES.—*D. F. Hope—Hunter.*

Competing.

Hair and Executor—Payment—Appropriation.—Circumstances in which held that a sum of money had been specifically appropriated by a party deceased to the payment of a debt forming a real burden on a landed estate, so as to relieve the parties to whom he had destined the property from the burden in a question with his executor.

IN 1815, the late Mr Yates, who was domiciled in England, purchased from Colonel M'Donald of Lynedale, the Island of Shuna. In consequence of the subsistence of heritable burdens, and of an obligation undertaken by M'Donald to enter him with the superior free of expense, a balance of the price, amounting to £5500, was retained in Mr Yates's hands. This sum was in the disposition declared to be a real burden on the lands, and Mr Yates also granted his personal bond for the amount, which he further deposited in the Bank of Scotland. M'Donald thereafter assigned Mr Yates's personal bond, and the real burden created on the lands, to one Campbell, by whom again it was transferred to the Leith Bank. In 1829, Mr Yates paid £4000 of this balance to the Leith Bank, but the entry stipulated for not having yet been secured, there remained unpaid at his death, which happened in August 1829, £1500, and a like sum of that deposited as above mentioned, with the interest thereon, remained in the Bank of Scotland. By trust-disposition, of date 1st April 1829, Mr Yates conveyed to trustees the Island of Shuna, to be disposed to the Provost and Magistrates of Glasgow, in trust for certain purposes, and by a will in the English form, of date 17th April 1829, he appointed his nephew, Jacob Yeats, his sole executor and residuary legatee. Between this executor and the Shuna Trustees, (the Provost and Magistrates of Glasgow,) a dispute arose as to the £1500, with accumulated interest, lying in the Bank of Scotland;—the trustees contending that it was appropriated to the payment of the balance of the price of Shuna, subsisting as a real burden on the lands, while the executor maintained that it fell to him as part of the deceased's general moveable estate, and that the trustees must take Shuna subject to the burden made real over it by the titles. To determine this matter, a multiple-poinding was raised in name of the Bank of Scotland, in which claims were lodged for these parties. Claims were also given in on the part of the Leith Bank, as in right of the burden over Shuna, and of the trustees of the deceased Captain Lockhart, a personal creditor of Mr Yates. The Leith Bank rested their claim both on the alleged appropriation of the sum in dispute by the deceased to the payment of their debt, and on an

2d Division.
Ld. Mackenzie.
T.

No. 282. arrestment used by them in the hands of the Bank of Scotland, while Lockhart's trustees founded solely on an arrestment posterior in date to May 24, 1832. that of the Leith Bank.

Yates v. Yeats, &c. The grounds on which it was maintained by the Shuna Trustees and the Leith Bank, that the fund in medio had been appropriated by the deceased to the payment of the balance of the price burdening the lands, were as follows :—

When the balance of the price of Shuna was originally deposited in the Bank of Scotland, it was lodged in name of Mr Rose, Commissioner of Excise ; but in 1826, it was transferred to that of Mr Yates, and on this occasion the following minute was subscribed by these two parties :

“ On the 2d February 1819, the sum of £5,649, 2s. 5d. sterling (supplied by James Yates of Salcombe, county of Devon), was deposited in the Bank of Scotland, in the name of Samuel Rose, Esq., Commissioner of Excise in Edinburgh ; but as settled between the parties, in trust for, and to be under the direction of Mr Yates.

“ This sum was part of the price of Shuna, in Argyllshire, which had then been lately purchased by Mr Yates from a Colonel M'Donald, and was retained by him till some defects in the title-deeds of the property were removed, and certain stipulated agreements were fulfilled. It was lodged in the above Bank, partly for security, and placed in Mr Rose's name, partly in consequence of the distance of Mr Yates's residence in England, but chiefly to show to Macdonald, or others concerned, that he (Mr Yates) derived no benefit whatever from the deposit, or by withholding the money.

“ On the 12th March 1819, Mr Yates authorized Mr Rose to advance £4000 sterling, in further payment of the purchase-money, to the Leith Banking Company, which had then, by assignment from M'Donald, become entitled to receive it. The balance left in the Bank was therefore £1649, 2s. 5d., with the interest of the whole original deposit.

“ Unwilling to continue longer in such a protracted trust, Mr Rose has this day, with the consent of Mr Yates, given up the receipt or document granted by the Bank when the deposit was made ; and the latter has taken, in his own name, two receipts, one for the above balance of £1649, 2s. 5d., and another for £387, 12s. 6d., the interest now due.

“ Mr Rose stands therefore clear of all concern in the transaction, and both parties have subscribed this memorandum explanatory of it.”

On the 28th May 1827, Mr Yates wrote to Mr Thomson, banker in Greenock, in these terms :—“ I had heard of Colonel M'Donald's death before. There is £1500, with several years' interest, lying in my name in the Bank of Scotland, till certain defects in the title-deeds of Shuna are removed. The Leith Bank have an assignment of the sum, and it is odd, that though only 3 per cent is allowed on the deposit, they seem to be careless about the business. He, the Colonel, could not, I suppose,

from his embarrassment, have any interest in it; but why did not they . No. 282.
push him to purge the titles?"

On the 15th April 1828, Mr Yates executed a will with reference to the island of Shuna in the English form, whereby he appointed Alexander Thomson, banker, Greenock, Thomas Waller of London, and Henry Strong of Salcombe, his executors and trustees, and devised to them the island of Shuna in trust, to convey the same in proper legal form, according to the law of Scotland, to the Provost and Magistrates of Glasgow in trust, for the purposes therein mentioned. After narrating their purposes, the will proceeded thus:—"As the island of Shuna appeared from the public registers to be greatly encumbered when I bought it in 1815, and the title-deeds were in consequence very defective, a moiety of the purchase-money was retained till these defects were purged, and there still remains a balance of £1500, with interest, amounting together to about £2000, deposited in my name in the Royal Bank of Scotland, for which I possess the Bank's notes or receipts. My will is, that after my decease, these notes or receipts shall become the property of, and be endorsed or transferred by my executors in another will respecting my property in England, to my trustees, the magistracy of Glasgow; but that the money should remain where it now is till the defects in the title-deeds, as above mentioned, are cured, or till the said trustees are fully satisfied with respect to the same, and till an entry is made with Lord Breadalbane, the superior of Shuna, to whom a yearly feu-duty of £8 is payable, of a new vassal after the death of M'Lean, the existing one, according to a stipulation made by me with Colonel M'Donald, my predecessor in Shuna. These done, the sum held in deposit will become the property of his successors or assigns (for he is dead), and must accordingly be given up or transferred to them on discharging an heritable bond by me to the Colonel, for the unpaid part of the original price." This will was holograph of the deceased, and signed by him in presence of witnesses, but it was not sealed. A holograph copy of it was sent by him to Mr Thomson at Greenock.

On the 1st of May thereafter, Mr Yates executed another will regarding certain other property belonging to him, and all his "chattels and effects," and concluding as follows: "And I appoint executor of this my will, Thomas Waller of London, wine-merchant, and Henry Strong of Salcombe, maltster, whom I have likewise named executors and trustees in a separate will, which disposes of Shuna, and of a deposit of money, which lies in deposit with the Royal Bank of Scotland, and is to remain there till certain defects in the title are cured." This will, however, was scored across, and marked by the deceased, "Cancelled by another will." (Initialed) "J. Y."

In January 1829, Mr Yates wrote to Mr Thomson (one of the executors in the will of 15th April), as follows:—"The death of my predecessor M'Donald has not produced what I expected, a settlement of that

May 24, 1832.
Yates's Trus-
tees v. Yates, &c.

No. 282. part of the price of Shuna (£1500, with accumulating interest, at 3 per cent), which, for a series of years, has lain in deposit with the Bank of Scotland. I fancy, as it has not been settled now, there is some defect which cannot be cured till the decease of an old Highlander, the present vassal, and that the money must remain in deposit till then. Is there no removing it to your Bank, and will it be any advantage to you? I have the Bank's note; but can it be legally done?"

May 24, 1832.
Yates's Trust
tee v. Yeats, &c.

On the 1st April 1829, Mr Yates having in the meantime been advised that his will of 15th April 1828 was not expressed in terms effectual to carry Scotch landed property, executed the trust-disposition above mentioned, conveying in the Scotch form to the individuals named trustees and executors in the former will, the island of Shuna, to be by them dispersed to the Magistrates of Glasgew, for the same purposes as there expressed in that will, and containing the following passage:

" As the Island of Shuna appeared from the public records to be greatly encumbered when I bought it from Colonel M'Donald, £5500 of the price was retained by me, and lodged in the Royal Bank of Scotland till the estate was cleared of the defects in the titles. Of this sum there still remains, in the same depository, of principal and interest, about £2000. Besides clearing the encumbrances, Colonel M'Donald is under obligation to me to enter, at his own expense, a new vassal with the superior, Lord Breadalbane, a new one, instead of M'Lean, the old one, who is still alive. This will cost M'Donald's creditors, or successors, a year's rent of Shuna. But the titles, that is, the encumbrances, cleared, and the entry with the superior made, the notes or receipts I hold of the Royal Bank, will become, with the interest due upon them, the property of Colonel M'Donald's creditors, or successors, or assigns, and must be given up on delivery or discharge of my heritable bond for the balance of the price of Shuna. One of these bank-notes, or receipts, is for £1649, 2s. 5d., and the other for £387, 12s. 6d., being the interest which had accrued at the time of settling with the Bank, in 1826. Now, if this transaction should not be closed before my death, I have, in a separate will, which respects my property in England, directed my trustees, or executors in that will, to assign or endorse the notes or receipts of the Royal Bank, to my said trustees, the Lord Mayor and Bailies, to be kept by them in the same depository where they now are, till the above defects are cured, and till the entry stipulated to be made with the superior is implemented; or, if the latter is called for before the titles are purged, it may, with no impropriety, be taken from the sums in deposit."

Finally, on the 17th of the same month, he executed the will formerly mentioned, whereby, without any expressed revocation of former wills, he made certain bequests, and appointed Jacob Yeats his sole executor and residuary legatee, in these terms:—

" As to my goods and chattels, wherever situated, I give and bequeath them to the said Jacob Yeats, his heirs and assigns, requesting, but not

enforcing, his observance of some private instructions which accompany, No. 282, but are not to be considered as any part of this, hereby appointing him, May 24, 1829, and his aforesaid, my sole executor and residuary legatee. It may be Yeats's Trust well to mention, that I include in this bequest, my stock of cattle, and other effects in Shuna, which are considerable. In witness whereof, I have signed and sealed these presents, this seventeenth day of April, in the year eighteen hundred and twenty-nine."

The Shuna trustees and the Leith Bank contended, that these several deeds and writings establish a destination by the deceased of the sum deposited in the Bank of Scotland, to the payment of the balance of the price of Shuna, and consequent relief of the trustees from the burden in the tithes, and that the last will in favour of Jacob Yeats only carried the moveable effects of the deceased, not previously disposed of by any former will. The Leith Bank further contended, that whatever determination might be come to in regard to the matter of appropriation in the question of relief between the trustees and the executor, they were at all events entitled to be preferred, in virtue of their arrestments, they always clearing off any remaining encumbrances, and fulfilling all the obligations incumbent on Colonel M'Donald, the seller of Shuna, in whose right they stood.

On the other hand, the executor and personal creditors of the deceased pleaded—The questions as to the destination of the sum in dispute in relief of the Shuna trustees, and as to the specific appropriation of it to the debt due to the Leith Bank, must be kept separate and distinct, the one depending on the wills of the deceased alone, and the other resting solely on the other documents. As to the question of destination, the declaration regarding the fund in medio, in the inoperative will of the 15th April 1828, was necessarily revoked, and superseded by the general bequest in favour of the executor, of all the chattel property of the deceased in the will of 17th April 1829, while the declaration in the trust disposition was merely a narrative statement, not effectual as a will at all. Then, as to the alleged appropriation, there was nothing done to give any right to the Leith Bank. They never acquiesced in the deposition, and the deceased might have withdrawn the money at his pleasure ; and consequently there was no such appropriation as to deprive the executor of this portion of the moveable effects of the deceased, clearly comprehended under the general bequest in his favour.

The Lord Ordinary preferred the Shuna trustees, repelled the claims of the other claimants, and found no expenses due to any party. All parties reclaimed ; the trustees as to expenses, and the others on the merits.

LORD GLENLEE.—I am for adhering, but with this qualification, that after discharging any encumbrances remaining over Shuna, the fund should be paid over to the Leith Bank, who are now in right of Colonel M'Donald.

LORD CRINELIE.—The fund having been arrested by the Leith Bank, I did

No. 282. not see what we had to do with the question of appropriation, or how the trustees can compete with onerous creditors having arrested. Lockhart's trustees' arrestments are posterior to those of the Leith Bank; and I would give decree in favour of the Bank, subject to the burden of paying encumbrances.

May 24, 1832. *Young v. Pollock.* — LORD GLENLEE.—That is the more correct form, but it will not really alter the case.

LORD MEADOWBANK.—I think so, too; at the same time, unless the Leith Bank desire it, I would allow the interlocutor to stand, preferring the trustees, subject to the qualification proposed by Lord Glenlee.

Anderson, for Leith Bank.—We are satisfied with the proposed qualification, and do not require the decree of preference to be in name of the Bank.

LORD JUSTICE-CLERK.—Then we adhere, subject to the qualification.

Jameson, for the executor, craved that the Court should introduce into the interlocutor,—“In respect of the arrestment by the Leith Bank, adhere,” &c.; but the Court declined so to limit the grounds of decision, and adhered, subject to the qualification, that on the encumbrances being purged, and the obligations come under by Colonel McDonald fulfilled, the balance should be paid over to the Leith Bank.

Trustees' Authorities—Stair, 3. l. 4; Traquair v. Blackshiel, 8th March, 1626, (11,337, and 3591); Aikman v. the Heirs and Successors of David Boyd, 29th January 1679 (11,347); Earl of Minto v. Elliot, H. of L., 29th June 1825 (1 W. and S. 658); Viscount Oxenfurd, 1664 (Sup. III. 68); Waugh v. Jameson, 17th February 1696 (5453); Arrestnot, 23d June 1773 (5225); MacNicol v. MacNicol, 16th June 1814 (Fac. Col.); Erakine, 3. 4. 17—18; Stewart v. Bisset, 16th February 1770 (App. Compensation, No. II, Hall, p. 342).

JAMES C. REEDIE, W. S.—CAMPBELL and MACDOWALL, S. S. C.—BISSET and MORRISON, S. S. C.—GIBSON and HECTOR, W. S. Agents.

No. 283.

MARGARET YOUNG, Advocator.—*Cunninghame.*
JAMES POLLOCK, Respondent.—*Jameson—J. Paterson.*

Proof—Oath.—Incompetent, after a reference to oath and deposition emitted, to refer to and connect the statements of the deponent in the record with the deposition; but competent to order a re-examination.

May 25, 1832. — AFTER the judgment reported ante, p. 8, the advocator made a reference to oath, in consequence of which the respondent emitted a deposition. On advising it, the Lord Ordinary pronounced this interlocutor:

1st DIVISION.
Ld. Corehouse. S.—“Having considered the oath of the respondent, in connexion with the facts admitted in the record, finds that the respondent is not entitled to the privileges of a bona fide and onerous endorsee, and appoints parties to be farther heard in the cause.”*

* NOTE.—“The bills, for payment of which the present action is brought, were endorsed to the respondent in very suspicious circumstances, as admitted by himself in his replies, and they were still more suspicious if the statements of the advocator

The respondent reclaimed, and contended that it was incompetent, after No. 288, a reference had been made to the oath of party, and he had emitted an oath under the sanction of the pains of perjury, to travel out of the oath May 25, 1832. Young v. Pollock. and rest the judgment on statements appearing in the record, or any other extrinsic document.

The advocator answered, that although it might not be competent to refer to a party's statements to contradict his oath, yet it was quite competent to do so to the effect of explaining the oath, and that here the deposition was vague and unsatisfactory.

LORD BALGRAY thought there was nearly sufficient in the oath itself to support the inference drawn by the Lord Ordinary, but suggested that it would be proper to ordain the party to be re-examined, as part of the oath was unsatisfactory and unintelligible.

LORD CRAIGIE.—The question presented by the interlocutor of the Lord Ordinary, is one of great importance,—whether, after a party has emitted an oath, we can go to the record? I deny the competency of this in the most explicit terms. Even if the advocator were to show us a writing under the hand of the respondent, contradicting every word to which he has sworn, I would deny the competency of looking at it. If an oath were not to be held as conclusive in itself, and exclusive of all other evidence, the worst consequences might follow. Faith must be given by us to the oath, and if the party has sworn falsely he may be indicted for perjury, and if a verdict be found against him there may be a remedy. I am not, however, averse to a re-examination, and will concur in that proposition, but I cannot adhere to the Lord Ordinary's interlocutor.

LORD GILLIES.—The sole question into which we can go, is, what is disclosed by the oath, and I doubt if *mala fides* is made out by it. But there are unexplained and suspicious circumstances, and the respondent has referred to bills and books,

in her defences be true. He now admits, upon oath, that the only value he paid to M'Carter, the endorser for these bills, was a counter acceptance for £110, which M'Carter seems to have discounted, but afterwards to have retired himself. The transaction, therefore, was merely an accommodation to M'Carter. Before the respondent paid any part of the contents of the bill which he had so accepted to M'Carter, he had brought the present action against the advocator, and her defences had been returned, containing her statement with regard to the fraudulent mode in which M'Carter had obtained the bills. If the respondent had been in bona fide, he could not have failed to disclose all the circumstances of the case in his replies, which would have enabled the advocator, by a multiplepoinding or otherwise, to have prevented M'Carter from receiving payment of the counter acceptance until the whole matter had been investigated—and that would have been done without loss, and with perfect safety to the respondent. Instead of doing so, the respondent sheltered himself under the general averment, that he was a bona fide and onerous endorsee, and went on afterwards, as he swears, paying M'Carter, in three several instalments, at the distance of several months from each other. It appears to the Lord Ordinary, that this amounts to satisfactory evidence of collusion between the respondent and M'Carter.

No. 283. which it is quite competent for us to look at, as they are made part of the oath. I think there should be a re-examination.

May 25, 1832.
Young v. Pollock.

LORD PRESIDENT concurred.

Lawson v. Fairie.

THE COURT accordingly recalled the interlocutor, and ordered the respondent to be re-examined.

Henry v. M'Ewan.

W.M. WADDELL, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

No. 284.

W. LAWSON, Advocate.—Skene—A. Wood.
J. FAIRIE and Co., Respondents.—D. F. Hope—Maitland.

May 25, 1832. This was a question of fact arising on a proof. The Lord Ordinary pronounced a judgment against the advocate, and the Court adhered.

1st DIVISION.
Ld. Corehouse.

J. MACDONNEL, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

No. 285.

Lieut.-Col. ROBERT HENRY, Pursuer.—Skene—Wood.
ALEXANDER M'EWAN, Defender.—D. F. Hope—More.

Landlord and Tenant.—Stat. 5th Geo. IV., c. 74—Clause—Personal Objection—Where parties had entered into missives of lease, in which the rent was fixed at a half boll of wheat, three firlots of barley, and six pecks of oats, for each Scotch acre, payable by the fairs' prices, but the proportions not expressed which these several measures bore to the imperial standard measure; and the landlord, under whose direction the missive of lease had been framed, raised an action, after the tenant had entered into possession, to reduce the lease, libelling upon act 5th George IV., c. 74, for uniformity of weights and measures, held, 1st, That the statute was not applicable to the case; 2d, Opinion expressed that, at any rate, the landlord having drawn the missive himself, was barred, personali exceptione, from pleading the statutory objection.

May 25, 1832.
2d DIVISION.
Ld. Moncreiff.
R.

The defender, Alexander M'Ewan, made an offer to the pursuer, Colonel Henry of Woodend, for a lease of the farm of Ardbenny, by missive, in these terms:—"I make offer of the following yearly rent for the farm of Ardbenny, as now possessed by yourself, for a lease of nineteen years from the term of Martinmas first, viz. one-half boll of wheat, three firlots of barley, six pecks of oats, all of the fairs prices of the county, payable at two terms, viz. Candlemas and Whitsunday, beginning the first payment at Candlemas 1829; but as the fairs prices may not then be fixed, a sum nearly what may then be considered a half-year's rent shall then be paid to account, and the balance of the year's rent shall be fully paid up at Whitsunday following, for each Scotch acre of arable land—you to give £85 to assist in building a house on the farm, deducted off first rent." Then there follow the various conditions of the lease as to cropping, &c., which it is unnecessary here to detail; and the offer concludes thus—"I agree to perform the carriage of 400 stones of coal from Dollar to your house at Woodend. I am, &c."—It was stated on the record, and not

denied, that this offer was written by M'Ewan at Woodend, in the presence and under the direction of Colonel Henry, who accepted of the same in the following terms:—"I agree to the above terms of lease for the farm of Ardbenny, the mill being left of same value at expiry as at entry."—In terms of these missives, M'Ewan entered into possession of the farm at Martinmas 1827, and at Candlemas 1828 he paid the half-year's rent. Shortly afterwards the parties got into litigation in the Inferior Court in reference to this lease; and Colonel Henry, after having sequestered the defender's stock and crop, raised the present action to reduce the missives, on the following ground, viz.—"The foresaid pretended missive or agreement, containing a special reference to the Scots acre of land, according to which the rents of the defender's possession were stipulated to be paid, and containing no specification of the ratio or proportion which the Scotch acre bears to the imperial standard acre, and as there are no bolls in the imperial standard measure for grain, is null and void, in terms of the act 5th Geo. IV. cap. 74, sect. 15., whereby it is enacted, 'That from and after the 1st day of May 1825, all contracts, bargains, sales, and dealings, which shall be made or had within any part of the united kingdom of Great Britain and Ireland, for any work to be done, or for any goods, wares, merchandise, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be made and had according to the standard weights and measures ascertained by this act; and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void.'"

In defence, it was pleaded, 1st, That the statute did not apply to contracts of lease in Scotland; and, 2d, That the pursuer was barred, personali exceptione, from taking the objection.

The Lord Ordinary ordered cases to the Court, and at the same time stated his views in the subjoined note.*

* "NOTE.—The great importance of the question raised in this cause, to the proprietors and tenants of this country, renders it necessary that it should be decided by the Court in a deliberate manner, and as speedily as circumstances will admit of.

"The question itself appears to the Lord Ordinary to be by no means free from difficulty. The point is short and simple. The parties entered into a contract of lease for nineteen years, by missive letters exchanged, in which the terms and conditions of the lease were definitely expressed, the rent being fixed at a half boll of wheat, three firlets of barley, and six pecks of oats, for each Scotch acre, payable by the year's prices. The contract thus entered into was followed by full possession of the farm, and by the payment of a half year's rent. After this, the parties got into litigation. And now the pursuer (the landlord) insists in this action of reduction

No. 283.
May 25, 1832.
Henry v.
M'Ewan.

No. 285.

Upon advising these cases, the Court, considering the point to be one of importance and difficulty, ordered a hearing in presence.

May 25, 1832.

Henry v.
M'Ewan.

for setting aside the contract of lease, on the ground that though the misives have fully expressed the terms of the bargain, they have not expressed the proportions which the several measures mentioned bear to the imperial standard measures, whereby he maintains the lease is rendered absolutely void.

" It is unnecessary to make any remark on the general character of this plea. That is too plain to require observation. But, whatever may be thought of it, it must be dealt with according to law; and when the Lord Ordinary reflects on the extent to which leases liable to the same objection may have been entered into, he must feel the importance of carefully weighing the merits of it.

" He is not at present able to enter into the view taken by the defender, that the provisions of the statute do not at all apply to contracts relative to the rents of lands in Scotland. The words of the 15th section appear to be so broad as naturally to comprehend that case. But, considering them in connexion with the 17th and 18th sections, there is very great difficulty in coming to any other conclusion. For the 17th section, which refers to lands in England, is framed for the express purpose of regulating the payment of *rents* under leases which were then existing; which seems to establish beyond any doubt, that the 15th section was understood to comprehend contracts for the rents of lands; and if the words, which relate indiscriminately to every part of the kingdom, were understood to include contracts for rent in England, it would not be easy to reach the conclusion that they do not also comprehend similar contracts in Scotland. The argument is therefore reduced to the narrow point, that in the 18th section, which relates to Scotland, the word 'existing' is not used. But the Lord Ordinary has great difficulty in thinking that this circumstance is sufficient to render the scope and purpose of this clause different from those of the 17th, or to convert it into a clause exceptive of rents in Scotland from the general operation of the 15th section.

" Neither is he satisfied that bolts, and firlots, and pecks, and Scotch acres, are not to be considered as local measures in the sense of the statute. He thinks that they certainly are so. As to the bolts, &c. indeed, it might perhaps be held that they are to be taken as meaning imperial bolts, firlots, and pecks, or the measures defined in the Sheriff's books as corresponding thereto, nothing to the contrary being expressed. But the Scotch acre is a measure so plainly peculiar and local, that if the 15th section is to have any effect, it seems clearly to apply to it.

" But although the Court should hold that these pleas of the defender cannot be sustained, the Lord Ordinary still thinks that the case is one of great difficulty. The statute relates altogether to contracts or agreements. But a lease, by the statute law of Scotland, is something more than a contract. When the contract has been clothed with possession, it becomes a real right. The decisions of the Court have gone very far in establishing, that any writing, however defective in statutory requisites, if followed by possession, constitutes a good lease, to give the tenant a real right under the act 1449. The most informal writing, though it should not even express the whole terms of the lease, or in particular the precise rent, has been held sufficient to sustain the title of possession, the terms being otherwise ascertained. But if other statutes, which are held to contain sanctions of nullity, are overruled by the force of possession, as constituting the real right, it will be a very serious question, whether the right must totally fall, even where there is the most distinct, and specific, and probative written contract, followed by possession, wherever the provisions of the late statute have not been observed.

" If the plea of the pursuer be good, it must apply to a feu-contract or disposition, even after seisin has been taken and recorded. This would be strong enough. But

Thereafter, their Lordships delivered the following opinions:—

No. 285.

LORD JUSTICE-CLERK.—I have done all in my power, by a most careful perusal of the act of Parliament, to arrive at a satisfactory opinion upon this matter; and it appears to me beyond dispute, that the pursuer, in pleading upon the application of a particular clause of this statute, to the effect of reducing the lease, must come into Court prepared to show that it is applicable. Whatever may have been the general object of the legislature as to weights and measures, it must be distinctly and satisfactorily made out that the case comes under the operation of the clause. founded upon. Of one thing there cannot be any doubt whatever,—and that is, that Col. Henry founds entirely upon one single clause of the statute in support of his claim of reduction. It is not to a combination of any of the clauses that he appeals, but to the fifteenth clause alone. Now, it is of great importance, in this question, to attend closely to the precise words of that clause. (Here his Lordship quoted the 15th clause of the statute.) This clause contains a distinct proviso with regard to all contracts, bargains, sales, and dealings, &c., for any work to be done, or for any goods, wares, merchandise, or other thing to be sold, delivered, done, or agreed for by weight or measure, &c. So much for what is embraced in this clause; but it is of importance to observe what is *not* in the clause. There is not one word in it, from beginning to end, applicable to prestatations, rents, or reddendos. The clause goes on to say, “that in all cases where any special agreement,” &c. It is perfectly clear, that if this referred to any thing else than the cases previously enumerated, the phraseology employed would have been totally different. The first branch of the clause contemplates the case where no special agreement is made, and the terms are precise as to what that special agreement is to apply; all such cases where there is no special agreement, are to be construed according to the

May 25, 1832.
Henry v.
M'EWAN.

yet even a feu-right is not so strong a case as that of a lease. For a feu can only be made by a regular deed, and seisin can only be taken on a technical precept, and can only be made effectual by a technical instrument. But the law is, that a real right of lease may be constituted by possession following on the most informal writing. And the question is, whether, after a real right is so constituted under all the former laws, it can be annulled by provisions which relate only to simple contracts or agreements.

“The Lord Ordinary sees very well that there are dangers and difficulties connected with this view of the question. But the difficulty of supporting the pursuer’s plea, consistently with the established law of Scotland, appears to him to be very great; and the danger of it is manifest. At least, if a lease so circumstanced is null and void, it is full time that a matter of law, which must so constantly and deeply affect the practice and good faith of both landlords and tenants, should be made clearly known.

“The defender has endeavoured to maintain, that the pursuer may be held to be barred from founding on the statute by personal exception;—and the plea deserves attention. But it is to be considered, that unless the limits of such a plea could be very specifically determined, there would be danger of defeating the statute altogether; and that it is not easy to see how a statutory nullity in an agreement otherwise perfect, can receive its fair effect, if facts inferring the consent of parties to waive it were sufficient to prevent the nullity being pleaded.

“With these remarks, the Lord Ordinary reports the case for the consideration of the Court.”

No. 285.

May 25, 1832.
Henry v.
M'Ewan.

weights and measures ascertained by the act. The other branch of the clause just contemplates the same cases with a special agreement, and provides accordingly; but as for rents, feu-duties, or payments or annual pretensions, there is not one word on the subject. From the first moment of considering this case, I thought it necessary to go to the statute and study it minutely; and I found, as it appears to me, that the Lord Ordinary had not read, or at least had overlooked, the expressions of a clause in the act most material to the argument—I mean the 9th. The terms of this clause confirm my opinion, and show that it is consistent with the real meaning of the act. (His Lordship here quoted the clause.) After enumerating the particular articles—coal, culm, lime, &c.—the clause goes on to use the very expressions adopted in the 15th—“sold, delivered, done, or agreed for, or to be sold, delivered, done, or agreed for by weight or measure,” &c., “all contracts, bargains, sales, and dealings.” Now, your Lordships find here just the leading expressions of the 15th clause. There is a precise enumeration of various articles, a distinction as to goods sold by heaped measure, &c., and yet not one word applicable to rents or feu-duties. When I read in the 15th section, the leading expressions of the 9th, and find nothing broader, it is impossible for me to say that the clause founded upon embraces rents of lands, or has any application to the case before us. The clauses and whole expressions taken together, undoubtedly make a complete proviso for all moveable goods and contracts, but nothing farther; and it will not do to take the concluding words of the 15th section,—“and in all cases where any special agreement,” &c.—and say, here is a proviso for *all agreements*. It is perfectly obvious that these expressions only refer to the precise case which precede those words, and must be so construed. Although the 15th clause is the only one upon which the pursuer founds, and although he is bound to shew that his case falls under it, still I think that the other clauses of the act are fair subject of consideration by us, in arriving at the meaning of the legislature. (His Lordship here quoted and commented upon the 17th and 18th sections of the statute, and expressed his opinion, that no argument could be drawn from them in support of the pursuer's plea.)

Now, being of opinion that the pursuer is not entitled to succeed in his action, upon the terms of the act of Parliament, it is not necessary to decide the remaining point of personal exception; but this, I must say, that were we to decide that point, and assuming the application of the act to this particular case, it would require very grave consideration indeed whether it were possible, under the circumstances, to allow the plea to be stated. When matters were no longer entire, after having involved the defender in litigation,—having obtained a sequestration, and taken steps which might have been the ruin of this man, Colonel Henry turns round on the defender, and says, This lease, to which I put my hand, and which was drawn up under my own express directions, is null and void in terms of the statute. I do not think this could be permitted; but being clear that the act does not apply, it is not necessary to say more upon the plea of personal exception.

LORD GLENLEE.—I concur in all that your Lordship has said, and have really nothing to add. The pursuer's summons is laid upon the 15th section alone; and I do not think, even if some other section supported his plea, that we would be entitled to take it under our consideration. I most entirely agree in your Lordship's observations as to the personal exception. There is a title in Brown's Synopsis, which very plainly includes the present objection to Colonel Heary's plea—“No man can take benefit by his own fault or neglect.” Now, will any one tell

me that this pursuer, dictating the deed himself, and making this alleged omission, No. 285. can afterwards found upon his own omission in his own favour? He handed the deed to his tenant as a full and efficient deed, and is at this moment absolutely bound to make it good.

May 25, 1832.
Henry v.
M'EWAN.

LORD MEADOWBANK.—My opinion has been completely expressed by your Lordships.

LORD CRINGLETIE.—I am very sorry to say, that I am forced to put a different construction on the act, though in this case, certainly, I regret the necessity of expressing an opinion against the defender. With regard to the latter part of Lord Glenlee's observations, there may be a great deal in them, and very probably this gentleman may be compelled to give his tenant a new lease; but the only question before us is, whether this lease can be sustained under the act of Parliament quoted? It is said that this action is only laid upon the 15th section of the statute; but the question remains, what is the precise meaning of the words? and can any one doubt that we are entitled to look to the other clauses of the act, in order to become acquainted with the meaning of the legislature, and the very nomenclature of the act? (His Lordship quoted the 15th section, and expressed his opinion that the words were broad enough to include the rents of lands, as being virtually under a contract for grain.) A lease, then, is a contract, which I think falls under the expressions of the 15th section. But when I look at the 17th and 18th sections, I can have still less doubt that contracts of every description were meant to be included. The 17th section lays down the rule for England as to all existing contracts and rents payable in grain, &c., and clearly proves the intention of the legislature to lay down a broad rule for all existing contracts. I cannot arrive at the conclusion, that in the 18th section, applicable to Scotland, the term *existing* contracts, though not expressed, is not meant to be implied. (His Lordship then quoted the 9th section, and expressed an opinion that it had a distinct reference to the 15th, and that, on the whole view of the clauses referred to, the terms were so broad as necessarily to include the case of a lease in Scotland.) As to the plea of personal exception or homologation, if your Lordships gave effect to that, it would be virtually to repeal the statute. If this lease be null under the act, no deed of the parties can restore its validity. Suppose the contract had actually been for the delivery of a thousand bolls of wheat, say for ten years,—no one can deny that that would be a contract falling under the act. Supposing a hundred bolls were delivered, that would be homologation; yet I conceive it would not be possible on that ground to withhold an application of the act in such a case for a declaration of nullity. It would, I repeat, virtually repeal the statute, to hold such a doctrine. We have been somewhat loose in the interpretation of Scotch statutes. We have even held that an act of Parliament may become a dead letter from desuetude. But this is a British statute, and we never have gone so far with such. The House of Lords would give us very different instructions if we did. Again, with regard to homologation, I hold the maxim to be clearly this—that no man can homologate without intending it. Now, I must acquit Colonel Henry of knowing any thing about this act at the time. The question just comes to this—is the lease null in terms of the statute? and I am sorry, under all the circumstances, to be constrained to give my opinion that it is.

THE COURT repelled the reasons of reduction, and decreed.

CHARLES C. STEWART, W.S.—JAMES ADAM, W.S.—Agents.

No. 287. and was forcibly detained without any warrant, and "that the said William Radley, at the time he received the pursuer into his asylum as aforesaid, had no authority, as by law required, for detaining the pursuer therein, and this was done solely at the instance and request of the said Robert M'Cosh and others, defenders." He farther alleged harsh and cruel treatment, and the fraudulent imputation from him of an irrevocable trust-deed.

May 26, 1826.
M'Cosh v.
M'Cosh, &c.

The defenders denied these allegations, and the following issue was prepared by the clerk, and approved of by the Lord Ordinary :—

"Whether, on or about the 3d day of May 1826, at Dundee, the defenders, or any two or more, did wrongfully conspire to deprive the pursuer of his liberty, and to confine him in a madhouse; and did all, or any of them, in pursuance of the said conspiracy, on or about the said day, wrongfully confine the pursuer, or wrongfully cause him to be confined in the Lunatic Asylum at Dundee, and to be therein detained from the 3d day of May 1826, to the 30th day of June same year, or during any part of the said period, to the loss, injury, and damage of the pursuer?"

The pursuer reclaimed, and suggested this issue :—

"Whether, on or about the 3d day of May 1826, at Dundee, the defenders did wrongfully conspire to deprive the pursuer of his liberty, and to confine him in a madhouse, and did, in pursuance of the said conspiracy, on or about the said day, wrongfully confine the pursuer, or wrongfully cause him to be confined in the Lunatic Asylum at Dundee, and to be therein detained from the 3d day of May 1826, to the 30th day of June same year, or during any part of the said period, to the loss, injury, and damage of the pursuer?"

Jameson, for Radley, objected that he was not alleged to have been engaged in the conspiracy, but only to have acted without a warrant, and therefore he should be excluded from that part of the issue relative to the conspiracy.

The Court ordered the issue to be in these terms :—

"Whether, on or about the 3d day of May 1826, at Dundee, the defenders, or any two or more of them, exclusive of William Radley, defender, did wrongfully conspire to deprive the pursuer of his liberty, and to confine him in a madhouse; and did all, or any two or more of them, including the said William Radley, in pursuance of the said conspiracy, on or about the said day, wrongfully confine the pursuer, or wrongfully cause him to be confined in the Lunatic Asylum at Dundee, and to be therein detained from the 3d day of May 1826, to the 30th day of June same year, or during any part of the said period, to the loss, injury, and damage of the pursuer? Damages laid at £5000."

CATHERINE MENZIES and JOHN MENZIES, Pursuers.—*Skene.*
JOHN MENZIES, Defender.—*D. F. Hope—Smythe.*

No. 288.

May 26, 1832.
C. & J. Menzies
v. Menzies.

Aliment—Parent and Child.—1. Pending a declarator of marriage and legitimacy, the children are not to be treated as legitimate in regard to the matter of interim aliment. 2. Circumstances in which £15 a-year allowed to each child in such a case.

CHRISTIAN STEWART, the mother of the pursuers, children of five and two years of age, along with them, raised an action of declarator of marriage and legitimacy against their father, the defender, whose servant she had been, and with whom she had for some time cohabited. The action was mainly rested on a letter granted to her by the defender, before the birth of either of the children, in these terms:—"Christy—You and I having lived together as man and wife for some time, I hereby declare you my lawful wife in the event of a child being born, in consequence of the present connexion betwixt us." On the case coming into Court, a demand for interim aliment was made on the part of the children; and a question arose as to the amount to be allowed. It was admitted that the defender was proprietor of an entailed estate of £1500 a-year, and heir to another of £800 a-year; but he alleged that he was greatly embarrassed, and had conveyed the life-interest of his estate to trustees, who allowed him only £200 per annum. The Lord Ordinary having awarded £10 yearly to each of the children, they claimed, and contended, that where there was a tolerable *prima facie* case of marriage, the children were entitled to aliment in the mean time, on the footing of their being legitimate; but at any rate, even if they were to be held bastards, considering the status of the father, and the circumstance that the mother had constantly cohabited with him, and that the children had been previously kept in his own house, the aliment awarded was greatly too low, not being above what would be allowed to the bastards of an ordinary tradesman.

To this it was answered, that the decision of the House of Lords, in the case of Madame Sassen, had fixed the principle, that, pending a question of marriage, the status cannot, with reference to the matter of aliment, be assumed as already established, and consequently, that, as to this question, the children must at present be deemed bastards; and that, on this assumption, £10 a-year each was not too small an allowance, considering the embarrassed circumstances of the defender, which he was ready to instruct, if required.

The Court, without proceeding on the assumption that the children were in the meanwhile to be dealt with as legitimate, thought that, in the circumstances, the allowance was too low, and awarded £15 each.

2d DIVISION.
Consistorial.
Lord Medwyn.
T.

No. 289.

May 26, 1832.
Calderhead's
Trustees v.
Fyfe, &c.

CALDERHEAD'S TRUSTEES, Pursuers.—*Jameson.*
ELIZABETH FYFE and J. MARSHALL, Defenders.

Tutor and Curator.—Incompetent to appoint a tutor ad litem for a pupil called as defender, for whom no appearance has been entered.

May 26, 1832. THE trustees of the deceased William Calderhead raised an action of implement against his heirs-at-law, Elizabeth Fyfe and John Marshall, both pupils, to have them ordained to make up titles to the deceased, and convey to the trustees his heritable property, in implement of the trust-deed. Appearance was made for John Marshall, but none was entered for Elizabeth Fyfe. The pursuers, thereupon, put in an affidavit, setting forth that the legal guardians of the latter had expressed their willingness to enter appearance for her, and to be appointed curators ad litem, but on condition of receiving ten guineas in consideration therefor; and that the pursuers had refused to comply with this condition, in consequence of which no appearance had been entered; and they now craved the Lord Ordinary to appoint tutors ad litem to both the defenders. The Lord Ordinary appointed a tutor to John Marshall, for whom appearance had been made. “But in respect that the other pupil, Elizabeth Fyfe, who is called as a defender, has not appeared in Court, finds it incompetent, at the instance of the pursuers, to appoint a curator ad litem for her.” His Lordship added the subjoined note.*

The pursuers reclaimed, but the Court adhered.

JAMES LANG, W.S.—Agent.

* “NOTE.—By the law of Scotland, a pursuer cannot compel a party to appear in judicio; and if a defender is not in Court, all that can be done is to take decree in absence. The judge has no power to do more, or to exercise any sort of jurisdiction over an absent defender. Hence he cannot appoint a curator for him. It is quite different if the pupil is brought into Court, either as a pursuer or defender, by his natural guardian; then the opposite party is entitled to ask that the pupil shall come with a legal guardian, that decree may be effectual against him; and he can crave the appointment of a curator ad litem, or the judge may appoint one ex proprio motu. The minute seems to imply the necessity of the consent of the natural guardian to the appointment of a curator: This, however, is not necessary; all that is necessary is the pupil being in Court. These points the Lord Ordinary thought had been fully settled, especially since the case of Stark against Sinclair, January 15, 1828.

“The Lord Ordinary cannot help noticing the voluntary affidavit produced in this case. This is a novelty in the practice of this Court, the business of which has been conducted now for three centuries without resorting to oaths of this kind. The multiplication of oaths in a community, in an advanced state of society, is a great evil, and the Lord Ordinary shall be sorry when the statements of counsel at the Scottish bar require that species of support.”

WILLIAM HUNTER, Suspender.—*Skene—Shaw.*
P. and W. CREIGHTON, Chargers.—*A. M'Neill.*

No. 290.

May 26, 1832.
Hunter v.
Creighton.

Diligence Legal.—A party being designed in letters of horning, “ Coalmaster, Provanhall, by Glasgow,” and it being alleged that he had never been so, but was a “ farmer, near Shettleston,”—a proof of this allegation allowed.

CREIGHTONS, holders of a bill of exchange, on which the suspender, May 26, 1832. William Hunter, was an endorser, raised letters of horning thereon, in which he was designed “ William Hunter, coalmaster, Provanhall, by Glasgow.” In virtue of these letters, a charge was given to the suspender by a copy charge left at his dwelling-house, but the execution designed him “ William Hunter, farmer, near Shettleston,” and bore that a copy charge had been left for him “ within his dwelling-place near Shettleston.” Of this charge Hunter brought a suspension, designing himself “ farmer, Hollow-Glen, near Shettleston.” He alleged that he never had been a coalmaster, and that his address was not, and never had been, “ Provanhall, by Glasgow,” and he contended that, at any rate, the execution, bearing a different designation from that contained in the letters, was inept, as disconform to its warrant. On the other hand, the chargers averred that Hunter had been a coalmaster, and that Provanhall and Shettleston were so nearly adjoining, that either designation was equally correct; and they pleaded, that Hunter being confessedly a party on the bill, and having received the charge, there was no sufficient ground for suspending.

2D Division.
Ld. Fullerton.
T.

The Lord Ordinary having repelled the objection, Hunter reclaimed.

LORD CRINGLETIE.—If it had been established that this man had been a coalmaster, though he had now given up the business, I would have thought the Lord Ordinary right, because a man may have changed his designation before the charge—as in the case of an advocate raised to the bench—a charge against him designed as a judge would be good, though he were designed as an advocate in the letters of horning. We would require, however, to know the facts.

LORD GLENLEE.—I am not disinclined to recall *in hoc statu*, and reserve consideration of the objection till it appears how the facts stand; at present, I am a little puzzled.

The other Judges concurring,

THE COURT recalled the interlocutor, and remitted to the Lord Ordinary to hear parties on the facts, and thereafter do as he should see just.

BOWIE AND CAMPBELL, W.S.—JAMES WILSON, W.S.—Agents.

No. 291.

HON. ARCHIBALD MACDONALD, and Others, Pursuers.—

Sol.-Gen. Cockburn—More.

May 29, 1832.

Macdonald v. LORD MACDONALD, Defender.—*D. F. Hope—M'Neill—H. J. Robertson.*
Macdonald.

Succession—Heir and Executor—Provisions to Children, &c.—A party having settled his moveable estate on his younger children, and executed a personal bond, whereby he made additional provisions to them, payable by the heirs succeeding him in two estates, whereof one was held in fee-simple, and the other under entail, but which allowed provisions to the extent thereby imposed; and the heir first succeeding having died intestate after possessing the estates for some time, without having paid the provisions—Held, in a question with the next heir, that he was liable to pay the provisions without relief out of the execruty of the heir first succeeding.

May 29, 1832. ALEXANDER, first Lord Macdonald, had five children:—Alexander Wentworth, Godfrey (the present Lord, and defender), James, and the

2d DIVISION.
Ld. Fullerton.

pursuers, Archibald, Dudley, and Lady Sinclair. His lordship held the estate of Macdonald under an entail, which allowed “competent provisions” to be made for younger children, “agreeably to the circumstances of the estate at the time;” and he was proprietor of various lands, and in particular of those of Strath, in fee-simple, and of considerable moveable funds. After having settled a provision on Lady Sinclair in her contract of marriage, he executed, in 1794, a trust-disposition of all his estates (exclusive of Strath and Macdonald), and of his moveable funds, for behoof of his four younger sons; and of the same date he executed a personal bond of provision, whereby, “over and above the other provisions settled upon my younger sons out of my separate estate and effects by deed of this date,” he bound himself “and my heirs succeeding to me, in my lands and estate of Macdonald, Strath, and others,” to pay to each of his four younger sons the sum of £7500, at the first term of Martinmas or Whitsunday immediately following his death; it being specially declared, that in the event of the decease of any of them before marriage or majority, the provision of the son deceasing should “accrue and belong to Alexander Wentworth Macdonald, my eldest son, or other heir succeeding to me in my lands and estates of Macdonald.” It was not disputed that these provisions were within the amount with which the succession to the entailed estate of Macdonald might have been exclusively burdened. Lord Macdonald died in September 1795, and was succeeded in his estates of Macdonald and Strath by his eldest son Alexander; and his younger sons having all likewise survived him, and having attained majority, became entitled each to £7500, contained in the bond of provision. Besides his own share, James acquired right by assignation to £3252 of the share of

Godfrey, (the defender,) and he also became a creditor of his eldest brother, in a personal debt of about £5000, for which he received, in 1810, a personal bond of corroboration. James died in 1814, whereupon his funds became divisible among his four surviving brothers and his sister. In 1824, Alexander, the second lord, died intestate and without issue, and was succeeded in the estates of Macdonald and Strath by his next brother, Godfrey, the defender. Alexander left moveable funds to a considerable extent, which were taken up by Archibald, Dudley, and Lady Sinclair, as his executors. A question then arose, whether the defender, as having succeeded to the estates of Macdonald and Strath, was liable in the provisions contained in the bond executed by the first lord, in so far as not already paid, without relief from the executry of the second lord; or whether, on the death of the first lord, these became personal debts of the second lord, so as to be a burden on his executry. With a view to settle this question, separate actions were raised against the defender by Archibald and Dudley, each for his own share, and by them and their sister, Lady Sinclair, as representing James, for the amount due to him in his own right, and as assignee to part of the share of the defender himself. As the pursuers of this last action were also the executors of the second lord, it was chosen as that in which to argue the question.

Pledged for the pursuers—

The bond granted by the first lord imposed the burden of the provisions on the heirs succeeding to him in the estates of Macdonald and Strath. These heirs were thus made successively the primary debtors. The first lord, had he paid the amount, might by assignation have kept up the burden against his successors, which he could not have done if he were the primary debtor, in which case he must have paid without relief. No doubt, if he had paid the provisions without taking an assignation, his executors would have had no claim of relief against the next heir, because he would thereby have extinguished the claim, and evinced his intention that it should not remain a burden on the succeeding heir; but by not paying the provisions, he evinced his intention that the burden should continue as fixed by the bond itself, viz. on the heirs succeeding to the estates of Macdonald and Strath.

Pledged for the defender—

The question does not regard the succession of the first lord, but that of the second lord, as to which the intention of the first lord can have no effect. Although the burden of the provisions was imposed on the heirs succeeding to the estates of Macdonald and Strath, and the estates were liable to be attached for it, yet it was not made real on the estates, but remained personal against the heir. On the death, consequently, of the first lord, the second lord became personally liable for the provisions, and his moveable estate might have been attached in

May 29, 1832.
Macdonald v.
Macdonald.

No. 291. payment. There having then been a personal claim against him, his executors must be primarily liable, without relief against the heir, as he did not, by will, make it a burden on the heir. Nor does it make any difference that one of the estates was entailed, because the estate, quoad the provisions, is just as if it were unentailed; and unless the defender would have been liable had the succession been to Strath alone, he cannot be subjected in relief of the executors, in respect of one of the properties being entailed. The pursuers, therefore, being the executors of the second lord himself, are bound to impute the executors, in satisfaction of their own claim.

May 29, 1832.
Macdonald v.
Macdonald.

The Lord Ordinary, on advising cases, pronounced the following interlocutor, adding the subjoined note: *—“ Having considered the cases for

* “ NOTE.—The defender does not deny his liability for the debt; but pleads that he is entitled to be relieved from the executors of the late Lord Alexander Wentworth. In the ordinary case, this would require to be made good in an action of relief against the executors; but as here the pursuers, claiming equal shares in the sum pursued for, happen to be also the whole executors interested in the intestate succession of the late Lord Alexander Wentworth, the question of relief admits of being discussed in the form of a defence. The question thus raised is attended with considerable difficulty. There seems no reason to doubt, that when a grantor of a bond of provision binds his heirs generally, the obligation on the first heir forms truly a personal obligation to all intents and purposes, which will, in the event of payment not being made during his lifetime, devolve on his executors, without relief from his heir. But the peculiarity of this case is, that the bond creating the obligation imposes it specially on the heirs succeeding in the estates of Macdonald and Strath. And again, the estates of Macdonald, forming by far the most valuable of the two (in the proportion, according to the pursuers, of more than eleven to one), was held by the grantor under a strict entail, containing a power to grant provisions to younger children, while it is not denied by the defender, that the bond of provision in question was within that power. Indeed, it is expressly admitted in the defender’s case, that he is bound, not only as the heir in Strath, but as the heir in Macdonald. With regard then to the estate of Macdonald, or rather such parts of the bond of provision as might be ascertained to form a burden on the heir in that entailed estate, this seems the ordinary case of a debt effectually created against the heirs of an entailed estate; a debt as to which, though remaining personal, the heir in possession, so far from being bound without relief, (so as to transmit the obligation against his general representatives,) is held entitled, even in the case of payment, to take assignations enabling his general representatives to obtain relief against the succeeding heirs of entail. As to the estate of Macdonald, then, it seems to follow from the known rule applicable to entailed estates, that by the bond in question, the grantor intended to create, and did effectually create, a burden transmissible against the heirs successively taking the estate, without relief from the executors of their respective predecessors. In regard to the estate of Strath, which is unentailed, there is more difficulty. The question, how far the heirs of an unentailed estate may be successively bound in an obligation merely personal, without relief, except from their successors, is one which must be of rare occurrence, as in such a case the unfettered nature of the right affords the heir in possession the means of relieving himself. But still the Lord Ordinary perceives no incompetency or in-

the parties, finds, that in the year 1794, Alexander Lord Macdonald executed a trust-deed, conveying the whole of his heritable estates, with the exception of the estates of Macdonald and Strath, and the whole of his moveable property, to certain trustees, for the behoof of his younger children: Finds, that, at the same time, Alexander Lord Macdonald executed a bond of provision for the sum of £30,000, by which, 'over and above the other provisions settled upon his younger sons out of his separate estate and effects, he bound and obliged himself, and the heirs succeeding to him in his lands and estate of Macdonald and Strath, and others, lying in the islands of North Uist and Skye,' to pay the said sum, in equal proportions, to his younger sons, Godfrey, Archibald, James, and Dudley Stuart Erskine Macdonald: Finds, that the Honourable James Macdonald, in addition to his share of £7500, acquired right to the sum of £3252, 10s. 4d. of the share belonging to his brother Godfrey, now Lord Macdonald: Finds, that Alexander Lord Macdonald was succeeded in the estates of Macdonald and Strath by Alexander Wentworth, the late lord, who died in 1824, and was succeeded in the said estates by the present defender: Finds, that no part of the said sums of £7500, and £3252, 10s. 4d., amounting to £10,752, 10s. 4d., was paid by Alexander Wentworth, the late Lord Macdonald, and that the present action is brought by the pursuers, being three of the executors of the Honourable James Macdonald, who died in 1814, for their shares of the said sum: Finds, that the present pursuers are also the whole executors of the late

May 29, 1832.
Macdonald v.
Macdonald.

herent incongruity in constituting a debt in such a way as to impose the obligation of debt, though personal, on a certain series of heirs, any more than in destining a personal right of credit to such series of heirs, of which last the competency cannot be doubted. The question, then, is one purely of intention, and considering the terms and whole tenor of the bond of provision, and its effect according to the ordinary rule, in regard to the entailed estate of Macdonald, the Lord Ordinary thinks, that it does contain a sufficient expression of intention, even as to both estates, that the obligation, so long as unperformed, should devolve successively on the heirs taking those estates; and that, in absence of any deed of the late Lord Alexander Wentworth altering that arrangement, it must be held, in a question inter haeredes like the present, to have been his intention that the debt should be paid by the heirs of the estates, the debtors appointed by the bond, without relief from his own executry. Upon these grounds, supported by the analogy drawn from the unquestioned practice in the case of entailed estates, the Lord Ordinary has repelled the defence in so far as it is pleaded against the claim for the principal and for the interest accruing since the present lord became liable by succeeding to the estates. He cannot, however, extend the principle beyond what is warranted by that analogy. He has therefore considered the interest accruing during the possession of the estates by the late Lord Alexander Wentworth, as properly a debt due by him in his individual character, to which the defender's claim of relief against the executry is applicable; and as it is not denied by the pursuers that the executry of the late lord is sufficient for that purpose, he has sustained the defence in regard to that interest."

No. 291. Alexander Wentworth Lord Macdonald, and have in the present action been met by the defence, that the debt in question, being one for which the late Lord Alexander Wentworth was personally liable, is a debt properly affecting his executry, and of which the defender is entitled to total relief from the pursuers, his executors : Finds, that by the bond libelled, creating the obligation, that obligation was expressly imposed on the grantor and the heirs succeeding him in the estates of Macdonald and Strath : Finds, in respect of the special terms of the bond, that the obligation to pay, though personal, devolved successively on the heirs possessing those estates, and that therefore the debt, in so far as unpaid by the late Lord Macdonald, was not one of which the defender, the heir now in possession of these estates, is entitled to demand relief from the executry of his predecessor : Therefore, Repels the defences, and decerns in terms of the conclusions of the libel in regard to the principal sum, and also in regard to the interest from the 19th of June 1824, the period of the late lord's death ; but in regard to the interest falling due during the possession of the estates by the late Lord Macdonald, Sustains the defences, and assuizes the defenders : Finds no expenses due, and decerns."

Lord Macdonald reclaimed.*

LORD CRINGLETIE.—It appears to me that the Lord Ordinary's judgment is right. The provisions are laid on the heirs succeeding to the lands of Macdonald and Strath. Now it is clear, from the trust-deed executed at the same time with the bond of provision, that Lord Macdonald contemplated that no person but the heir was to pay. It is said, however, that the intention of the first lord is of no consequence, the question being as to the succession of the second lord. Now, I think if the first lord's intention be admitted, it answers the objection, because, if it be ascertained that the burden was laid on the heirs in Macdonald and Strath, it remained so till paid. The principal debtors are the heirs in Macdonald and Strath, and when a principal debtor pays, he must do so without relief. If the second lord had forfeited, or had only lived a day, could his executors have been held bound to pay the provisions ? The obligation remained as it was, and, if Lord Macdonald had paid it, might have been kept up against the entailed estate.

LORD GLENLEE.—I do not see that the circumstance of the estate of Macdonald being entailed makes any difference from what would have been the case if the

* In the actions at the instance of the Honourable Archibald, and the Honourable Dudley Macdonald, for their individual shares, the Lord Ordinary decreed against Lord Macdonald on this additional ground, that " even if he had a good claim of relief against the executry (which, for the reasons assigned in the action at the instance of all the three executors, the Lord Ordinary thinks he has not), he must pay the debt, and make good his claim of relief in proper form, by an action directed against the whole executors." In these actions the Court adhered to his Lordship's interlocutor.

question had occurred as to Strath alone. Now, certainly, no claim lies against No. 291. the first lord's executors; but not in respect of the terms of the bond binding him-
 self and the heirs in Macdonald and Strath to pay, but from the reference contained May 29, 1832.
 in it to the other deed, as excluding the liability of all others of his successors except Macdonald v.
 his heir in these lands. The second lord, however, on succeeding, undoubtedly Macdonald.
 became the proper debtor, and the creditors in the bond might have attached his moveable funds in payment. Then when he died, did the right to attach his funds expire at once? and could his executors have objected to the creditors in the bond confirming as executors' creditors, on the ground of the intention of the original grantor? It happens here, however, that the creditors are executors of the second lord; but I have no idea that the circumstance of their being executors can in any view put an end to the demand. At the utmost, it could only go this length, that so far as there is an excrescence of funds, after paying debts, the executors must hold it pro tanto in payment of claims. If there is no such excrescence, then the present lord must undoubtedly discharge the provision; but the question is, whether he is entitled to be relieved out of the excrescence of the executry which exists. I see the Lord Ordinary has thought, that if the whole estates had been unentailed, the question would have been very doubtful; but he finds much on analogy of entailers' debts, &c. Now I do not see how, because the heirs burdened are heirs of entail, the claim against the executors of each is to disappear. So far as we see of the entail of Macdonald, it gives no power to burden the estate really, but only empowers to contract the debt forming provisions for the younger children; and so far the irritant clauses, &c., do not strike at it, and so it is just like an entaller's debt, capable of being made to affect the estate, but only a personal debt due by him, and every body who represents him. The entail gives no power to declare that only those heirs who succeed shall be liable, and not the executors of these heirs; and I just consider this like personal debts, for which all heirs of entail are liable, but which the creditors may obtain payment of out of personal funds; and if so, he executors must pay themselves out of the executry of the second lord.

LORD MEADOWBANK.—I agree with Lord Cringletie. I go on the intention, not of the first lord, but of the second, and on this ground—The heir in the estate is primarily liable, and I hold that the second lord, not having paid, showed his intention to burden the heir in the estate succeeding to him, and not his executors.

LORD JUSTICE-CLERK.—I am in favour of the interlocutor, and on the ground taken by Lord Cringletie. It is clear, that any heir succeeding to the entailed state of Macdonald, paying the provision, might have kept it up against his successors. There is, no doubt, this peculiarity, that Strath is unentailed; but there is no want of clear declaration by the grantor, that it was to affect the heirs in these two estates. The grantor was succeeded by the second lord, and, by succeeding, became bound to pay the provisions. He was liable, and the unentailed estate might have been attached. He dies, leaving executry; and the question is, whether the present lord is liable, being in possession of Macdonald and Strath. I limit it is just the same as an entaller's debt; but where there is a manifest declaration of intention, though not made a real burden, effect must be given to it, the person first liable having done nothing to counteract it.

THE COURT accordingly adhered.

No. 291. *Pursuers' Authorities.*—Stair, 3. 5. 17; Erak. 3. 4. 27-52; Kerr, Feb. 15, 1758 (15551); Gordon, Jan. 29, 1731 (11534); Crawford, March 11, 1809 (F.C.); *Ross v. Ross*, April 2, 1787 (14955), reversed in H. of L.; *Bootle v. Blundell*, 19 Vesey, 594.

May 29, 1832. *Macdonald v. Macdonald.* *Defender's Authorities.*—Erak. 3. 9. 48.; 2 Sandford, 49, and cases there quoted; Campbell, Jan. 14, 1747 (5213), affirmed.

Blackett, &c. v. Gilchrist, &c.

VANS HATHORN, W.S.—BOWIE AND CAMPBELL, W.S.—Agents.

No. 292. **ELIZABETH BLACKETT and Others, Pursuers.**—*D. F. Hope—Neaves. T. Gilchrist and J. Wilson, Defenders.*—*Rutherford—W. Bell.*

Foreign—Trust.—1. A deed executed by a party domiciled in England, disposing, according to the law of Scotland, a landed estate in Scotland, burdened with a sum of money in favour of parties then resident in England, must be construed according to the law of Scotland. 2. Circumstances in which trustees, resident in England at the date of the trust, were held personally liable for trust funds paid over to them, without referring the question of their liability to the law of England.

May 30, 1832. **THE late Anthony Forster**, who was resident in the town of Berwick-

upon-Tweed, by a deed of settlement, of date Nov. 4, 1795, drawn by a Scotch conveyancer, and expressed in the technical language of the law of Scotland, disponed his lands of Jardinefield, situate in Scotland, together with his whole other estate, to his eldest son, and the heirs of his body; whom failing, to certain other substitutes. The deed was granted under the burden, *inter alia*, of paying to the defender Gilchrist, and the late William Berry, (whom the other defender, Wilson, represented,) both then resident in Berwick, the sum of £400, “in trust, that they may satisfy and pay the yearly interest and proceeds thereof for the liferent use of the said Mary Forster,” (his sister,) “the wife of Richard Blackett, for her liferent use only, exclusive always of any right, control, or interest of her said husband, *jure mariti* or otherwise, and to the heirs of her body, equally among them, share and share alike, in fee.” Mr Forster died in 1798, and thereafter the £400 provided to Mrs Blackett and her children was paid by his heir to the trustees. At this time Blackett and his family were in necessitous circumstances, (though it was averred by the pursuers, his children, that he ultimately died solvent,) and the trustees agreed to lend him the £400, on security of a mortgage over a house belonging to him in Berwick. This mortgage was granted, and the money advanced; but subsequently, in 1805, the trustees gave up the mortgage, to enable Blackett to sell his house, and in lieu thereof, took a personal bond from him and his brother-in-law, John Forster, then a wood-merchant in Berwick. Blackett having died, was succeeded in a farm held by him in Scotland, and to which he had removed in 1799, by his eldest son, who, after some time, left the country, and was now in Van Diemen's Land. Shortly after the date of the bond,

2d Division.

Ld. Fullerton.

R.

John Forster, the co-obligant, became bankrupt, and was discharged, on payment of a composition of 9s. in the pound. The trustees did not claim on his estate under the bond, nor did they make any attempt to recover the amount of it from Blackett's eldest son while he continued in this country. They stated, that the bond having been deposited in the hands of an attorney in Berwick, who died in 1813, had thereupon disappeared, and had not been recovered by them till after the raising of this action. It was instituted, in 1826, by all the children of Blackett, with the exception of the eldest son, and concluded for payment of their shares of the £400.

May 30, 1832.
Blackett, &c. v.
Gilchrist, &c.

In defence it was pleaded—

1. The deed of settlement of Anthony Forster being executed by a party domiciled in England, must be construed according to the law of England, whereby, it was averred, the destination would be held to have vested the £400 in Mrs Blackett absolutely, so that the trustees were warranted in paying the money to her and her husband; and at all events, the question of personal liability of English trustees, must be determined by the law of England.

2. The trustees were not taken bound to require security when they lent out the money; and, under the circumstances of Blackett's family, they were in any case warranted in advancing to the father for the benefit of the family; and they now sufficiently implement their obligations under the trust, in handing the bond over to the pursuers.

To this it was answered—

1. The deed having mainly reference to a landed estate in Scotland, and having been prepared by a Scotch conveyancer, was a Scotch deed; and as to the provision of £400, which was a burden on the heir succeeding to the lands, it must be construed according to the meaning of the terms as used in the law of Scotland, which vest the fee in the children, and give a bare lisperent to the mother; and it was denied that the terms would have a different construction according to the law of England: and,

2. The trustees, having received the money, have not discharged themselves merely by production of the bond, inasmuch as they took no steps to make it effectual for more than twenty years, which, in England, raises a presumption of payment; but, on the contrary, failed to avail themselves of the composition paid by one of the obligants.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:—"Finds, that the clause of the deed of settlement of Anthony

* "Note.—As the settlement of Anthony Forster was prepared by a Scotch conveyancer, expressed in the phraseology of Scotch conveyancing, and was mainly intended for the conveyance of a Scotch heritable property, and as it cannot be maintained that the subject-matter of the special trust regarding the £400 was in any way localized in England, the Lord Ordinary does not think that the mere circumstance of the grantee being domiciled in England, necessarily demands the applica-

No. 292. Forster creating the trust, in regard to the sum of four hundred pounds, being the only sum now in dispute, must be construed according to the law of Scotland: Finds, that, according to that construction, the children of Mrs Mary Forster, or Blackett, and Richard Blackett, were entitled to the fee of the said sum, while the right of the mother was limited to a life-rent: Finds, that the pursuers are six of the children of the said Mary Forster or Blackett, and that the object of the present action is to recover payment of their shares of the said sum of four hundred pounds from the defenders, the surviving trustees, who had intromitted with the said sum: Finds, that the shares so pursued for still remain due to the pursuers, and that, in the circumstances of the case, as they are proved or admitted by the defenders, the defenders have incurred a personal liability for the shares now pursued for; and, therefore, repels the defences, and decerns in terms of the conclusion of the libel."

The trustees reclaimed, and, besides their argument on the general point, they founded on certain averments as to Blackett's eldest son and heir having, on succeeding to his father's farm, in consideration of the stocking thereon, agreed to pay the pursuers a certain sum annually out of the profits, and contended that the amount thus drawn out of their father's succession, must, when ascertained, be imputed, pro tanto, in extinction of their present claim, which was a debt of the father.

tion of the English rule of construction, in determining the meaning of the clause in dispute. The fee of the trust sum being then in the children, the only question is, whether the defenders have so acted as to incur a personal liability? and, whatever hardship there may be in the case, the Lord Ordinary has not been able to resist the conclusion that they are liable. Even in the original loan to Richard Blackett, particularly considering their own statements of his embarrassed circumstances at the time, it is difficult to reconcile their administration with a due regard to the interest of the fairs; and it is more difficult, perhaps, to excuse their neglect in relation to Blackett's co-obligant, Forster. But, holding these difficulties to be removed by the admission of the pursuers, that their father, Mr Blackett, to whom the money was lent by the trustees, was solvent at the period of his death, there arises this most serious objection, that, although the bond is stated by the defenders to have been amissing from the death of Mr Dickson, their attorney, in the year 1818, no steps were taken to get a renewal of the bond, and although Richard Blackett is said to have died solvent, no steps were taken at his death against his succession, or against his son, who represented him, and even the existence of this bond does not seem to have been mentioned, until the defences given in, in the present process, bearing date February 1827, after various dilatory defences had been repelled, by which time James Blackett, the son, had removed to Van Dieman's Land. In these circumstances, the Lord Ordinary cannot consider the defenders entitled to discharge themselves of their liability by now offering to assign the bond, in order that the pursuers may take steps against their brother, James Blackett. He thinks that they must be held liable, at all events, to the pursuers; and that, in the circumstances of the case, it lies upon them to make good the bond in which they are the creditors, and of which the enforcement has been so long delayed."

LORD MEADOWBANK.—There is no averment by the trustees that the father was not insolvent when he died. No. 292.

LORD JUSTICE-CLERK.—The question, whether any part of the claim is extinguished or discharged, is subsidiary to that of the liability of the trustees, as to which I am satisfied that they are liable. They undertook a trust which they were bound to have fulfilled. Now, they lend out the money to the father on a personal bond by himself and his brother-in-law. The latter becomes insolvent, and paid 9s., but they do nothing at all, and they say the obligation is discharged by handing over the bond. It is clear that this deed, drawn by a Scotch conveyancer, and conveying a Scotch estate, must be regulated by the law of Scotland, according to which, the mother had only a life-rent, and I think the liability of the trustees made out. If they can relieve themselves, by showing that the pursuers are liable to any extent for their father's obligations, it may be the subject of further investigation.

May 30, 1832.
Blackett, &c. v.
Gilchrist, &c.

LORD MEADOWBANK.—The deed undoubtedly fails to be ruled by the law of Scotland; but whether the trustees are to be personally liable, being trustees in England, may, perhaps, rather be a question of English law.

LORD GLENLEE.—The provision was to be paid by the heir in Scotch heritage to trustees, and though they were resident in England, its construction must depend on the Scotch law. As to the other point, I have some difficulty. If I saw a specific statement on admitted facts, which could be sent to an English lawyer for his opinion, I might not object. But all we see is, that the trustees got the money, and that there has been nothing done to discharge themselves. They were certainly bound to administer the £400 for the benefit of the family, and they have not done it.

LORD CRINGLETIE.—Having got the money, and done nothing to apply it in terms of the trust, they must be liable to repay.

LORD MEADOWBANK.—I am inclined to concur in that.

LORD JUSTICE-CLERK.—As to the other matter, whether the pursuers are liable as representing their father, we have at present no means for deciding.

LORD GLENLEE.—Why did the trustees not make use of the diligence they obtained, in order to ascertain the state of the father's funds at his death?

LORD MEADOWBANK.—And they have not stated on the record that the father died solvent. I am not for opening up the matter now.

LORD JUSTICE-CLERK.—In these circumstances we must just adhere.

THE COURT accordingly adhered.

Horne and Rose, W.S.—Geo. Tonn, jun. W.S.—Agents.

No. 293.

DAVID JOBSON, Suspender.—Ivory.May 31, 1832.
Jobson v.
Reid.**ANN REID or ROBERTSON, Charger.—Keay—Pyper.**

Husband and Wife—Parent and Child—Title to Pursue.—1. Where it was proved that a woman had had illicit intercourse with A. in summer 1823, was pregnant prior to the 18th of September of that year, and was married to B. on the 28th, and could not have had connexion with B. earlier than the 18th,—held that A. was liable in alimony to the child, reserving the question of its legitimacy.

2. A married woman, whose husband had been abroad for several years, found entitled to sue with a curator ad litem an action of alimony against the alleged father of her child begot before, but born after marriage—the husband being called for his interest, and not appearing.

May 31, 1832. **ANN REID** was married to Alexander Robertson, seaman, on the 28th
 1st Division. of September 1823. She was delivered of a child at Dundee, on the 12th
 Lord Newton. of March 1824, being within six lunar months from the date of the marriage.
 s.

The child appeared to be full-grown. On the 16th, she presented a petition, in name of herself and her husband, to the Sheriff of Forfarshire, against David Jobson, alleging that he was the father of the child, and praying for inlying expenses and alimony. In defence, he pleaded, inter alia, that the husband, Robertson, had not authorized the action. As Robertson was absent as a mariner, her father was named curator ad litem, and the action proceeded. A proof was allowed, from which it appeared that Robertson was one of the crew of a vessel which cleared out at the Leith Custom-House, for Van Diemen's Land, on the 3d of May 1823, being more than eleven lunar months prior to the birth; that his father's family, living at Pathhead, about 25 miles from Dundee, received a letter from the captain of the vessel, in the end of July or beginning of August, intimating that Robertson had been put ashore at Plymouth; that Robertson came to Pathhead about the end of August, or beginning of September, and that he had gone, with two companions, to Dundee, about the 18th or 20th of September. It also appeared that Reid was pregnant prior to the 18th of September, having been observed by some of her neighbours to be in that condition, and an inspection corporis having been made by a surgeon at Jobson's desire. The surgeon could not fix the date of the inspection more nearly than that it was in September, October, or November 1823; but at the time of inspection Reid appeared to be four months gone with child. There was evidence of admissions by Jobson that he had repeatedly met Reid, privately, in the summer of 1823, for the purpose of illicit intercourse.

The Sheriff, after allowing Reid her oath in supplement, decerned for inlying expenses and alimony, with expenses. A charge was given of the Sheriff's precept, in name of Reid and her husband. Jobson presented

ll of suspension, which was refused by Lords Mackenzie and Core- No. 293.
se, but afterwards passed by the Court.¹

May 31, 1839.
Jobson v.
Reid.

The Lord Ordinary, on June 18, 1829, found "that there is evidence Jobson v.
t the child, to which this question relates, appeared at its birth to be
n not prematurely, but after the full time; and that this was corro-
ated by evidence, showing that the charger had been with child from a
riod corresponding to such timely birth: that there is evidence that the
suspender had carnal intercourse with the charger, the mother of the child,
at a time not far from nine months previous to its birth: that there was
no evidence at all that Robertson, who married the charger about six
months before the birth of the child, had carnal intercourse with her pre-
vious to the marriage; and, on the contrary, that there is evidence that
he could not have had such intercourse any considerable time before that
date: that, in these circumstances, the marriage of the charger does not
form a legal bar to the admission of her oath in supplement, to prove that
the suspender was the father of her child, which oath, if not so barred,
was admissible, there being far more than a semiplena probatio of such
paternity: that it was proved, by her deposition, that the suspender was
the father of her child; and that there was no informality in the process,
decree, or execution, sufficient to warrant suspension; and, for these
reasons, found the letters and charge orderly proceeded, and the sus-
pender liable in expenses," &c.

Jobson reclaimed, and the Court, on the 19th of January 1830,² intima-
ted an opinion that the case was not sufficiently matured for judgment,
and that the husband of Reid should still be called. Their Lordships
therefore remitted "to the Lord Ordinary to appoint the husband to be
called for his interest, and to ascertain the point of fact respecting the
time at which he left the sea-service, and the period when he returned to
Scotland."

Robertson had left his wife before the action was raised in the Sheriff-
court, and as he could not now be found, the Lord Ordinary granted war-
rant for letters of incident diligence to cite him edictally, which was done.
He was said to be abroad or dead; the last trace of him being his deser-
tion from a king's ship in 1825. It was, at the same time, ascertained,
that the vessel which cleared out at the Leith Custom-House on the 3d
of May, had sailed next day. Parties then intimated they had no farther
proof to adduce, and the Lord Ordinary ordered cases for the Inner
House.

Pleaded by Jobson—

1. The marriage was on the 28th of September, and the birth occurred
on the 12th of March following; this was only one day less than six lunar

¹ During the discussion, a curator ad litem was appointed, in this Court, to Reid.

² Ante, VIII. 343.

No. 293. months; and as the husband was proved to have gone to Dundee, where Reid lived, eight or ten days before his marriage, there was room to apply the rule *pater est quem nuptiae demonstrant*. Besides, Robertson might have been in Dundee several weeks before the 28th of September, though no proof of it could now be had.

May 31, 1832.
Jobson v.
Reid.

2. As the facts thus obviously admitted of the paternity of the husband, the law would not suffer the child to be deprived of its legitimacy, in an action to which the husband had never made himself a party, and where the interests of the child were unprotected.

3. Reid had no *jus exigendi* without her husband's concurrence; and no authority from him was produced to insist in the demand.

Pleased by Reid—

1. As Robertson sailed from Leith Roads on the 4th of May 1823, and as the child was born on the 12th of March 1824, it was impossible that it could have been begot prior to the 4th of May; and as Reid was pregnant before the 18th of September, (which was the earliest date of Robertson's return to Dundee,) the presumption that he was the father of the child was absolutely excluded. On the other hand, it was proved that there was illicit intercourse with Jobson in summer 1823; a period corresponding with the birth of a full-grown child in March 1824.

2. The child cannot be foreclosed, by any judgment in this cause, on the subject of its legitimacy. It did not require to be made a party to the action for aliment against Jobson. The husband was either dead or forth of the kingdom, and, after every enquiry, an edictal citation was found to be all that could be done to certiorate him.

3. In these circumstances, she was entitled, along with a curator ad litem, to insist in her own right.

LORD PRESIDENT.—I think there is sufficient evidence to subject Jobson to aliment the child. Our judgment does not bar the child from vindicating its status afterwards, as it is no party to this process; and I would incline to insert a reservation to that effect in the interlocutor.

LORD BALGRAY.—I concur with the Lord Ordinary in the judgment which he pronounced. I think aliment should be awarded *hoc statu* against Jobson.

LORD GILLIES.—If the proper question raised were the legitimacy of the child, I should feel the case to be attended with greater difficulty than I now do. But there is clear evidence of illicit intercourse between Jobson and Reid; her pregnancy ensues; she claims aliment for her child against Jobson, and I see nothing in the case to exempt him from liability.*

THE COURT then “adhered to the interlocutor of Lord Newton, of date June 18, 1829, without prejudice to any question which may afterwards arise relative to the legitimacy of the child; found additional expenses due since the date of the above interlocutor,” &c.

* Lord Craigie was not present.

Suspender's Authorities.—1 Ersk. 6. 49 and 50; 3 St. 3. 42; Sandie, July 4, 1823 (Ante, No. 293. II. 453); Routledge, May 19, 1812. F. C. and 4 Dow, 392: *Rex v. Luffe*, 8 East. 193.

Charger's Authorities.—3 St. 3. 42; 1 Bank. 2. 3. 46; 1 Ersk. 6. 49; *Cruises on Dignities*, May 31, 1832. Ed. 1823, 280, § 88; *Ibid.* 281, 289, 292. Johnson v. Reid.

BROWN and MILLER, W.S.—J. D. LAWRIE, S. S. C.—Agents.

Jackson's Trustees v. Black.

JACKSON'S TRUSTEES, Advocators.—Jameson—Christison.
JAMES BLACK, Respondent.—Cunningham.

Torrie, &c. v.
Munsie, &c.
No. 294.

Expenses.—In an action by a creditor of a defunct against his trustees as intromitters,—held, that as the trustees opposed decree of constitution, (to which the creditor was entitled,) they were liable in expenses.

BLACK, holding a bill of the late Thomas Jackson, raised an action, May 31, 1832. about a month after his death, before the Sheriff of Lanarkshire, concluding for payment against his trustees as intromitters, and with the usual conclusion for expenses. The trustees gave in defences, in which, instead of limiting their opposition to a personal decree, and allowing decree of constitution, they craved that the action should be dismissed as prematurely brought. After some litigation, the Sheriff decerned against them qua trustees, and found them liable in expenses; they thereupon brought an advocation, in which the Lord Ordinary remitted simpliciter with additional expenses, and the Court adhered.

W. RENNY, W.S.—JAS. STEWART, S. S. C.—Agents.

No. 295

THOMAS JAMESON TORRIE.—*Rutherford.*

PATRICK TORRIE MUNSIE.—*Pyper.*

KING'S REMEMBRANCE.—*Sol.-Gen. Cockburn—Brown.*

Succession—Provisions to Children—Clause—King—Bastard.—A party having provided £10,000 to his only lawful child in full of all claims, and by a trust-deed of settlement appointed the residue of his estate to be paid to two natural children, ‘equally betwixt them, share and share alike, and their heirs and assignees,’ but not payable till the marriage or majority of each respectively; and one of them died in minority and unmarried, held, 1. That the bequest had not vested in him. 2. That the *jus accrescendi* did not take effect in favour of the surviving natural child. 3. That the Crown could not take as included under the conditional institution to ‘heirs;’ and, 4. That the legitimate child, as his father’s executor at law, was entitled to one-half of the residue, (in addition to his provision,) as lapsed.

Trust—Interest.—Trustees having profitably employed the trust-funds of a defunct, out of which a child was provided by marriage-contract in a certain sum—Held, that the child was entitled to the accumulated profits thereon, and not merely to legal interest.

No. 295. THE late Patrick Torrie, by antenuptial contract, entered into in 1806, with Janet Jameson, became bound to provide her in an annuity of £300 per annum, in the event of her survivance, and to lay out £6000 on good security to answer the same; and further, to lay out and secure £10,000 on bonds to himself in liferent, and the children of the marriage in fee. This provision was declared to be "in full satisfaction to them of all bairns' part of gear, legitim, portion, natural executry, and every thing else they could ask or claim by and through the decease of the said Patrick Torrie, their father, except what further he may think fit to bestow of his good-will." In implement of this contract, he conveyed, by disposition and assignation, dated May 2, 1810, certain bonds and a house, to the value, in all, of £10,000, partly to himself in liferent, and the children of the marriage in fee, and to the extent necessary for securing his wife's annuity, to her for her life-rent use allanerly, and the children of the marriage in fee.

By a trust-deed of settlement of prior date, he had conveyed all his property, heritable and moveable, to trustees, for payment of his debts, of the provisions to his wife in his contract of marriage, and of certain legacies, and for disposal of the residue according to the following declaration:—"And lastly, the residue and remainder of the prices and produce of my said estate and effects is hereby provided, and shall be provided and settled and secured for the following purposes. In the first place, in case there shall be a child or children procreated of the marriage betwixt me and the said Janet Torrie, then for payment to such child or children of the sums provided to them by the aforesaid contract of marriage, and the remainder of the prices and produce of my said estate and effects, I hereby appoint my said trustees to pay over to Anne and Peter Torrie, my natural children, equally betwixt them, share and share alike, and their heirs and assignees. But declaring that in case there shall be no child or children procreated of the marriage betwixt me and the said Janet Torrie, then and in that case I appoint the whole residue and remainder of my said estate and effects, after satisfying the provisions contained in the said contract of marriage in favour of the said Janet Torrie, and the annuities before mentioned to be paid to the said Anne and Peter Torrie equally betwixt them, share and share alike, and their heirs and assignees. But which provisions in favour of the said Anne and Peter Torrie shall not be payable until they shall respectively attain the age of majority, or be married."

He further nominated the trustees tutors and curators to these natural children.

Mr Torrie died in 1810, leaving his widow, an only child of the marriage (Thomas Jameson Torrie), and the two natural children. The trustees entered into possession of the whole funds, including the bonds specially assigned in implement of the contract of marriage; and during the

May 31, 1832.
2d Division.
Lord Medwyn.
F.

Torrie, &c. v.
Munisie, &c.

minority of the children, they administered them to considerable advantage, regularly accumulating the profits and interests as received. No. 295.

Peter died in minority, and unmarried; while Anne married John Munsie, and thereafter died, leaving an only child, Patrick Torrie Munsie. On Thomas Jameson Torrie coming of age, certain questions having arisen as to the share of his father's estate to which he was entitled, the trustees raised a multiplepoinding, in which claims were lodged for the following parties, viz.—

Thomas Jameson Torrie, who claimed, 1. The £10,000 provided by the contract of marriage to the children of the marriage, with the accumulated profits accruing thereon since his father's death; and 2. As his father's executor at law, the half of the residue of his estate, provided to his natural son, on the ground that that bequest had lapsed by the boy's death in minority, and unmarried.

Patrick Torrie Munsie, who claimed the whole residue, one-half as expressly provided to his mother (Anne Torrie), and the other, as having accrued to her by the death of her brother Peter—and

The King's remembrancer in Exchequer, as King's donatory, who claimed the half of the residue provided to Peter, as having fallen to the King by reason of bastardy.

The claim of Thomas Jameson Torrie for his provision under the marriage-contract was not disputed, except in regard to his demand for the accumulated profits thereon, as to which he contended, that the trustees having administered it, and made profit upon it, they were bound to account to him for that profit, and were not entitled to throw it into the residue.

By the other claimants it was maintained, that although in so far as regarded the funds specially appropriated by the deed of assignation in implement of the contract of marriage, he was entitled to accumulated profits, this would only give him such profits on £4000 of the whole sum, the remaining £6000 having been thereby destined to answer the widow's annuity, and that to this extent he was merely a creditor of the trustees as representing his father, and consequently could only demand the amount, with legal interest for the period during which he had allowed it to remain in their hands.

As to the half of the residue provided to the natural son Peter, it was pleaded—

For Thomas Jameson Torrie.

The residue of the estate destined in the trust-deed to the natural children was not to be payable until they should respectively attain majority, or be married. As it was therefore uncertain whether either of these events should happen at all, seeing that the vesting of the bequest depended on the survivance of majority, or on the marriage of each child respectively, the rule applied, dies incertus pro conditione habetur. But

May 31, 1832.
Torrie, &c. v.
Munsie, &c.

No. 295. as Peter died in minority, and unmarried, his share of the bequest did not vest, and the question then arises, whether it accresced to the other natural child, fell to the crown, or lapsed, so as to be taken up by the claimant, as executry of his father not tested upon.

May 31, 1832.
Torrie, &c. v.
Munsie, &c.

In regard to the claim of the representative of Anne Torrie, the bequest was left to "Anne and Peter Torrie, equally betwixt them, share and share alike, and their heirs and assignees." This was not a joint bequest of the whole residue to both, but a separate bequest of one half to each; and, by a subsequent clause, the shares are made separately payable, viz. when each child respectively should attain majority, or be married. There is no room, therefore, for the doctrine of accrescence, which can only have place where the subject of the bequest is given as a joint or common estate. On the contrary, the present case falls under the rule of the decisions in *Paterson v. Paterson*,¹ and *Rose v. Rose*,² which are almost identical with it.

Then in regard to the claim by the crown, the bequest never having vested so as to become the estate of Peter, it must depend solely on the effect of the adjected word "heirs," as creating a conditional institution. But the king is not an heir in the sense which would warrant his being included under a destination to heirs. He takes the property of a bastard not properly as heir (although from the similarity of rights he is generally termed so), but because the goods of the bastard are bona vacantia, and so fall to the king, as all other property bearing the character of res nullius. But it never was pretended that the crown could take property as included under a destination to "heirs," for in that way, if property were destined to A and his heirs, whom failing to B, then B never could take at all, since the crown would come in under the general destination to the heirs of A. The crown, therefore, having no right, and the half of the residue not having accresced to Anne, the bequest necessarily lapsed, and to that extent the testator died intestate: consequently, the claimant, as his executor at law, is the party entitled to this share of the residue.



For Patrick Torrie Munsie—

The case resolves into a *questio voluntatis*. It is clear that the testator has expressed no intention to favour his executor at law beyond the £10,000 specially provided to the children of the marriage, which is declared to be in full to them of all they could claim by and through his death. Then the subject bequeathed is not a special legacy divided into definite parts, but a general residue, and this is given as one subject to the two natural children. It is obviously intended as a joint bequest, and the intention is the more indisputable from there being no one favoured after these children to take the bequest on the failure of one of them. If

¹ June 4, 1741 (8101).

² Jan. 15, 1782. *Elchies, Legacy*, No. 9.

the terms of the bequest had been simply to "Anne and Peter Torrie," No. 295. without any addition, there could have been no question raised, but the adjection of the words, "equally betwixt them, share and share alike," merely expresses what the law would have inferred from a simple joint bequest, viz. that the interest of both was equal, but it does not separate the bequest into two distinct legacies. In such circumstances, the share of the predeceaser accresces to the survivor. This was the Roman law, as laid down by Vinnius (Inst. 2. 20. 16.) ; and Lord Stair (3. 8. 27.) states it as adopted in ours, while in the cases of Rose and of Paterson, the bequests were more properly of a half of the subject to each legatee, than of the whole subject in equal parts to the two.

May 31, 1832.
Torrie, &c. v.
Munie, &c.

For The King's Remembrancer—

Without disputing that the vesting was suspended till marriage or majority, so that nothing had vested in the bastard at his death;* still the residue is provided to him and his "heirs," and the crown, as ultimus haeres, is entitled to take under this conditional institution.

The Lord Ordinary pronounced this interlocutor: "Finds, that by his trust-disposition and deed of settlement, of date 18th November 1807, Mr Torrie conveyed his whole property to trustees.—First, for payment of his debts and funeral expenses—Second, for payment and satisfaction to his widow of her claims under the contract of marriage; and, Thirdly, for payment of certain annuities; and, 'Lastly, the residue and remainder of the prices and produce of his estates is hereby provided, and shall be provided and secured, in the first place, for payment to such child or children of the sums provided to them by the foresaid contract of marriage.' Finds, that by the said contract of marriage Mr Torrie bound himself betwixt and the 1st day of April 1807, to lay out and secure the sum of £10,000 on good and sufficient bonds, and to take the rights thereof to himself in liferent, and to the children one or more of the marriage, whom failing, to his own heirs and assignees in fee, and that in implement of this obligation, and of a similar obligation, to lay out and secure £6000 for answering his wife's annuity of £300, and on the narrative that 'having been requested by the said Janet Jameson, my wife, and her friends, to lay out the sum for answering her annuity, in the event of her surviving me, and the provision to the child or children procreated, or to be procreated, of the marriage betwixt her and me, in terms of the contract of marriage before recited, I have agreed to grant the disposition, assignation,' &c., he, of this date, (May 2, 1810,) makes over the specific sums in certain bonds and a house to himself in liferent and the children in fee: Finds it stated by the trustees, that the funds which belonged to Mr Torrie have been managed and improved

* No argument was maintained as to the question of vesting, the Remembrancer proceeding on the assumption that the bequest had not vested.

No. 295. by them, since his death in 1810, to the best advantage, the surplus having been always laid out and invested as an increase to the capital of the trust-funds: Finds it stated by the trustees, and no counter allegation, that no demand was ever made by the claimant, Thomas Jameson Torrie, or on his behalf by his tutor or curator, for fulfilment of the obligation in favour of the children under the contract of marriage, beyond the implement of it so far as made by the testator: Finds in these circumstances that the said claimant is entitled to payment of the sum of £10,000, with the legal interest thereof, but not to compound or accumulated interest, except in so far as regards the sum of £4000 contained in the disposition and assignation, 1810, which remains after providing for the widow's annuity, the fee of which was vested in the children of the marriage, upon which sum of £4000 the claimant is entitled to receive whatever profit or advantage has been derived from the investment of the surplus interest as a capital sum bearing interest, the sums laid out annually for the maintenance and education and other expenses of the claimant, being proportionally borne by the interest of the said £4000 and the interest of the remainder of this provision, being £6000: Finds that Mr Torrie's natural son Peter having died in minority, and unmarried, the bequest in his favour lapsed in respect that although the bequest be to heirs and assignees, the crown which claims as *ultimus hæres* clearly cannot be supposed to be such an heir as the testator contemplated in this clause, nor the heir in whose favour the law has modified the rule by which legacies lapse, if the legatee die before the term of payment, so as to entitle the heir to take, not through the legatee, but as conditional institute, the right of the crown to succeed to a bastard not being so much of the nature of succession as heir, as that all *bona vacantia* fall to the crown: And, in respect, further, that the claimant, Patrick Torrie Munsie, cannot state himself to be the heir of his uncle, nor is the bequest a joint bequest to the two natural children to be held *pro indiviso*, where, if the interest of the one is out of the field, the interest of the other would be increased by being relieved of this burden, therefore repels the claim of the crown and of Patrick Torrie Munsie to Peter Torrie's share of residue, and finds that Peter's share of the residue falls to be taken up by the claimant, Thomas Jameson Torrie, as heir and executor to his father: Finds that the said Patrick Torrie Munsie is entitled to the other half of the residue provided to his mother now deceased, in terms of his father and mother's contract of marriage, and prefers him thereto accordingly: Finds no expenses due to any of the claimants, and decerns and declares accordingly."

All parties reclaimed, Torrie in so far as he was refused accumulated profits on the whole £10,000 provided to him, and the others on the principal question.

The Court ordered Cases; on advising which—

LORD GLENLEE.—I certainly differ from the Lord Ordinary's interlocutor, in so far as regards the limitation of Torrie's claim for the accumulated profits. I see no reason for making any difference between one part of the £10,000 and the other. As to the other points, I agree with the interlocutor. The bequest to Peter Torrie did lapse, and all that can be said as to its not lapsing, depends on the adjectioNo. 295.
May 31, 1832.
Torrie, &c. v. Munsie, &c.n of "heirs," as including the Crown. Now, although the right of challenging death-bed deeds belongs to the Crown, that right is not restricted to heirs of line, but belongs to any heir *alloqui successurus*. But what gives the Crown right to be considered universal heir of provision? Originally the gift of bastardy, and that of *ultimus haeres*, were different in the narrative, and it is very plain that the Crown cannot have this benefit. Then as to whether Peter Torrie's share accrued to his sister, doctors on civil law differ; Voet is opposed to Vinnius. The passage from Stair, quoted by Munsie, looks in favour of the *jus accrescendi*, but then he adds the words: "But this takes place only in institution and substitution of heirs, that the testator die not partly testate, but not in legacies and *fidei commissis*." And though I admit it was originally a case of difficulty, I do not think we can deviate from the decision of the two cases quoted, one of them (Paterson) being nearly identical with this. The whole goods here were given to trustees, and the portions are expressly divided, and I rather think that we cannot deviate from these, and that the *jus accrescendi* does not take place, and I do not think there is sufficient evidence to presume intention that the whole residue should go to the survivor.

LORD CRINGLETIE.—I am of the same opinion. The trustees were not debtors, but held the funds for the benefit of the whole estate, and did accumulate, and so Torrie is entitled to the accumulation on the whole £10,000. Then, as to the other matter, the legacy to Peter not vesting, the words "heirs" are of no consequence, as they were only to take if he himself took. And I observe this in addition to what Lord Glenlee has said to satisfy me that the Crown has no right whatever. Then as to the *jus accrescendi*, I agree entirely that we must follow these two cases of Rose and Paterson.

LORDS JUSTICE-CLERK and MEADOWBANK concurred.

THE COURT accordingly altered, in so far as regarded the accumulation of profits to which they found Torrie entitled on the whole £10,000, but quoad ultra adhered.

Torrie's Authorities.—Paterson, June 4, 1741 (8101); Rose, Jan. 15, 1792 (Elchies v. Legacy, No. 9); Stair, l. 3. 7; 3. 3. 47; 4. 12. 1; Erak. 3. l. 67; 3. 9. 9; 1. 3. 7; Sempills, Nov. 15, 1792 (8108).

Munsie's Authorities.—Stair, 3. 8. 27; Vinnius, Inst. 2. 20. 16.

King's Remembrancer's Authorities.—M'Kenzie, 3. 10. 1; Erak. 3. 10. 4, 5; Goldie, July 31, 1753 (3183); Brock v. Cochran, Feb. 2, 1809 (F. C.)

JAMES CARNEGIE, Jun. W.S.—J. B. GRACIE, W.S.—JARDINE, STODART, and FRAZER, W.S.
—Agents.

No. 296.

June 1, 1831.
M'Ghie v.
Donaldson.

M'GHIE, Pursuer.—*W. Bell.*
SAMUEL DONALDSON, Defender.—*Cunninghame.*

Hunter v.
George's Trust-
tees.

Process—Expenses.—Circumstances in which the assignee of a bankrupt pursuer was ordained to find caution for the expenses of process.

June 1, 1832. M'BETH raised an action against Donaldson. He became bankrupt, ^{1st Division.} was incarcerated, and was ordained to find caution for the expenses of Lord Medwyn. process. He executed a disposition omnium bonorum, and an assignation of his action in favour of the incarcerating creditor. M'Ghie, a labourer, paid that creditor's debt, and got from him an assignation to the process, in trust for himself and M'Beth's other creditors, who were not named. Donaldson produced a certificate from the minister of the parish that M'Ghie was in poor circumstances, and he craved an order against him to find caution for expenses. M'Ghie resisted this, alleging generally, that the assignation was onerous, and that, as he was not bankrupt, he could not be liable to find caution. The cause originally depended before the late Lord Newton, and now before Lord Medwyn, who reported the question. The Court observed that the facts of the case were very peculiar, and found, that in the circumstances the assignee must find caution for the expenses of process.

No. 297.

JOHN HUNTER, Petitioner.—*Keay—W. Bell.*
GEORGE'S TRUSTEES, Respondents.—*Skene—Robinson.*

Process.—A petition craving the rectification of an Inner-house interlocutor, as ultra vires of the Court—refused.

June 1, 1832. THIS was the sequel of the case reported ante, May 24, p. 561. Hunter, ^{1st Division.} as onerous endorsee of a bill for £200, raised action against George's trustees. The Lord Ordinary found, "in the circumstances of the case, as admitted by the pursuer, that he is not entitled to the privileges of a bona fide and onerous endorsee; but in respect that the defenders do not find upon the letter from Macdonald, the drawer, to Reid, as conclusive evidence that the bill was an accommodation to the drawer, in so far as George was concerned, but refer to books and other documents, remitted to Mr Joseph Macgregor, accountant in Edinburgh, to examine the said books and documents, to call for such others as may be competently produced, to hear parties, and, thereafter, to report to the Lord Ordinary; and, in the meantime, appointed intimation of the dependence of the action to be made to the Aberdeen Banking Company."

Hunter reclaimed against this judgment, and prayed the Court, "in hoc statu, to recal the said interlocutor, in so far as the Lord Ordinary finds that the pursuer (petitioner) is not entitled to the privileges of a bona

fide and onerous endorsee ; and to reserve consideration of that question, No. 297. till the prejudicial question, whether the bill libelled on was granted without value, in so far as the acceptor James George was concerned, shall be competently determined ; or to do otherwise in the premises as your Lordships shall see just."

June 1, 1832.
Hunter v.
George's Trustees.

George's trustees also reclaimed, and prayed the Court " to recal the said interlocutor, in so far as it assumes that the defenders do not found on the letter addressed by Charles Macdonald to Alexander Reid, as conclusive evidence of the bill in question being an accommodation one, as regarded James George also ; to find that the said letter is sufficient evidence to that effect ; to recal the remit to the accountant, assoilzie the defenders from the conclusions of the action, and to find the pursuer liable in expenses ; or to do otherwise in the premises, as to your Lordships shall seem proper."

The Court " recalled the interlocutor of the Lord Ordinary, in so far as it proceeds on the ground of the defenders having declined to found on the letter from Macdonald to Reid ; also recalled the remit to Mr Macgregor, accountant, as unnecessary ; and in respect that, by the foresaid letter, the bill libelled on is proved to have been signed by James George only as an accommodation bill, and that the pursuer is not entitled to the character or privileges of an onerous endorsee, assoilzied the defenders from the conclusions of the libel, and decerned : found the pursuer liable to the defender in expenses," &c.

Hunter now presented a petition to the Court, setting forth that their judgment was ultra vires, because it decided a question which had not been previously determined by the Lord Ordinary ; that, from the shape of the case, the Court could not competently do more than affirm the finding that Hunter was not entitled to the privileges of an onerous endorsee, and quoad ultra, recal the Lord Ordinary's interlocutor, in respect George's trustees now founded on the letter of Macdonald, as their sole and conclusive evidence that the bill was an accommodation bill, and remit to the Lord Ordinary to determine that question. He therefore craved the Court " to rectify their interlocutor, and either to remit the cause to the Lord Ordinary, with instructions to order Cases, and thereafter report it for the decision of the Court, or to recal that part of the interlocutor in which the defenders are assoilzied from the conclusions of the action, and the pursuer found liable to them in expenses ; and quoad ultra, to remit to the Lord Ordinary, with such finding, or such modification on his Lordship's interlocutor of 2d February, 1832, as may be necessary to give effect to the opinion of the Court on the matter submitted to review by the foresaid mutual reclaiming notes ; and farther, in case of the defenders' refusal to consent to such modification on the foresaid interlocutor, to find them liable in the expense of this application," &c.

George's trustees answered, that the petition was incompetent, being an attempt to obtain a review of an Inner-House interlocutor ; and that

No. 297. it was also groundless on the merits. They had reclaimed against the Lord Ordinary's judgment, in respect that they had adduced sufficient evidence of the non-onerosity of the bill, to entitle them to be assuized, while his Lordship had failed to assuize them; and the Court, under the reclaiming note, had adopted their views, and assuized them with expenses. Such procedure was perfectly regular, and unchallengeable in point of form.

June 1, 1832.
Hunter v.
George's Trustees.
—
Pattison v.
Phaup.

LORD BALGRAY.—In the record, it was positively averred by George's trustees that the letter was good evidence of the non-onerosity. That record was before the Lord Ordinary as well as us. The interlocutor, as written out, embodies accurately the findings of the Court; and it was quite consistent with form that the Court should have found as they did. Though a Lord Ordinary may think there is not proof enough in the case, and allow farther proof, a defender may reclaim, and insist that there is already proof enough in process to entitle him to be assuized. Such was the course followed by the defenders here. It was perfectly regular, and I am for refusing the present petition, with expenses.

The other Judges concurred; and the petition was refused, with expenses.

Petitioner's Authorities.—6 Geo. IV. c. 120; A.S. July 11, 1828, § 63 and 78.

J. HUNTER, W.S.—A. DUN, W.S.—Agents.

No. 298.

PATTISON, Petitioner.—*Maidment.*
PHAUP, Respondent.

Agent and Client—Expenses.—A. S. Feb. 1806.—An agent who presented an application under A. S. Feb. 1806, against his client, entitled to the expense of the application, the client having attended at the taxation, and very slight deductions being allowed.

June 1, 1832.
—
1st DIVISION.

PATTISON presented an application under A. S. Feb. 1806, against Phaup, his client, to have his accounts taxed. Phaup attended at the taxation. On the auditor's report being moved,

Maidment, for Pattison, craved to be allowed the expense of the application, and stated that only a very slight deduction from the account had been made by the auditor at taxation. The Court allowed as craved.¹

¹ See ante, Brown, p. 45, and Miller, p. 479.

JAMES RICHARDSON, Pursuer.—*Robertson—G. G. Bell.*

No. 299.

THOMAS WILLIAMSON and Others, Defenders.—*Murray—T. Grahame.*

June 1, 1832.
Richardson v.
Williamson,
—

Reparation—Wrongous Imprisonment—Jurisdiction—Statute.—1. Circumstances of alleged irregular procedure by magistrates of a burgh, in punishing a party for disorderly behaviour in the streets, held relevant to infer damages against them, without libelling malice, notwithstanding the statute 43 Geo. III. c. 141, as extended by 9 Geo. IV. c. 29, and 11 Geo. IV. and 1 Wm. IV. c. 37, § 18. 2. Held that the summons was relevant, notwithstanding the exception, in 1701, c. 6, as to riots. 3. The procurator-fiscal of the burgh having voluntarily acted as clerk of the magistrate, and written out the procedure and sentence in virtue of which the imprisonment was inflicted—held that he was jointly and severally liable.

JAMES RICHARDSON raised an action of damages against John Irving, June 1, 1832.

provost of Annan, Thomas Williamson, senior bailie, and George Dalgliesh, procurator-fiscal. He set forth, that Bailie Williamson and a burgh officer had seized him after he had gone beyond the limits of the burgh, on account of some noisy extravagance in the streets of Annan, on the 15th of October 1829, and carried him to the burgh jail: that he was confined there till the 17th of October, without any written complaint having been preferred against him, or any written warrant for his incarceration: that on the 17th of October, Provost Irving, Bailie Williamson, and Dalgliesh, entered the jail, and prepared a minute, holograph of Dalgliesh, purporting that Bailie Williamson then made a verbal representation to Provost Irving of the alleged misconduct of Richardson, stating that he had struck and insulted Williamson, and one of the burgh officers, &c.; and concluding by expressing an opinion that it was necessary to inflict an exemplary punishment on Richardson; that the minute then proceeded, “ And the said James Richardson being brought before the Provost and the Bailie, and he having heard the Bailie’s representation as above detailed, and being judicially examined, declares that he has no recollection of the manner in which he behaved on the occasions mentioned by the Bailie, as he was quite drunk at the time; that he is sorry he should have behaved in an improper manner on those occasions, and promises he will not do so again; all which he declares to be truth.” The following deliverance was then pronounced:

“ Having considered the within declaration of the said James Richardson, with the representation of the Bailie before-mentioned, fine the said James Richardson in the sum of £10 Scots, and ordain him to be imprisoned in the tolbooth of Annan until he pay the said fine; farther, ordain him to be imprisoned for fourteen days from this date; and, before his liberation from jail, ordain him to find sufficient caution acted in the burgh-court books of Annan, to keep the peace towards the lieges for the space of three years from the date hereof, under the penalty of £100

1st Division.
Ld. Corehouse.
S.

No. 299. Scots, and decern accordingly. (Signed) John Irving, Provost; Thomas Williamson, Bailie." The pursuer farther alleged, that the above proceedings were held within the jail, with shut doors, and without any solemnity; that the pursuer had received no previous notice of the charge to be preferred; that the representation by the Bailie to the Provost was not made in the pursuer's presence; that it was a false representation; that it was vague and irrelevant; that it was never subscribed by the Bailie; that when the representation was read over to the pursuer he was allowed no time to take legal advice, or prepare a defence; that no evidence was led in support of the Bailie's representation, and it was not made upon oath; that Williamson was the accuser, witness, and judge in the cause; and that in virtue of the warrant, the pursuer had suffered imprisonment, under circumstances of aggravation, for fourteen days. He concluded against Williamson, Irving, and Dalgliesh, as jointly and severally liable for £500 damages, besides expenses of process.

Irving and Williamson pleaded as preliminary defences,

1. The action was incompetent as laid. The statute 43 Geo. III. c. 141, as extended by 9 Geo. IV. c. 29, § 26, provides, that unless malice be alleged against any inferior magistrate, he shall not be liable for more than twopence of damages, nor for any expenses of process, "in regard to any sentence pronounced, or proceeding had in any criminal trial." As the proceedings in this case were had in a summary criminal trial, and malice was not alleged, it was inept to conclude for any thing but twopence of damages.

2. Where a party was found in open riot in burgh, he might be summarily seized and incarcerated, without any signed information or warrant. An exemption in regard to such a case, was made by the statute 1701, c. 6. Neither was any regular libel necessary before trial and imprisonment for such an offence; and as the proceedings were not brought under reduction, and no breach of the act 1701, c. 6. was committed, and malice was not alleged, the action must be dismissed. 43 Geo. IV. c. 141; 9 Geo. IV. c. 29, 326; 1 Wm. IV. c. 37, § 13.

Pleaded in defence by Dalglieah. He did not act as procurator-fiscal, but simply as clerk of the Magistrates in writing out a minute of the proceedings, and of the confession signed by the pursuer, and of the warrant signed by the Magistrates. There was therefore no relevant ground of action against him.

The Lord Ordinary "having heard parties upon the preliminary defences, repelled the objection to the relevancy of the action, and remitted the process of new to the roll of jury causes; reserving all questions of expenses to the issue of the action."*

* "NOTE.—If the facts set forth in the summons be true, the clause of exception in the act 1701 can afford no defence. The illegality of the proceedings, as there stated, does not depend on a neglect of the forms prescribed by that act; they would

The defenders reclaimed.

No. 299.

LORD PRESIDENT.—I am for adhering to the interlocutor of the Lord Ordinary. *Richardson v. Williamson, &c.* I do not mean to say that it would have been illegal in Williamson to seize any man committing a riot in the streets; but the allegations of subsequent irregular procedure appear to me to be relevant. The plea founded on the statutes may be stated to the judge at the trial. *Berford v. Brown.*

LORD BALGRAY.—I am for adhering.

LORD CRAIGIE was understood to concur in the interlocutor, but not in the note, of the Lord Ordinary.

LORD GILLIES concurred with the Lord President, observing, that the allegations of the pursuer went to this, that he had been punished without a trial, and without any proof being adduced against him.

THE COURT adhered.

W. STEWART, W.S.—W. MARTIN, S.S.C.—Agents.

W. R. F. BERFORD, Pursuer.—*Jameson—Christison.*

No. 300.

DAVID BROWN, Defender.—*D. F. Hope—R. Bell.*

Heritable and Moveable—Succession—Trust.—1. Trustees under a marriage contract empowered to lay out a sum of money provided to the wife, on security either real or personal, having lent it on an heritable bond, taken, not in terms of the destination in the contract, but to the husband in trust for the uses in the contract, and it not appearing that the wife had specially sanctioned or known of this investment; held, that it did not so alter the character of the fund in regard to the matter of succession, as to preclude her bequeathing it by will. 2. A sum of money taken to a party, “her heirs and assignees,” not heritable, destinatione.

By antenuptial contract, dated June 7, 1825, betwixt the defender June 1, 1832. Brown, and the deceased Anna Maria Berford, he bound himself to infest her in an annuity of £70 out of his lands of Rawflat, while she conveyed to him the sum of £4900, with the whole property belonging to

2d Division.
Ld Mackenzie.
T.

have been equally improper if it had never passed. Neither can 43 Geo. III. c. 141, as extended by 9 Geo. IV. c. 29, to all inferior judges and magistrates of Scotland, be of any avail to the defenders. Under these statutes, it is necessary to libel malice in an action of damages against such judges and magistrates, ‘in regard to any sentence pronounced, or proceeding had, in a criminal trial.’ But, according to the showing of the pursuer, he was never competently brought to trial. The proceedings against him were extrajudicial, lawless, and oppressive.

“The case of the defender Dalgliesh, the procurator-fiscal, is more favourable, because he is represented as acting, not in his official character as procurator, but only as an amanuensis to the two magistrates who pronounced the sentence, and by virtue of their order. But accession to an illegal act is not justified by the order of a superior; and it is no part of the procurator-fiscal’s duty in any case to act as ‘clerk to the magistrates, or to receive their orders.’”

No. 300. her, on condition that he should secure and employ £3300 thereof in a particular manner. The assignment and relative obligation were in these terms: "For the which causes, and on the other part, the said Anna Maria Berford binds and obliges herself to be worth of good and lawful money the sum of £4300 sterling, which sum of £4300, and every other sum and subject pertaining to her, the said Anna Maria Berford does hereby assign and make over to him, the said David Brown, under the express condition and declaration that he shall be bound to secure, lay out, and employ the sum of £3300 sterling thereof at least for her use and behoof, and for the use and behoof of the issue of the intended marriage, if any be, upon the terms, and in the way and manner specified in the obligation now herein to be come under by him, and not otherwise. Agreeably whereto, in consequence, and in consideration of the above assignment, the said David Brown does hereby expressly bind and oblige himself, and his heirs, at sight, and with the advice of the trustees after named, or any two of them, within twelve months of the said intended marriage, to ware, employ, bestow, and secure upon land, bond bearing annualrent, or other sufficient security, all and whole the sum of £3300 sterling of the portion or tocher afore assigned, to take the rights and securities thereof to himself and the said Anna Maria Berford, and survivors of them in mutual liferent, for their liferent use allenarly, and the children of the marriage one or more procreated betwixt them in fee; and failing of children procreated of the marriage by death or non-existence, at the dissolution thereof by the decease of the said David Brown, the sum of £1650 sterling to his heirs and assignees whomsoever, and the like sum of £1650 sterling to the said Anna Maria Berford, and her heirs and assignees whomsoever; and upon the dissolution of the marriage by the decease of the said Anna Maria Berford, the sum of £1650 sterling to the said Anna Maria Berford, her nearest heirs and assignees whomsoever, and the like sum of £1650 sterling to the said David Brown, and his heirs and assignees whomsoever, and always with and under the conditions, restrictions, provisions, and declarations underwritten, viz. that neither the liferent nor fee of the before-mentioned sum of £3300 sterling, or any part thereof, shall be assignable by him, the said David Brown, or any manner of way affectable for the debts, deeds, or contractions of him, the said David Brown, or any how subjected, to be made forthcoming by any of his creditors, the same being declared void and null, and of no effect; and as often as the said sum of £3300 sterling shall be uplifted, which the said David Brown, with the advice of his said spouse, and a quorum of the after-named trustees, is hereby understood to have right to do, for the better management and securing thereof, he shall be bound and obliged, as he hereby binds and obliges himself, by and with the advice of his said spouse, and a quorum of the said trustees, again properly to lend out and to employ the same, and to take the rights and securities thereof in favour of himself and his said spouse and survivor of them in mutual liferent, and the children of the

June 1, 1832.
Berford v.
Brown.

marriage in fee; and failing of children by death or non-existence at the dissolution of the marriage by the decease of the said David Brown, the sum of £1650 sterling, or one half thereof, to the said Anna Maria Berford and her foresaids, and the like sum of £1650 sterling, or other half thereof, to the heirs and assignees of the said David Brown; and upon the dissolution of the marriage by the decease of the said Anna Maria Berford without children as aforesaid, the sum of £1650 sterling thereof to be paid to the said Anna Maria Berford, her nearest heirs and assignees whomsoever, and the like sum of £1650 sterling to the said David Brown, and his heirs and assignees, and that under the conditions, restrictions, provisions, prohibitions, and declarations before mentioned, to be either actually engrossed in the security, or expressly referred to as contained in this contract; such reference being declared as effectual and sufficient as if these several irritancies and conditions were specifically enumerated in the said right or security."

Five trustees (the pursuer, who was Mrs Brown's brother, being one) were nominated by the contract, as the parties at whose instance all execution thereupon should pass against the husband, two being declared a quorum.

On the 15th of November, immediately subsequent to the marriage, Mrs Brown wrote this testamentary letter:—"Rawflat, 15th November 1825.—Feeling convinced of the uncertainty of life, and having heard but very lately that it is in my power to dispose of £1500 as I please, I bequeath the same £1500 to my husband, David Brown of Rawflat. That D. B. should be put in possession of the said money when I am dead, as much as when I was living, is the prayer and request of his wife. Signed by me, (Signed) ANNE BROWN."

Thereafter, on the 26th, Brown, with consent of a quorum of the trustees, lent out the £3300 to Sir William Scott of Anerum, on an heritable bond. By this deed, after reciting the contract, and narrating that Brown and two of the trustees had agreed to lend him the money, on his "giving an heritable security therefor," in "terms of the marriage-contract," and that the money had been advanced, Sir William bound himself to repay the same "to the said David Brown and his heirs, at sight of the trustees named in the said contract, for the special uses and purposes therein and before-mentioned." The bond contained a precept for infecting Brown in the lands of Over Anerum, which was declared to be "granted with and under the conditions, provisions, and reservations contained in the contract between the said David Brown and Anna Maria Berford before narrated." Infectment was taken in February 1826.

Mrs Brown having died in October 1826, without issue, the pursuer Berford, her brother and heir-at-law, raised an action against Brown, to have him ordained to denude in his favour of Sir William Scott's bond, to the extent of one half, or failing doing so, to pay over to him the sum of £1650.

June 1, 1832.
Berford v.
Brown.

No. 300.
June 1, 1832.
*Berford v.
Brown.*

In defence Brown maintained, that, in terms of the marriage-contract, he was entitled to a liferent of the whole £1650 provided to his wife, and that the fee of £1500 thereof had been transferred to him by her testimentary letter in his favour.

Pledged for Berford—

1. The £1650, provided to the wife on the dissolution of the marriage, was destined to her and "her nearest heirs and assignees," and so was heritable destinatione, and incapable of being carried by will.¹

2. Supposing it to have been moveable prior to its investment, it was rendered heritable before her death, and the heritable investment having been made in consequence of powers granted by her in her marriage-contract, must be as effectual with reference to her succession, as if it had been done by her own personal act. Nor is it of any consequence that the bond, instead of being conceived in the very terms of the contract, was taken to her husband as trustee, because it was taken to him expressly for the purposes of the contract, so as to create not merely a personal claim against him to account for the money invested, but a right to the security itself, which would have been effectual to her in a competition with his creditors, had he died bankrupt. The fund, therefore, having thus been rendered heritable in virtue of powers granted by the party herself, could not be tested upon, and must descend to the heir agreeably to a series of judgments to that effect.²

3. In regard to the claim of liferent, it is excluded by the terms of the contract directing the £1650 provided to the wife, "to be paid" to her nearest heirs and assignees on the dissolution of the marriage by her death without issue.

Pledged for Brown—

1. A destination of a moveable fund to heirs, is a destination to the heirs in *mobilibus*, and unless there be an express exclusion of executors, a provision in such terms will not fall under the exception in the act of 1661.

2. Even if the exercise of the discretionary powers conceded in the contract of marriage could operate an alteration in regard to the matter of succession, this effect could only be produced by a strict compliance with the terms of the contract. These, however, were entirely disregarded, inasmuch as all securities were by the contract directed to be taken to the husband and wife, and the survivor of them in mutual liferent, and the children of the marriage in fee, &c. while the bond in question was taken directly to the husband alone; and although it was declared to be in trust

¹ Ersk. 2. 2. 14; Robertson, Jan. 19, 1637 (5489); Simpson v. Walker, Feb. 19, 1714 (5475); Ross v. Ross, July 4, 1809 (F. C.)

² Coutts v. Durie, Nov. 30, 1791 (4624); Davidson v. Kyde, Dec. 20, 1797 (5597, App. Herit. and Mov.); Burrell, Dec. 14, 1825 (ante, IV. 314); Dick v. Gillies, July 4, 1828 (ante, VI. 1065.)

for the uses as in the contract, yet until the money was secured in the No. 300. terms thereby required, matters remained under the husband's personal obligation to implement it, and the right to enforce that personal obliga- Jane 1, 1832.
Berford v.
Brown.

tion was a moveable right, transmissible by will. But even conceding that the powers under the contract were duly exercised, the sanction of the party herself to the investment was necessary to deprive her of her right of testing. When powers given to trustees for investment of money are clearly intended for the purpose of security only, and when it is discretionary on their part to take either moveable or heritable security, their selection will not affect the succession of the proprietor of the money, unless he have specially sanctioned the mode of investment resorted to by them, because, unless he have done so, there is no ground for inferring an intention on his part to alter the course of succession conformable to the previously subsisting character of the fund; and consequently, as there is no evidence, in the present case, of Mrs Brown's having approved or known of the investment, there are no grounds on which to infer that she intended to deprive herself of the power of disposing by will, which she had actually exercised only a few days before the date of the investment.

3. The terms of the contract are clear, that the survivor was provided in a liferent of the half destined in fee to the predeceaser's heirs.

The Lord Ordinary pronounced this interlocutor :—" Finds, that by the due construction of the contract of marriage libelled, the liferent of the sum of £3300 libelled, is provided to remain with the husband, that is to say, the defender, in case of the predecease of his wife, Anna Maria Berford ; and therefore, to the effect that the said liferent may remain with him, sustains the defences, and asoilizes the defender : But finds, that the right to the half of the fee of the said sum, after the liferent of the longest liver of the said spouses, as it stood secured at the death of the said Anna Maria Berford, was heritable, and could not be conveyed by her testamentary bequest, mentioned in the defences ; and, therefore, in respect to the same, finds that the pursuer has right to it on failure of the liferent of the defender : and decerns and declares accordingly: Finds neither party entitled to expenses."

Both parties reclaimed, Brown as to the main question, and Berford as to the liferent.

The Court ordered cases, at advising which :—

LORD JUSTICE-CLERK.—The doubts which from the first I entertained as to one branch of the interlocutor, have not been removed. As to the liferent, that has been properly decided ; but when we look at the contract, and consider the special terms of the security, doubts have occurred to me in regard to the other part. It is clear there is no positive injunction in the marriage-contract that the funds were to be laid out on land. A latitude is allowed to the trustees as to that matter, but it is specially provided, that in whatever way the money may be secured, there was to be a certain destination. Then the most important and particular object

No. 300.

June 1, 1832.
Berford v.
Brown.

was, that the sum should be effectually secured. Two of the trustees consented with the husband in lending the money, which was done within five months of the marriage, on an heritable bond, to Sir W. Scott. Now, it is true that there was an intention to follow out the marriage-contract, the terms of which are narrated; but the bond itself is taken to David Brown and his heirs, for uses as in the contract. This is a departure from the terms of the contract, and this lady having, on 15th Nov. 1825, in belief that she had power to dispose of her share of the funds, made this bequest in favour of her husband, the question comes to be, whether the subsequent investment of the money deprived her of that power, and rendered her bequest of no effect. The bond was executed on 24th November, nine days after the date of the letter. Now, she must either have been kept in ignorance of the intention to lend out, or she must have held that the trustees could not preclude the effect of her bequest. The question then is, has the loan made such an alteration in the powers of the parties under the marriage-contract, as to put it out of her power to leave by will, and oblige her to dispose by disposition? Suppose her brother had been one of the trustees consenting, could he by his own act defeat her bequest, by investing the fund on heritable security? I think this must have been answered in the negative. I conceive this would be only securing the money for the power of disposal in the contract. Then, does it alter the matter that other trustees are those who consent? If so, this effect could only arise from their following out literatim et verbatim the provisions of the marriage-contract; and if they have not complied literally therewith, it must be held just as if Mrs Brown had died before any investment, and while it remained under the personal obligation against the husband. It would be the hardest thing in the world to allow the destination to be affected, when the contract was not followed out, even admitting that if it had been done in literal compliance with the contract, it would have had that effect. I confess that at present I cannot hold this to have affected the right of succession, but think that Mrs Brown effectually exercised her power under the marriage-contract.

LORD CRINGLETON.—When I first read the interlocutor, I was satisfied that it was wrong on this point. I even doubted as to the different, as to which, however, I am now satisfied that it is right. As to the other matter, I am of your Lordship's opinion. Before money can be so laid out as to affect the succession of a party, the consent of the party is necessary; and, therefore, even if it had been laid out in the exact terms of the contract, if without her consent, I doubt exceedingly if it would have affected the succession. Suppose Brown had died, had his wife any right to the bond? Certainly not; all she had was a personal right to call him to account, and therefore a right which could be conveyed by will.

LORD MEADOWBANK.—I have no difficulty as to the different. On the other point, it is clear, that under the marriage contract, and before the money was invested, the lady had a right to dispose of it by will. But the difficulty I have is, whether she did not, by the terms of the contract, put it in the power of the trustees to vest the money, so as to prevent her disposing of it by will. Suppose Brown had died bankrupt, would she not have had a good right to a share of this bond? It appears to me her claim would have been invincible. Still that does not solve the difficulty; because, if, under the marriage-contract, she had only agreed to limit the power of disposal on certain conditions, and these were not fully complied with, then it will not be effectual, and that is attended with infinite difficulty.

LORD GLENSLIE.—I am inclined to think Brown's claim good. It would be going too far to hold, that the giving a general power to trustees to lay out on heritable security, should enable them so to dispose of it without her concurrence as to change the nature of it in regard to succession, and to deprive her of the right to Brown. No. 800.
 June 1, 1832.
 Berford v. Henry v. Mac-
 Dougall's Trust
 disposed by will. That is the general nature of the thing, when funds are to be invested solely for security. In the case of Kyde, the security had been approved of by the man, and it rather appears from the report, that if the change had only been in virtue of the general power, and after the will, it would not have been allowed the effect there given to it. At the making of the will, Mrs Brown certainly had the power to dispose of the fund. Then afterwards it was invested without any concurrence of hers, and I do not think this sufficient to take away that power.

THE COURT accordingly, while they adhered in so far as regarded the different, altered as to the £1500 bequeathed to the defender by Mrs Brown's testametary letter, sustained the defences, and to that extent assuited.

W. RENNY, W.S.—W. BELL, W.S.—Agents.

LIEUTENANT-COLONEL HENRY, Advocate.—Jameson—A. Wood. No. 801.
M'DOUGALL'S TRUSTEES and Others, Respondents.—D. F. Hope—Ivory
 —Cowan.

Process—Expenses.—Observed, that in an advocation from a judgment in an inferior court regarding preliminary defences, it is competent for the Lord Ordinary, while he remits to repel them, to decide the question of the expenses of the advocation, though the defender intimate his acquiescence in the judgment.

In an action at the instance of the advocate, Colonel Henry, before the Sheriff of Perthshire, the Sheriff having sustained certain preliminary defences to the competency of the action, and the title of the pursuer, Colonel Henry brought an advocation. The Lord Ordinary remitted to the Sheriff, with instructions to repel these defences, and with power to him to determine all questions as to the expenses in this and the Inferior Court at the issue of the cause. The respondents intimated their acquiescence in this judgment, and this was set forth in the interlocutor; but Colonel Henry re-laimed in regard to the matter of expenses, and stated, that the Lord Ordinary had proceeded on the assumption that it was imperative on him to reserve the question of expenses till the issue of the cause, as in the case of a judgment in which the defender had acquiesced, repelling a preliminary defence taken to an action instituted in this Court, and he intended that the provision in regard to such cases did not at all apply to the expenses of an advocation from a judgment of an inferior court regarding preliminary defences. June 1, 1832.
 2d Division.
 R.

The Court were agreed that it was not imperative on the Lord Ordinary to have reserved the question of expenses, and that he might com-

No. 301. patently have determined it; but being satisfied that there were no grounds on the merits for interfering with his Lordship's disposal of that question,
 June 1, 1832. Henry v. Mac- they refused Colonel Henry's reclaiming note.
 Dougall's Trustees, &c.

C. C. STEWART, W.S.—GIBSON-CRAIGS, WARDLAW, and DALEIEL, W.S.—W. DOUGLAS, W.S.
Ferrier v. Gart-
more's Cre-
ditors.

—Agents.

D. of Gordon's Trustees v. Innes. No. 302. C. FERRIER (WHITE'S TRUSTEE), Pursuer.—D. F. Hope—Forsyth. GARTMORE'S HERITABLE CREDITORS, Defenders.—Rutherford—H. Bruce.

June 2, 1832. FERRIER, trustee on the sequestrated estate of John White, having led an adjudication against the lands belonging to Graham of Gartmore, re-Lord Medwyn. strictable to his life interest if the lands were held under entail, instituted a

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process of ranking and sale, containing the ordinary conclusions as applicable to the case of lands held in fee simple. The Lord Ordinary having pronounced the usual interlocutor, allowing a proof of the value of the lands, &c., the heritable creditors of Gartmore reclaimed, and stated that an action had been instituted to determine whether the estates were truly held under the fetters of an entail effectual against creditors; and they contended, that until that was determined, it was premature to proceed with a ranking and sale. To this it was answered, that the question whether the lands were effectually entailed was competently raised in the ranking, and that the heir of entail had put in a caveat with a view of trying it, so that there were no grounds for staying proceedings, especially as the proof of the rental would be the same, and equally useful, whether it should turn out that the fee of the lands, or only the bankrupt's life interest, could be sold.

The Court remitted to the Lord Ordinary "to sist further procedure under the interlocutor complained of, and to hear parties on any questions that may be raised under the summons."

JAMES SWAN, W.S.—R. STRACHAN, W.S.—JAMES KNOX, S.S.C., and Others,— Agents.

No. 303. DUKE of GORDON'S TRUSTEES, Pursuers.—Robertson.
 MRS EUPHEMIA INNES, Defender.—Skene.

Landlord and Tenant—Violent Profits.—In estimating violent profits payable to an heir of entail, by a tenant whose lease had been set aside, no deduction can be allowed for the interest of money expended by the tenant in ameliorations on the property.

In estimating the violent profits found due by the late Mr Innes to the late Duke of Gordon, for his possession of the estate of Durris (ante, VI. 996), Mrs Innes, his executrix, claimed deduction of the interest of the money expended by him in the amelioration of the property. The Lord Ordinary repelled the claim, and the Court adhered.

June 2, 1832.
2d Division.
Ld. Mackenzie.
R.

J. MORRISON, W.S.—DALLAS and INNES, W.S.—Agents.

D. of Gordon's
Trustees v.
Innes.

GENERAL BAILLIE'S TRUSTEES, Pursuers.—Jameson—Marshall.
MRS ELIZA CROSSE or STEWART, Defender.—D. F. Hope—M'Neill.

Baillie's Trus-
tees v. Crosse.
No. 304.

Heritable and Moveable—Husband and Wife—Jus Relictæ.—The proprietor of lands really burdened with an annuity having conveyed them to a trustee to be sold, with a declaration, that out of the price to be obtained, a certain sum should be set aside, and made a real burden on the lands to answer the annuity, and having died after the lands were sold, but before any conveyance was executed in favour of the purchaser—held, in a question with the widow of the trustee, that this sum was heritable, and not subject to the *jus relictæ*.

THE lands of Barrachnie, belonging to the late Robert Crosse, were held by him, subject to an annuity of £40 a-year, forming a real burden thereon, in favour of Mrs Annabella Gibson or Crosse, the widow of a former proprietor. In 1801, Mr Crosse dispossed the lands to William Bogle, writer in Glasgow, in trust, for the purpose of being sold for payment of his debts; and it was specially declared, that from the price of the lands, Bogle should “set aside £800, or such other sum as may be deemed adequate to the payment of the said annuity due to the said Annabella Gibson, which sum shall be declared a real lien on the said lands during the life of the said Annabella Gibson, and shall be payable to me, my heirs and assignees, at her death.” Bogle sold the lands in spring 1802; but before he had executed any conveyance in favour of the purchaser, Mr Crosse died. In the conveyance subsequently executed by him, this sum of £800 was made a real burden on the lands, and the annuity was drawn by the annuitant till her death in 1814. In the meantime, Mr Crosse's widow had married the late General Baillie; and in a multiplepoinding raised by Bogle, as to a balance of funds in his hands, the General's trustees, (who had right to one-third of the moveable estate pertaining to Crosse at his death, as having fallen to the widow *jure relictæ*,) contended, that this sum of £800 must be considered moveable, in respect it had not been made real at the date of Crosse's death, the disposition not having at that time been granted to the purchaser of Barrachnie. To this it was answered by Mrs Stewart, (the only child and representative of Mr Crosse,) that the annuity having been a real burden on the lands, and this amount being directed to be retained out of the price as a real lien on the lands, to answer the annuity during the life of the annuitant (who survived the

June 2, 1832.
2d Division.
Ld. Fullerton.
R.

No. 304. trustee), and thereafter to be payable to him, "his heirs, and assigns," it truly had never existed as a moveable fund.

June 2, 1833. Baillie's Trustees v. Crosse. The Lord Ordinary found, "that the sum of £800 in question was heritable at the death of Mr Crosse, in a question with his widow;" and the

Paul v. British Court adhered.

Commercial Insurance Co.

A. CLASON, W.S.—C. C. STEWART, W.S.—Agents.

No. 305. WILLIAM PAUL (Inglis's Trustee), Pursuer.—*Rutherford.*
BRITISH COMMERCIAL INSURANCE COMPANY, Defendants.—*M'Neill.*

Expenses.—An action to recover on a life policy having been abandoned on correspondence being obtained from the papers of the party effecting it, tending to show knowledge and concealment on his part, of facts which would invalidate the policy—Expenses awarded to the defendants.

June 5, 1832. IN an action at the instance of Paul, trustee on the sequestrated estate of the late William Inglis, W.S., against the British Commercial Insurance Company of London, to recover the amount of a policy of insurance effected by them on the life of the late Earl of Mar, they

2d Division.
Jury Court.

R.

pleaded in defence, that the Earl's state of health was such as to render his life not insurable, and that Inglis, who was his lordship's agent, was, at the time of effecting the insurance, aware of this. Preparatory to going to trial, the Insurance Company obtained a diligence, under which they recovered from the trustee a correspondence between Messrs Inglis and Weir (of which firm Inglis was a partner), and Lord Mar's factor at Alloa, where his lordship resided, relative to a certificate to be granted by the Earl's ordinary medical attendant, from which it appeared that the latter had declined to grant a certificate, unless with a qualification of which Messrs Inglis and Weir did not approve, and that the certificate finally granted by him, even though modified in consequence of communications from them, was not forwarded to the Insurance Company, but that Lord Mar was brought to Edinburgh, in order that an unqualified certificate might be obtained from a physician there, and who was not in the habit of constantly attending him.

The trustee now abandoned the cause, whereupon the Insurance Company moved the Court for expenses, and their Lordships awarded expenses accordingly.

H. INGLIS and WEIR, W.S.—J. T. MURRAY, W.S.—Agents.

J. P. TOUGH and A. TOUGH, Suspenders.—*A. McNeill—Burton.*

JOHN SMITH, Charger.—*Rutherford.*

No. 306.

June 5, 1832.
Tough v.
Smith.

Process.—A petition to be reponed against an Inner House interlocutor in absence incompetent.

Allan v. Scott.

On a reclaiming note against an interlocutor in the Bill Chamber, June 5, 1832. refusing a bill of suspension, the Court, on Saturday (June 2), altered and remitted to pass in respect of no appearance by the charger, in support of the interlocutor. This day a petition was given in for him, stating that his agent, from accidental circumstances, had not been aware that the cause was in the roll on Saturday, and praying to be reponed and heard. This the Court considered incompetent, unless with the consent of the suspenders, who refused to agree to any thing further than that the suspension should be discussed on the bill.

2d Division.
Bill-Chamber.
Ld. Moncrieff.
R.

Their Lordships accordingly remitted to that effect.

C. F. DAVIDSON, W.S.—G. MORNO, S.S.C.—Agents.

JOHN ALLAN, Pursuer.—*Thomson.*

DAVID SCOTT, Defender.—*Wilson.*

No. 307.

Process—Record—A. S. July 11, 1828.—Observed that it is irregular to make up a record upon revised condescendence and answers, defender's statement and answers, and pursuer's counter statement and answers; but that the averments of both parties should be stated in one connected series of averments by the pursuer, with relative answers by the defender, followed, if necessary, by one connected series of averments by the defender, with relative answers by the pursuer.*

ALLAN raised a summons of declarator and payment against Scott. The June 7, 1832. record consisted of a revised condescendence by Allan, revised answers,

1st Division.
Ld. Cerehouse.
B.

* The clause of the A. S. is 105, p. 64, octavo edition. It orders, 1. That the party appointed to condescend shall state the facts he offers to prove in support of his case, and that the respondent shall answer by admitting or denying these averments, without introducing any counter statement. 2. That if the respondent has any counter statement, he shall place it under a separate head annexed to his answers, to be intituled, " Respondent's Statement of Facts," and that to this the condescender shall make answers, by admitting or denying the averments, but without inserting into these answers any counter statement; and, 3. That " in case any further counter statement shall become necessary on the part of the condescender, in consequence of the respondent's statements, the same shall be added in an additional article or articles at the end of his said answers;" and that then the respondent shall be allowed to revise and make answers.

No. 307. and a statement of facts by Scott, with answers thereto by Allan; and also a counter-statement by Allan, and answers by Scott.

June 7, 1832.
Allan v. Scott. The Lord Ordinary decreed in favour of Allan. Scott reclaimed; but intimated, before advising, that he only meant to crave leave to offer a reference to the oath of Allan. This was allowed.

LORD PRESIDENT.—I cannot refrain from adverting to the peculiar form in which this record has been made up. There are three successive series of statements and counter statements by the parties. In any subsequent case, I shall move that a record, so prepared, be re-transmitted to the Outer House, in order to be brought into a more regular shape. Each party should have but one connected series of averments,—having the respective answers by the opposite party subjoined.

Thomson.—The precise form of this record was enjoined by the Lord Ordinary, in order to make it correspond, according to his Lordship's view, with the Act of Sederunt.

LORD PRESIDENT.—It might have been necessary in the Outer House to require this, as one step towards preparing the cause, so as thoroughly to exhaust the averments of both parties. But after that was done, there was another step requisite to complete the preparation of the record; and that was, to consolidate the whole averments and answers of both parties, in one connected series of averments and relative answers, made by each of them respectively, and beginning with the pursuer. That I understand to be the form of process enjoined by the Act of Sederunt.

W. ALLAN, S.S.C.—D. SCOTT, W.S.—Agents.

No. 308.

JAMES BORTHWICK, Petitioner.—D. F. Hope.

Judicial Factor—Curator bonis.—Circumstances in which power granted to the curator bonis of a party insane, to borrow money on a heritable subject, and to grant a lease of it for twelve years.

June 7, 1832.

1st Division.
B.

IN February 1832, Borthwick was named curator bonis to Lieutenant R. L. Mitchell, R.N., then labouring under an attack of insanity. He now presented a petition, stating that he had been named, with power to serve Mitchell heir cum beneficio inventarii to his deceased father, and to make up titles in his person to his father's estate: that the only heritage consisted of certain premises which had been occupied by the father as a wood-merchant: that his right to the greater part rested on an obligation by one Campbell to convey it, on receiving payment by seven termly instalments; that two terms had been paid, and the third was current when the father died: that, in the event of failure to pay, Campbell had a right to rescind the transaction: that it was greatly for the benefit of Mitchell to complete the transaction, but this could not be done without borrowing money on the property, which was a measure contemplated by the father himself, as he had specially stipulated with Campbell to

have access to the title-deeds, if he required, to effect a loan : and that it No. 308.
 was impossible to complete Mitchell's title without borrowing. He farther June 7, 1832.
 stated, that the premises would bring a high rent, if let for a sufficient term Borthwick.
 of years to a person engaged in the wood trade : that an advantageous offer Ritchie v. Ro-
 had been made by such a person, on condition of obtaining a lease for twelve bertson, &c.
 years, and an assignation to the stock of wood ; which last, the executors
 were willing to grant. He therefore craved authority "to borrow money
 on the security of the said property, for the purposes above specified ; and
 for that purpose to grant bonds and dispositions in security to the lenders,
 containing all the requisite and usual clauses, binding the said R. L.
 Mitchell, and burdening the said property, and which shall be, to all
 intents and purposes, as effectual as if granted by the said R. L. Mitchell
 himself ; and farther, to authorize and empower the petitioner to grant
 leases of the said premises for a period not exceeding twelve years," &c.

THE COURT granted the prayer.

SCOTT, FINLAY, and BALDERSTON, W.S.—Agents.

JOHN RITCHIE, Pursuer.—Stark.

No. 309.

JANET ROBERTSON OR MARSHALL, and Husband, Defenders.—

A. M'Neill.

Property—Bona Fides.—Question as to whether a house had been built in the bona fide belief that the site, which was truly the property of another, belonged to the builder.

QUESTION ON evidence, as to how far it had been established that a June 7, 1832.
 mason, who had erected a house on a feu actually belonging to his bro- 2d Division.
 ther-in-law, had built it as his own, in the bona fide belief that the proper- Lt. Mackenzie.
 ty was his, and had not been merely employed as a workman to build it F.
 for his brother-in-law.

The Lord Ordinary, holding that the proof established the house to have been built bona fide as his own property, decerned in an action for restitution of the value, but the Court, taking a different view of the import of the proof, altered and asoilzied.

J. NAIRN—A. BAYNE—Agents.

No. 310.

June 7, 1832.
Cheyne v.
Smith.CHARLES CHEYNE, Pursuer.—*Rutherford—Piper.*
MRS ANN SMITH or THOMSON, Defender.—*Jameson—Neaves.*

Superior and Vassal—Prescription.—Where a party disposes a portion of lands belonging to him, with a double manner of holding for a penny Scots feu-duty, if asked only, and relieving him of a proportionate part of the feu-duty payable for the whole lands to the overlord, which was also to be paid under the public manner of holding; and infestment was taken base; and the whole lands were thereafter disposed to a singular successor without any exception from the dispositive clause in the disposition, but with merely an exception from the clause of warrantice of "feu-rights," including that above mentioned; and this singular successor completed his right by confirmation from the over superior, and more than 40 years' possession followed, during which the feu-duty for the whole lands was paid by him and his successors to the overlord, and the proportion thereof laid upon the part disposed was drawn by them from the owners, but not the penny Scots,—held, that the latter parties were still entitled to obtain an entry from the overlord, and were not bound to hold under the singular successors of the original disposer.

June 7, 1832.

2d DIVISION.
Ld. Moncrieff.

F.

IN 1725, Sir James Nicolson of that ilk, feued to Andrew Moffat three and a half acres of his lands of St Leonard's, now forming part of the Crosscauseway, Edinburgh, at a feu-duty of £140 Scots, with a duplication on the entry of heirs and singular successors. Moffat having taken infestment under the feu-contract, granted various rights of portions of the ground thus acquired by him. In 1752, he conveyed a quarter of an acre to Patrick Tod by a disposition, containing an obligement to infest "by two several infestments and manners of holding, the one thereof to be holden of me and my foresaids for payment of a penny Scots money, upon the ground of the said lands, if asked allenarly, and freeing and relieving us at the hands of the superiors thereof of the sum of £12 Scots money, as the proportion of the feu-duty payable out of the heil three acres and a half of land to them, effeiring to the said quarter of an acre disposed, as hereby taxed and ascertained, and the other of the said infestments to be holden from me and my foresaids, of our said immediate lawful superiors of the said ground, for payment to them of £12 Scots at Whitsunday and Martinmas yearly, by equal portions, and doubling the said feu-duty at the entry of every heir to the premises." In conformity with this obligation, the disposition contained procuratory of resignation, and indefinite precept of sasine. On the precept, infestment was taken by Tod in common form, in 1753. In 1754, Tod disposed this quarter of acre to one M'Dougall, who again disposed it in 1756 to a person called Begbie, and after a series of transmissions by base infestments, it came to be vested in the person of the defender, Mrs Thomson.

In the meanwhile, on Moffat's death, his heirs made up titles, under the Nicolson family, to the whole three and a half acres contained in the original feu-contract, and these, they in 1759 conveyed, by onerous titles, jointly to one Robertson and the same Patrick Tod who had been the

original disponee to the quarter of an acre, which prior to this he had No. 310. conveyed away, and which was at this date vested in Begbie above-men-
June 7, 1822.
Cheyne v.
Smith.
tioned. The disposition to Robertson and Tod was granted with a double manner of holding, and contained procuratory and precept. There was no exception from the dispositive clause, but the clause of warrandice was qualified by an exception of "the tacks or feu-rights granted by the deceased Andrew Moffat, our father, in favour of Robert Mitchell, James Bell," and several others, including Begbie above-mentioned, "without prejudice to the rents and feu-duties payable by them, and hereinafter conveyed." In 1762, Robertson and Tod conveyed the three and a half acres to trustees, who obtained a charter of resignation from the Nicholson family, whereupon they were infest in the whole subjects in 1763.

Thereafter, these trustees conveyed the property in exactly similar terms, and with a like exception from the clause of warrandice, but from that alone, to one Angus, who, having been infest in 1767, disposed the same to trustees, who obtained a charter of confirmation and resignation from the superior in 1792, and were infest thereon. Several subsequent transmissions and entries with the superior took place; and finally, in 1828, the pursuer Cheyne purchased the three and a half acres from the trustee on the sequestered estate of Mr Bristow Fraser, W.S., the then proprietor, and upon the trustee's disposition took an infestment, which was confirmed by the superior now in right of the Nicolson family, in 1830.

Cheyne thereupon brought a process of reduction-improbation, and declarator of non-entry, against Mrs Thomson, as his vassal in the quarter of acre disponee originally by Andrew Moffat to Patrick Tod, to compel her to enter with him as her superior. As a preliminary defence against production of her titles, Mrs Thomson pleaded, that in virtue of the obligation by Moffat, grantor of the disposition of the quarter of acre now vested in her, to infest the original disponee public, and of the procuratory of resignation in his favour, she was entitled to enter with the over superior, and was not obliged to hold under the pursuer, as coming in place of Moffat. No record was made up, but it was not alleged by the pursuer that any of the proprietors of the quarter of acre had ever entered with Moffat's successors as their superiors, or paid the penny Scots of feu-duty, while it was not pretended on the other hand that they had ever obtained an entry from the over superior. It was averred, however, by the defender, that the various successors of Moffat had received, along with the titles, a chartulary, containing a copy of the original feu-charter to Patrick Tod; and by the pursuer, that the defender's predecessors had constantly paid the £12 Scots, of which they were taken bound to relieve Moffat and his successors, to the predecessors of the pursuer, by whom the full sum of £140 Scots, due as feu-duty for the whole lands, had been paid directly to the over superior, which statement was not disputed.

The Lord Ordinary ordered minutes of debate.

No. 310.

*Pleaded for the pursuer—*June 7, 1832.
Cheyne v.
Smith.

1. The infestment under Moffat's disposition of the quarter of acre being necessarily held base while unconfirmed, Moffat remained vested with a mid-superiority in regard to that portion of the property. The defender's predecessors no doubt might have obtained confirmation from the superior, so long as this mid-superiority remained vested in Moffat, or was in hereditate jacente of him. But when Moffat's heirs made up titles to the whole property, including this quarter of acre, and conveyed it, with procuratory and precept, to a singular successor, who obtained himself first confirmed, the prior procuratory still unexecuted was necessarily evacuated, and the fee of the whole property under the Nicolson family became thereby full, so as to preclude either a resignation on the procuratory in the original disposition by Moffat, or a confirmation of the indefinite infestment, which was consequently fixed as base. No doubt, if this second conveyance had been fraudulent, and the disponee had been cognisant of the fraud, the original disponee in the quarter of acre might have set aside the public right thus created to his prejudice, and have thereafter obtained an entry with the over superior; but unless such fraud could be established, the right of the second disponee first confirmed would undoubtedly be preferable, and the original disponee would only have a claim of damages against the disposer, who had granted the conveyance to his prejudice. Now, supposing that such a personal objection lay against Tod, the disponee from Moffat's heirs, as would have entitled the defender's predecessors to have set aside his right as mid-superior of this quarter of acre, in respect that he, as the original disponee in it, must have been cognisant of the exact nature of the right conveyed, such objection was not pleadable against the several singular successors from him, whose titles could give them no information of a right to hold public having been granted, seeing the only exception was of "feu rights," and that not from the dispositive clause, but from the clause of warrandice. Besides, mere knowledge of a prior right is no bar to a second disponee completing his conveyance first, by a prior confirmation, to the complete exclusion of the other.¹

2. The pursuer's right to the mid-superiority of the quarter of acre is fortified by prescription, which precludes all questions of mere bona fides. Since 1763, it has subsisted feudally vested in the persons of his predecessors' singular successors, without any limitation in the titles. The dispositive clause in the original conveyance carried the whole three and a half acres without any exception, while the only exception was from the clause of warrandice, and of tacks and feu-rights. The investitures have been repeatedly renewed, while the several parties in right of the mid-

¹ Leslie v. M'Indoe's Trustees, May 21, 1824 (ante, III. 48); Rowand v. Campbell, June 30, 1824 (ante, III. 496); Struthers v. Lang, Feb. 2, 1826 (ante, IV. 418); M'Nair v. M'Nair and Brunton, Feb. 16, 1827 (ante, V. 372).

superiority have drawn the £12 Scots from the vassals in the quarter No. 310. of acre; and although they may not have levied the additional penny ^{June 7, 1932.} Scots, that was stipulated for *si petatur tantum*, and the omission to demand it cannot affect the possession otherwise had for greatly more than ^{Cheyne v. Smith.} 40 years; and,

3. The right on the part of the defender to revert to the over-superior, even supposing it to be good against a singular successor, has been lost by the negative prescription. So soon as the mid-superiority was vested in a singular successor, this privilege ceased to be *res meræ facultatis*; it was a claim, which, if competent at all against a bona fide singular successor, required to be enforced, and this not having been attempted for more than 40 years, it has been lost.

Pleaded for the defender—

1. Although the indefinite infestment of the original disponee in the quarter of acre was construed base while unconfirmed, the disponee was at any time entitled to revert to the over superior, and obtain confirmation. Nor could the subsequent conveyance by Moffat's heirs preclude this, for the successive disponees took the right as it stood in Moffat's person, qualified by the privilege on the part of the defender's predecessors of reverting to the superior. The right of the latter was referred to in the titles of the pursuer and his predecessors, and they were bound to have known the nature of the right so referred to, and must be presumed to have known it, and a copy of the original disposition, it was averred, was contained in a chartulary, regularly transmitted through the successive proprietors, and being thus in knowledge of the prior right, they could not exclude it by the titles made up by them.¹

2. There are no *termini habiles* here for pleading prescription. The titles of the pursuer's predecessors were all along qualified by the right of the defender's predecessors, and there has been no possession on the part of the former, inasmuch as the £12 Scots was due under the public, as well as under the base right, while the penny Scots, due only under the latter, was never demanded, and no casualty was ever paid, or entry taken by the defender's predecessors.

3. His right to revert to the over-superior, being *res meræ facultatis*, could not be lost by the negative prescription.

The Lord Ordinary sustained the defences, found that the defender was not bound to take a day to satisfy the production, and dismissed the action, adding the subjoined note.*

¹ Hume, Feb. 4, 1629 (1690); Hamilton, June 22, 1669 (Supp. 588); Aitken v. Goldie, July 3, 1745 (4862); Lang v. Magistrates of Dumbarton, June 29, 1813 (F. C.)

* "Note.—The original disposition of the quarter of acre to Patrick Tod, the defender's author, containing a double manner of holding, and warrants for carrying the same into effect by procurator of resignation and precept of seisin, was clearly

No. 310. Cheyne having reclaimed, the Court ordered cases; on advising which, their Lordships delivered their opinions as follows:—

June 7, 1832.

Cheyne v.
Smith.

LORD JUSTICE-CLERK.—If I could persuade myself that our decision could affect the doctrine of prescription, I would be very unwilling to adhere to the interlocutor. But I am satisfied that it does not impinge on the rules of prescription at all. There are no facts on which prescription can be pleaded. In the first place, the £12 Scots was just a proportionate part of the whole feu-duty for the

an absolute conveyance of the entire right of property, as it previously stood in the person of Moffat. And although Moffat might be stated not to be feudally divested of the character of vassal of the over-superior, Sir James Nicolson, as long as the procuratory of resignation had not been executed, and no confirmation had passed on the seisin taken by Tod on the precept, there is no doubt that it was *res mere facultatis* to Tod or his donee, at any time to complete his title by resignation, or to apply to the over-superior for confirmation of his seisin; and under the title, as it stood in the person of Tod, it never could have been competent to Moffat or his heirs to require any heir or donee of Tod to enter with them as mid-superior. The case of the pursuer, therefore, necessarily must rest, and is reected, on the supposed effect of the conveyance of the whole three and a half acres by Moffat's heirs to the same Patrick Tod, as an onerous purchaser, and of the subsequent conveyances to other third parties, with the charters and indentures obtained by them. But the first disposition, and all those which followed it, contained an express exception of various rights which had been previously granted by Moffat, and among others the right originally granted to Tod, but then standing in the person of Patrick Begbie. The titles which had been thus created are, no doubt, described as feu-rights. But still, the right actually held by Patrick Begbie is expressly excepted. Patrick Tod, the first donee of the three and a half acres, could not be ignorant of its true nature, having been himself the original purchaser of that right, with a double manner of holding. But, at any rate, both he and all parties acquiring from him, when they saw the exception in the title given by the common author, were bound to know the nature of the right so excepted, and it appears to be very clear that none of them were ignorant of it. What is called the feu-duty paid, was merely the proportion of the original cumulo feu-duty payable to Nicolson's heirs, as fixed by the disposition to Tod; and no entry or casualty was ever asked; while it is admitted that the original disposition of the quarter of an acre was inserted in a chartulary, which was delivered over by Moffat's heirs to the author of the pursuer, and passed to him through the various transmissions. Whatever error, therefore, there may have been in Moffat's heirs taking the entry from Nicolson's heirs of the whole three and a half acres, and in the subsequent charters being framed in the same manner, the Lord Ordinary is of opinion that the pursuer is not entitled to avail himself of that error as a mid-impediment to bar the right of the defendant to hold of Nicolson's heirs. It could create no mid-impediment, at all events, to prevent resignation on the procuratory, and with regard to the plea of prescription, the Lord Ordinary thinks that there is no room for it, because, from the nature of the right, there could be no possession to give positive prescription, and it was *res mere facultatis* to the defendant and his authors to enter with Nicolson's heirs. He has no idea that they must be held to have made a choice to hold base (with an untaxed casualty), merely by abstaining from executing the procuratory.

* The equity of the case is too plain to require any remark. The title of Moffat, now held by the pursuer, contains a taxation of the entry to a double feu-duty. In such circumstances, to demand a year's rent from a party to whom Moffat gave a

three and a half acres. No casualty was enforced, and no entry taken, and there are in fact no termini habiles for prescription, and we must judge on the titles. Then there is in the titles an exception of all rights. The mid-superior was never acknowledged, and he never attempts to enforce his right; and the question is, if the party is not at any time entitled to exercise the privilege of going to the over-superior, and I conceive that he is. It is of no consequence that the exception is only in the clause of warrandice. Erskine (2. 3. 31.) states, that in that clause most essential exceptions may be made. No mere lapse of time bars going to the over-superior, and there has been no mid-impediment to prevent this.

LORD CRINGLETIE.—Where there is a double manner of holding, and an infest-
ment taken, it is held to be base, till confirmed. The public holding remains in
abeyance, and is not worth a farthing till confirmed. I admit the party may go to
the superior at any time, if there is nothing to prevent it. Then what is sufficient to
prevent that? If a second right is given to another party who first completes it by
getting it confirmed, the party who first gets confirmation secures the subject.
Now, when a man resigns and gets a charter, it is just the same, to carry the domi-
nium directum, as if he had obtained confirmation; and when he gets right to the
whole of a subject, and resigns and gets a charter, that will carry the superiority,
though, of course, it will not carry any base right under it. I should like to have
seen what right was given to M'Dougal, for I suspect it must have been to be held
under himself; and if M'Dougal only got right to hold under Tod, the whole basis
of the defence falls, and I strongly suspect it must have been so. But independently
of this, the trustees obtained a charter from Nicolson, on which they were infest in
the whole subject in 1763. Now, there has been 70 years possession on that, and
is that not sufficient to establish their title to the superiority? Then afterwards
charters of confirmation and resignation were repeatedly renewed, and how can the
superior now give confirmation to a different party? Even if obtained, such con-
firmation would be useless. I go on the ground, that the person first entered has
the right. The pursuer's predecessors might perhaps have been called on to denude,
but only tempestive. Their right is secured now by prescription, and transferred
to singular successors, and prescription having run in favour of the purchasers, has
secured the superiority of the subject. On these grounds I think the interlocutor
wrong. No doubt if the exception had been in the dispositive clause, the Lord
Ordinary would be right, but being in the clause of warrandice, it is only an excep-
tion of a feu-right.

LORD GLENLEE.—I thought the interlocutor right. I have no doubt but that
the right to go to the superior was *res meræ facultatis*. It is, however, said,
that there is now a mid-impediment, but what is it? That the superior at present
is this party; but then he holds his right subject to the qualification inherent in it,
that it is defeasible by applying for confirmation. The feu-right, as it is called, was
not only known to the whole world, but acted on, and benefit taken of it by these

right, with double holding, is manifestly unjust. The pursuer could never transact
on the faith of this.

"This cause having been debated on the preliminary defences, the Lord Ordinary
has given his judgment on the state of it, as appearing from the representation of
the titles by both parties, neither having required that a record should be made
up."

No. 310.
June 7, 1832.
Cheyne v. Smith.

No. 310. parties being relieved of £12, and how can they resist any thing consistent with the very terms of the deed on which they must stand?

June 7, 1832.

Cheyne v.
Smith.

LORD MEADOWBANK.—I concur with Lord Glenlee and your Lordship.

THE COURT adhered.

Gracie v. Han-
nay's Repre-
sentatives.

A. BOYD, W.S.—SMITH and NEIL, S.S.C.—Agents.

No. 311.

J. B. GRACIE, Pursuer.—*Pyper.*

HANNAY'S REPRESENTATIVES, Defenders.—*Bell.*

Entail—Bona Fides—Repetition.—An heir of entail having reduced a sale of lands, and allowed a tenant possessing under a missive from the purchaser, to continue in his farm for a part of the term, but without homologating the missive which stipulated for an allowance out of the rents to the tenant for improvements for the first three years,—held, in an action for repetition of a term's rent drawn by the purchaser after the period when bona fides was determined to have ceased, that he was not entitled to deduction of the allowance made to the tenant for improvements.

June 8, 1832. In November 1821, pending the action at the instance of the late Mr

Vans Agnew, for setting aside the sales of certain portions of the entailed estates of Sheuchan and Barnbarroch, the late Mr Johnston Hannay of

2d DIVISION.
Ld. Mackenzie.
R.

Torr, one of the purchasers, let to one Mitchell for 19 years, from Martinmas 1821, the farm of Rascarrel, (forming part of the lands sold,) by missive, whereby he became bound to allow the tenant the sum of £300 in all, but not more than £100 in one year, for making improvements on the farm. On the 31st of July 1822, the House of Lords reduced the sales, and ordained the lands to be restored to Mr Vans Agnew, with the rents from the period of his succession;¹ but on a rehearing (March 12, 1823),² they so far varied in regard to the rents, as to find that the purchasers could not be in bona fide after the date of the former judgment, and that Mr Vans Agnew was entitled to demand the rents as if he had then first succeeded.

In the meantime, sequestration had been applied for in November 1822, and a judicial factor was thereafter appointed. The judicial factor continued in possession till Martinmas 1824, and in August preceding, Mitchell, the tenant of Rascarrel, entered into an agreement with Mr Vans Agnew, whereby it was stipulated, that "without homologating" the missive, Mitchell should possess the farm till Martinmas 1825, and that the missive should then expire, the parties intending, as set forth in the agreement, to enter into a new lease. The several purchasers, and among the rest the late Mr Hannay, had drawn the rents which fell due at Martinmas 1822.

¹ I Shaw's Ap. Cases, 333.

² Ibid, 413.

Mr Vans Agnew, founding on the judgment of the House of Lords, No. 311. March 12, 1823, as entitling him to that term's rent, raised an action, (now insisted in by Mr Gracie, W.S., judicial factor for his creditors,) for recovery of the rents so drawn by them. In defence, Mr Hannay pleaded as to the farm of Rascarrel, that Mr Vans Agnew had adopted the lease, and had in consequence become liable in implement of the obligations thereby imposed on the landlord, and so was bound to admit deduction of the sums stipulated for in favour of the tenant for improvements, and which had actually been allowed him by Mr Hannay, in settling for the term's rent, of which repetition was now sought.

The Lord Ordinary at first sustained this plea; but on a remit from the Court to reconsider it, his Lordship pronounced this interlocutor, adding the subjoined note.*

"The Lord Ordinary having heard parties' procurators, and thereafter considered the process, in the question with the representatives of the late Mr Johnston Hannay: Finds that they are not entitled to a deduction of the whole amount of the money which was paid to the tenant of Rascarrel for improvements after Mr Agnew had right to possession; but finds that, as the executors of Mr Agnew insist for the rent actually received, they are bound to allow deduction of as much of the said actual rent as may reasonably be stated to have been paid by the tenant, on account of the said payment for improvements, and to have been over and above that rent which Mr Agnew himself, if he had obtained possession of the land, but not paid any thing for improvements, would in that year have obtained; and appoints the cause to be enrolled with a view to fix the amount of said allowance: Finds the representatives of Johnston Hannay liable to John Black Gracie, writer to the signet, judicial factor for the creditors of the late Mr John Vans Agnew, in expenses."

Hannay's representatives reclaimed.

* "NOTE.—The Lord Ordinary at first thought, that as Mr Agnew or his executors, instead of reducing the lease, claimed the rent received under it, he was bound per contra to allow all that had been paid under that lease in that year. The Lord Ordinary thought the case the same as if the lease had bound the tenant to make the outlay for improvements, in which case Mr Agnew or his executors could not have claimed as rent the sum so laid out in that year. And this view was strengthened by the arrangement made by Mr Agnew with the tenant. But considering the mala fides found by the House of Lords, the Lord Ordinary thinks that Mr Agnew or his executors must have the full profits, such as he would have had if the land had been given up to him, in which case he would probably not have made the outlay on improvements. But then neither would he have got quite so high a rent. This is, however, but a small matter; and if the view of the Lord Ordinary be adhered to, it may be modified without regarding exact accuracy, or causing further expenses. The expenses must be given, because the question arose out of the mala fides of the party, as found by the House of Lords."

No. 311. **LORD JUSTICE-CLERK.**—Whatever we might have done, had there been a re-
claiming note from the other side, there are no grounds for altering on that for
Hannay's representatives.

June 8, 1832. **Gracie v. Han-**
 nny's Repre-
 sents. The other Judges concurring.

The other Judges concurring,

Howison v.
Stewart, &c.

The Court adhered.

J. B. GRACIE, W.S.—Dickson and Stewart, W.S.—Agents.

No. 312.

WILLIAM HOWISON, Petitioner.—*Henderson.*

JAMES STEWART and WILLIAM STEWART, Respondents.—*Thomson.*

Agent and Client—Factor—Process—A. S. Feb. 6, 1806.—A summary application for a remit to the auditor, under the Act of Sederunt, February 1806, is not competent as to factorial claims by a factor against his constituents, though these parties also stand in the relation of agent and client to each other, in several processes.

June 9, 1832. Howison presented an application under the Act of Sederunt, February 6, 1806, stating, that he had been named law-agent and factor for 1st Division.

B.

Howison presented an application under the Act of Sederunt, February 6, 1806, stating, that he had been named law-agent and factor for James Stewart of Brugh, and his curator; that he had conducted the whole of the minor's affairs, and that several business accounts had been incurred to him, as agent in various processes, conform to accounts produced; and he craved a remit to the auditor in common form. Stewart and his curator objected that the accounts lodged did not relate exclusively to agency in judicial proceedings, but embraced Howison's transactions as factor, and, inter alia, a considerable claim of factor fee; but it was only an agent's account, relative to the conduct of legal proceedings, which fell under the Act of Sederunt; and whatever claims, as factor, or otherwise, Howison might have, he must establish them by an action of accounting.

LORD PRESIDENT.—The accounts for agency in processes before this Court, must be separated from the rest of these accounts. To the former, the summary remedy of the Act of Sederunt is applicable, but not to the latter. We cannot remit to the auditor the accounts as now presented.

The other Judges concurred, and the petition was superseded.

W. Howison, S.S.C.—J. M. Cook, W.S.—Agents.

DAVID WILSON, Pursuer.—*Alison.*
JAMES TAYLOR, Defender.—*Smythe.*

No. 313.

June 9, 1832.
Wilson v. Tay-

Cessio.—Circumstances in which the Court refused the benefit of the cessio to a party who had been eighteen months in prison.

WILSON began business as a grocer and spirit-dealer in 1830. He June 9, 1832. commenced without capital, and in about six months he owed debts amounting to above £2000. His estates were sequestrated, and Taylor was named trustee. On Wilson's statutory examination, he admitted, that after being in the custody of a messenger, he handed over a pocket-book with money to his brother; that he could not say how much the money might be; but that he had stated to the trustee, he was certain the pocketbook contained £205, and more. Between £60 and £70 of this sum was afterward returned by the brother to Wilson, and by him given to the trustee. Wilson, at his examination, made up a state of his affairs, in which, even supposing all its items admitted, there remained a balance of £500, of which he could give no account whatever.

Wilson raised a process of cessio, in which he failed to give any satisfactory explanation of the deficiency of his funds, or to account for having given money to his brother. He stated the brother to be owing above £200 to him; and the trustee actually recovered decree against the brother for £835; yet the only explanation Wilson gave of the cause of his putting his pocketbook and money into his brother's hands, was an allegation of his being indebted to the brother in a sum of £90, and having requested him to pay other debts of his to the amount of £27. He now averred that the pocketbook contained only £148. The trustee opposed the cessio.

At the advising, Wilson insisted on the length of his imprisonment, since November 1830, and on the injury which he alleged his health to have sustained from it.

LORD PRESIDENT.—This is one of the worst cases of cessio that I have seen. The pursuer admits having handed over a large sum of money to his brother, after he was actually in the custody of a messenger. He gives no satisfactory explanation of the large deficiency of funds so suddenly incurred; and I cannot think, that, on a fair administration of the law of cessio, this pursuer is now entitled to the benefit of the process. I am for refusing it, *hoc statu.*

The other Judges concurred, and the cessio was, *hoc statu.*, refused.

N. GRACIE, S.S.C.—W. DUNCAN, W.S.—Agents.

No 314. WILLIAM HENDERSON, and Others, Advocators.—*Skene—Marshall.*
 ALEXANDER REID, Respondent.—*Robertson—G. G. Bell.*

June 9, 1832.
 Henderson, &c.
 v. Reid.

Process—Executor—Advocation.—1. Where a party who was decerned executor, presented an incidental petition to the commissaries, craving leave to examine two individuals, and such others as might be afterwards condescended on, and a condescendence of a number of individuals was afterwards lodged, and the commissaries refused to allow them to be examined; and a second incidental petition for leave to examine them was also refused, and a bill of advocation being presented, held that the advocation was competent, and a remit made with instructions to allow the examination under the second incidental petition.

2. Question whether a judge, acting as ordinary on the bills in vacation, having advised a cause on the 11th of May, can sign it on the 12th, the vacation having expired.

June 9, 1832. MRS AGNES HENDERSON died in March 1823, leaving a sister Barbara, married to Alexander Reid, a brother William, and several other brothers and sisters. In June 1823, William, and the other brothers and sisters, raised an action before the Sheriff of Edinburgh against Reid and his wife, setting forth that Reid had intromitted with the estate of the deceased, and concluding against him to account for his intromissions, and pay a just share of the execruty to each of them. Reid objected to their title, that they were not decerned executors; he also denied the alleged intromissions, and averred that the effects of the deceased had been already divided by neutral parties, and that the pursuers had got their share. The pursuers having failed to lodge answers, Reid was assailed with expenses.

In October 30, 1830, William Henderson and others (being the pursuers in the previous action) presented an incidental petition to the commissaries of Edinburgh, setting forth that their deceased sister died, possessed of considerable personal funds, chiefly in bank deposit receipts; that Alexander Reid had the custody of these, and of her other papers at her death, but had denied the existence of such funds and vouchers, so that they were unable to give up inventories, or obtain their shares of the execruty; that they had obtained themselves decerned executors, and, in order to make up an inventory, craved an order for summoning Alexander Reid and his wife, and also, if necessary, "any other members of their family, or other persons who may be condescended on, to appear, &c., for examination in the premises, and to answer all pertinent interrogatories regarding the affairs or money of the said deceased, and to decern and ordain them, or either of them, to deliver into the custody of the clerk of Court, all goods or effects, and all vouchers, documents, or other papers which belonged to the said deceased, or related to her property and estate, and to deposit in bank any money of which they, or either of them, may be possessed, or which may be discovered, forming

part of the estate of the said deceased, and to lodge the vouchers there- No. 314.
for in the hands of the clerks of Court, to abide your Lordships' future orders."

June 9, 1832.
Henderson, &c.
v. Reid.

After some opposition, Reid and his wife were examined. William Henderson and others then put in a minute and condescension, enumerating eighteen individuals, including Reid's children, besides the clerks of two banking companies, and craving leave to examine them, or as many of them as might be found necessary. Reid objected to allowing such examination to proceed, under a petition which implicated his character, by charging him with having had undue intromissions with the funds of the deceased. The Commissaries refused the desire of the minute. Henderson and others reclaimed, and also lodged a separate incidental petition, of new reciting their interest to have an examination of all persons who were acquainted with the state of the affairs of the deceased at her death, but omitting all mention of the name of Reid as an introducer. They enumerated the individuals who had been named in their minute, and craved warrant to serve the petition on them, "or such of them as the petitioners may find it necessary to examine," and to ordain them to appear for examination, "and to answer all pertinent interrogatories regarding the affairs of the said deceased Mrs Agnes Henderson; and to ordain such of them as may be found to be in possession of any goods, gear, effects, vouchers, documents, or other papers or writings, which belonged to the deceased, or related to her property, to deliver the same into the custody or keeping of the clerk of Court; and to deposit in bank any money, of which they or any of them may be possessed, forming part of the said deceased's estate; and to lodge the vouchers thereof in the hands of the clerk of Court, or otherwise, as your Lordships may direct; all to abide your Lordships' future orders, or the orders of any other competent Court."

Reid lodged answers, and the Commissaries "refused the desire of" the petition. They also refused the reclaiming petition against their former judgment, under the first incidental petition.

Henderson and Others then presented a bill of advocation as to both petitions. The bill was objected to as incompetent.

Pleaded by Henderson and Others—

1. Advocation was competent, the second incidental petition having been refused without qualification, and all farther examination having been refused under the first petition.

2. The first incidental petition had not only craved leave to examine Reid and his wife, but also, if necessary, "any other persons who may be condescended on," to appear for examination, &c. The subsequent minute and condescension stating such parties as should be examined, was therefore quite regular under that petition. There was a necessity, from the nature of the case, to allow such examination, in order to expiate the condition of the deceased's affairs, and give up an inventory; and the Commissaries were instructed to make such enquiries through

No. 314. their procurator-fiscal, if the parties interested failed to do so. This petition was consistent with common practice.

June 9, 1832. Henderson, &c. 3. Reid had no right or title to oppose the examination of any other party than himself. The interlocutor was therefore erroneous which had refused the desire of the minute under the first incidental petition.

The second incidental petition had abstained from even mentioning Reid's name; it did not crave an order against him; and he had no right or interest to oppose it. But it was competent in itself, because the progress of such an investigation frequently suggested new parties to be examined, and a new incidental petition might therefore be presented as to them.

Pleaded by Reid—

1. Advocation was incompetent, not being under 50 Geo. III. c. 112, although the judgments complained of were merely interlocutors.

2. Since the abolition of the quot-silver, the Commissaries had themselves instigated no enquiries into the estates of defunct persons; and as their court was now reduced, they had no procurator-fiscal. But as Henderson and others had been decerned executors, they might sue Reid in an action of accounting. If their former action should afford him a defence of res judicata, that circumstance did not entitle them to deviate into an irregular and inquisitorial form of procedure. But farther, the first petition had specified no individuals by name, except Reid himself and his wife; both had been examined under it; its conclusions were therefore exhausted as to this, and the minute and condescendence were incompetent. They could not thus thrust new parties into a cause; and if they could not do so by this means, as little were they entitled to do so by the device of a new incidental petition, presented relative to the same process of confirmation.

3. Reid had a right and interest to appear. He was directly a party to the first petition, and his character was implicated by it. His character was equally involved under the second petition, which was merely incidental, and relative to the previous procedure; and his children were parties, against whom it was directed.

The Lord Ordinary, “ In respect, 1mo, That the complainers have been confirmed (decerned) by the proper authority, executors, qua nearest of kin, to Mrs Agnes Henderson, and have thereby become the legal trustees for collecting and administering the funds and effects belonging to her at the time of her decease under those restraints which the law and practice of Scotland have sanctioned: 2do, That the law of Scotland has been particularly careful to protect the funds and goods of dying and deceased persons, and, upon principles of equity and necessity, has, from the earliest times, laid down regulations to attain that end: 3to, That executors, like all other accountable trustees, are entitled to enquire into, and expiscate who have been the intromitters and possessors, without title, of all that belonged to their constituent, in order that the proper legal means may be

adopted for recovery: 4to, That this enquiry and expunction is the more necessary and proper in the present state of society, where so much property may be held without any written title or document being in the custody of the proprietor, or even can be from its nature: 5to, That the Court, or authority which confirms the executor, is the proper tribunal for authorizing and conducting such enquiry: 6to, That the present application to the Court of Session appearing to be the first of the kind that has been made the subject of litigation; therefore, in order that the matter may be maturely considered, appoints the parties to print the bill and answers, and to box the same to the First Division of the Court, in order that the same may be reported. And, as it is only the general question at issue that is proposed to be brought under the consideration of the Court, the Lord Ordinary recommends to the parties, by mutual adjustment, to leave out such part of the bill and answers as have no reference to the point in question; also, recommends to the parties to examine the Record of the Commissary Court relative to their practice in such matters."

June 9, 1832.
Henderson, Esq.
v. Reid.

At advising—

LORD BALGRAY.—This case appears to me to be of a rather novel complexion. I could wish to have an enquiry into the practice of the Commissary Court.

Skene.—The advocates are poor parties, to whom the expense of litigation is most burdensome. It is important for them to have a judgment of the Court to-day, if the Court think there is enough of clear principle to enable them to decide without reference to the practice.

LORD CRAIGIE was understood to express a decided opinion, that the advocates had a right to obtain the examination which the Commissaries had refused.

LORD PRESIDENT.—In the process of confirmation, an incidental petition was presented by the advocates. It craved leave to examine, not merely Reid and his wife, but, if necessary, "other persons who may be condescended on." The minute and condescension, stating parties who were to be examined, were therefore not incompetent under that first petition; and I think the prayer of the minute ought not to have been refused. Suppose that a party dies, and that some one, who is in the house at the time, takes possession of his papers and money, and hands them over to a third party, not living in the house. The relations of the deceased search the house and find nothing; they present a petition to examine the party first mentioned, and others to be condescended on. They do not find him in possession of any money or vouchers, but they perceive that the examination of the second-mentioned party is essential to their interests, and crave leave to examine him. They have a right to obtain such leave, and so the advocates should have been allowed in this case. Then what interest has Reid to oppose? What title or interest has he to appear and resist the second petition? He is already examined. He is not even mentioned in the second petition. As to the other parties, they are only to be ordained to give up such vouchers and effects as belonged to the deceased, and are in their possession. What right has Reid to object to this? I think the Commissaries have pronounced erroneous judgments, and that we ought to remit with instructions to them to grant the prayer of the second incidental pe-

No. 314. tition ; and, at the same time, find Reid liable in the expenses arising from his opposition in that court and in this.

June 9, 1832.
Henderson, &c.
v. Reid.

Gillies v.
Smith.

LORD BALGRAY was understood to assent.

LORD PRESIDENT.—Before taking leave of the case, I may notice, what appears to me to be an irregularity, though it has not been insisted in, and may be of no moment in this case. The interlocutor ordering the cause to be reported is signed by Lord Balgray, as Ordinary on the Bills, on the 12th of May. I doubt whether his Lordship was not *functus officio* at that date.

LORD BALGRAY.—I advised the cause on the 11th, and gave judgment, but the interlocutor remained unsigned till the 12th.

THE COURT then “ remitted to the Commissaries, with instructions to alter their interlocutor, to sustain the last incidental petition as competent, and to allow the persons therein named to be examined in terms thereof, and also to find the respondent, Alexander Reid, liable in the expenses arising from his opposition to the petitions of the complainers in that court ; found the said respondent liable in the expenses of this advocation ; appointed an account thereof to be given in, and, when lodged, remitted the same to the auditor to tax and to report, and to the Lord Ordinary on the Bills to decern for the amount.”*

Advocates' Authorities.—Balf. 655, 670, and 676 ; A. S. July 24, 1584, and Feb. 28, 1666 ; Dirleton's Doubts, p. 31.

Respondent's Authorities.—50 Geo. III. c. 112, § 32 and 33 ; Beveridge, *Form of Proc.* 200.

J. ANDERSON, S. S. C.—SCOTT and RYMER, W. S.—Agents.

No. 315. ROBERT GILLIES, Suspender.—D. F. HOPE—Miller.
JOHN SMITH, Charger.—JAMESON—Neaves.

Agent and Principal.—Circumstances in which the master of a vessel having gratuitously undertaken the charge of a consignment of goods on board, was held responsible for the value, in respect of insufficient execution of the charge.

June 9, 1832. IN December 1812, the charger Smith being in command of a merchant vessel bound on a voyage from Greenock to Kingston in Jamaica, shipped 2d Divinox. on board of her, as an adventure of his own, a quantity of malt liquors Lt. Mackenzie. R. and other articles, for the West India market. The vessel proceeded to the Cove of Cork, to wait for a convoy, and while there Smith was by the owners superseded in the command, and the suspender Gillies was appointed master in his place. Smith on this consigned his goods to Messrs Bogles and Co. of Kingston, to whom he addressed a letter, enclosing the invoice, which he intrusted to Gillies, who agreed to take charge of it and of the goods. Thereafter the vessel sailed for Kingston, where she safely arrived, and delivered her cargo. After some time, Smith having

* Lord Gillies was absent.

heard nothing of his consignment, wrote to Bogles and Co., making enquiry regarding it. In answer they (March 16, 1814) replied,—“ We never received any consignment on your account, and some mistake, which we are unable to explain, must have taken place;” but they afterwards added to the letter containing this statement a postscript to the following effect:—“ We have just learnt from Mr Jones, our wharfinger, that the goods were left by Captain Gillies in his hands, with instructions to correspond with him on the subject. Mr Jones is to make up the account immediately, when we shall write to you again.” Some farther correspondence passed with Bogles and Co. and with Gillies, but the proceeds of the goods never having been received from Jones, Smith raised an action before the Court of Admiralty, concluding for the value against Bogles and Co., and alternatively against Gillies in the event of Bogles and Co. being assailed “ by and through any fault, negligence, or carelessness, on the part of the said Robert Gillies, in executing the trust reposed in him.” Bogles and Co. having defended themselves on the ground that the goods and letter of consignment were not duly delivered, so as to impose on them the obligation to account, a proof was allowed, the following summary of the result of which, and of the admissions of the parties, was embodied in a joint case drawn up for the opinion of the Attorney-General of Jamaica, as to Bogles and Co.’s liability by the law of that island.

“ 1st, That Gillies was gratuitously intrusted by Smith with the care of the goods, the invoice thereof, and the letter to Messrs Bogles and Co., in the manner before detailed. 2d, That Smith sent no separate letter by post to Messrs Bogles and Co., regarding the consignation. 3d, That the goods which had been consigned by Smith to Bogles and Co., were delivered by Gillies through his mate, Henry King, at Bogles and Co.’s wharf at Kingston, to Joseph Jones the wharfinger. 4th, That the wharf at which they were so delivered, belonged in property to Messrs Bogles and Co., and Jones was not tenant thereof, but wharfinger under Messrs Bogles and Co., to whom the wharf belonged, and by whom it was occupied; and Jones was in the habit of receiving for them all goods landed for them at the wharf. 5th, That the wharf was not solely used for the landing of goods consigned to Messrs Bogles and Co.; but any person might land goods there, on payment of certain wharfage-rates. 6th, Gillies asserts, that the letter to Messrs Bogles and Co., and the invoice of the goods consigned to them, were delivered by him to Jones, their wharfinger, as well as the goods in question; but although it is admitted that the goods were delivered to Jones, there is no direct evidence that the letter and invoice were so delivered, and Jones himself is now dead. 7th, It is denied by Bogles and Co. that they ever received either the goods, the invoice, or the letters; or that they ever heard of such goods having arrived, until informed of it by Smith’s subsequent letter formerly mentioned, received about a year after the goods were said to have been landed at Jamaica.”

No. 315.
June 9, 1832.
Gillies v.
Smith.

No. 315.

June 9, 1832.
Gillies v.
Smith.

The Attorney-General, proceeding chiefly on the circumstances that the wharf was open to the public, and not exclusively for the use of Bogles and Co., and that there was no evidence of Gillies having delivered the letter at the counting-house of the Company, returned an opinion, concluding as follows:—"Under all the circumstances of the case, Gillies does not appear to me to have done all that he was bound to do by the law and practice of Jamaica, and I am of opinion that what he did was not sufficient by that law and practice to render Bogles and Co. liable for the goods in question."*

The Judge-Admiral, on considering this opinion, assizized Bogles and Co., and found Gillies responsible for the goods, appointing parties to be heard as to the amount. Thereafter, on the abolition of the Admiralty

* The entire opinion was as follows:—"1st, I am of opinion that the master of the vessel, having undertaken the trust stated in the first question, is not understood, according to the law and practice of the island of Jamaica, sufficiently to discharge the duty intrusted to him, by merely delivering the goods, invoice, and letter, to the wharfinger of the mercantile house to whom the goods were consigned, at a wharf which is the property of the consignees. It is not within the scope of his employment, nor has he any authority, as wharfinger, to accept consignments for the mercantile company by which he is employed as a wharfinger. The mere delivery to him of the goods, invoice, and letter, without any communication to the company, would not create between the owner of the goods and the company the relation of consigner and consignee, so as to make the latter accountable to the former for the proceeds of a sale effected by the wharfinger. It was the duty of the master to have delivered at the counting-house of the company, the invoices and letter; for the company had a right to determine whether it would accept the consignment, and thus undertake the duty of consignee.

"2d, In answering the preceding question, I have considered that the wharf, although the property of the consignees, was one open to the public, at which my person might land goods on payment of wharfage-rates;—such, in fact, are all the wharfs in Kingston. If the wharf were exclusively confined to the landing of goods consigned to the proprietors, it would resemble a warehouse, and the wharfinger would have other duties, and a more extensive authority with respect to the landing and receiving of goods, than belong to him in the mere character of wharfinger. In such a case, the delivery of the goods, invoices, and letter to him, might be regarded as a delivery to his employers as consignees; and the latter would be bound by his acceptance of the consignment. But the wharf on which the goods in question were landed, was certainly not of that description, and the wharfinger had no such authority to bind his employers.

"3d, I am of opinion that the master of the vessel should have delivered the letter, in person, at the counting-house of the company, which was situated in the same place as the wharf.

"4th, Even if there had been evidence of the delivery of the letter to the wharfinger, I should have considered that the master had not discharged his duty, because he ought to have delivered it at the counting-house.

"5th, Under all the circumstances of the case, Gillies does not appear to me to have done all that he was bound to do by the law and practice of Jamaica; and I am of opinion, that what he did was not sufficient, by that law and practice, to render Bogles and Co. liable for the goods in question."

Court, the cause proceeded before the Sheriff of Renfrewshire, who de- No. 315.
cerned against Gillies for a certain sum, as the value of the goods and
expected profits thereon, and for expenses of process. Gillies thereupon June 9, 1832.
brought a suspension, in which he pleaded—
Gillies v.
Smith.

A gratuitous mandatory is liable only for gross negligence in the execution of commissions intrusted to him;¹ but here the suspender acted bona fide, and with ordinary care and prudence in delivering the goods to the servant of the consignees, and at their own wharf, and so cannot be rendered responsible.

To this it was answered—The suspender must be held to have undertaken the ordinary duty of a shipmaster, in regard to the goods in question; but at any rate, even a gratuitous mandatory is bound to give ordinary diligence and attention in the execution of a charge undertaken by him, while the suspender in this case contented himself with delivering the goods to a wharfinger at a public wharf, without even handing the letter of consignment and invoice to the consignees, and under these circumstances he is clearly liable for the value of the goods.

The Lord Ordinary, with a slight variation as to the amount, repelled the reasons of suspension, adding the subjoined note.*

Gillies reclaimed.

LORD JUSTICE-CLERK.—I cannot doubt but that the interlocutor is right. Bona fides on the part of the suspender is not enough. Having undertaken, whether gratuitously or not, to deliver not only the goods, but the letter, he was bound to perform the duty so undertaken; and it was no fulfilment of it throwing the goods on this wharf, which was a public wharf. If it had been exclusively Bogles and Company's, there might have been a difference; as it is, he is undoubtedly liable.

The other Judges concurring,

THE COURT adhered.

J. GIBSON—M. SMELLIE and J. MURDOCH, S. S. C.—Agents.

¹ Inst. Lib. iii. tit. 15, § 3; ff. Lib. xiii. tit. 5, l. 5, § 2; Paley on Principal and Agent, 7; Jones on Bailments, 10, 21; Sheills and Horne v. Blackburn (1 H. Blackstone, 158.)

* "The Lord Ordinary is satisfied that the suspender undertook to do the ordinary duty of a shipmaster taking charge of consigned goods, in relation to these goods, though he might decline to claim any payment for that duty. Smith would have been insane if he had let his goods go away to the West Indies without an understanding to that effect; and certainly there was a palpable failure in that duty, when the goods and letter were both given to the wharfinger, and the matter never mentioned in any way to the consignees."

No. 316. ARCHIBALD WILSON and Others, Petitioners.—*D. F. Hope—Buchanan.*
 DUNCAN SINCLAIR, Respondent.—*Jameson—A. Wood.*

June 12, 1832.
 Wilson, &c. v.
 Sinclair.

Process—Expenses—Appeal.—Where an action was raised for repetition of a sum, and relief from another action, and the Lord Ordinary assailed, and found no expenses due, and the Court altered and decerned with expenses in the repetition, and remitted to the Lord Ordinary to hear parties on the conclusions for relief; and the defenders appealed against the judgment of the Court, and also against that of the Lord Ordinary, in so far as it did not find expenses due to them; and the House of Lords reversed the interlocutors complained of—held, that it was incompetent to award the expenses of this Court in applying the judgment, the question being no longer open after the cases of Reid and M'Taggart.

June 12, 1832. SINCLAIR raised an action against Wilson and Others, alleging that they had compelled him, under a bond of caution, to pay a sum which was not due by him, and had assigned to him their grounds of debt and diligence, with warrantice from fact and deed, under which assignation he had operated a partial relief against one Campbell; but that Campbell had discovered the grounds of debt and diligence to be irregular, and had raised an action of restitution. Sinclair therefore insisted against Wilson and others, in repetition of the sum paid by him to them, and relief from Campbell's action. Campbell eventually obtained decree of repetition in his action against Sinclair. In Sinclair's action against Wilson and others, the Lord Ordinary, on November 13, 1827, “assailed the defenders, and decerned, but found no expenses due.”

Wilson and M'Lellan reclaimed as to expenses; Sinclair reclaimed on the merits. On 12th February 1828, this interlocutor was pronounced: “The Lords having resumed the consideration of this note, and of the other note for Duncan Sinclair, with the other parties in the cause, before answer, recal the interlocutor complained of, to the effect of allowing the pursuer to amend his fifth plea in law, and remit to the Lord Ordinary to hear parties, and to do farther in the cause as to his Lordship shall seem proper.”

An addition being made to the pleas in law, the Lord Ordinary reported the question on Cases. On 12th February 1829, the Court found Wilson, &c. liable in repetition to Sinclair, “and decern accordingly;” and farther, remit to the Lord Ordinary to hear parties on the other conclusions of the libel for relief; also find the said defenders, Archibald Wilson, James Jamieson, and John M'Lellan, jointly and severally, liable to the pursuer in expenses; appoint an account thereof to be given in,” &c.

Wilson and Others entered an appeal against the judgment of the Court, and also against the judgment of the Lord Ordinary, of 13th November

1827, in so far as it found no expenses due. The House of Lords pronounced this judgment : " After hearing counsel, &c. upon the petition and appeal of Archibald Wilson, &c., complaining of an interlocutor of the Lord Ordinary in Scotland, of the 18th November 1827, in so far as it does not find the petitioners entitled to expenses ; and also of two interlocutors of the Lords of Session there, of the First Division, of the 12th day of February 1828, and 12th day of February 1829 ; and praying that the same might be reversed, varied, or altered ; or that the appellants might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet ; as also upon the answer of Duncan Sinclair, &c., it is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the interlocutors complained of in the said appeal be, and the same are hereby reversed."

June 12, 1832.
Wilson, &c. v.
Sinclair.

During the dependence of the appeal, Sinclair had obtained interim-execution, under which he recovered the principal sum claimed, with interest and expenses. These sums were repaid by him after the interlocutor of reversal. Wilson and Others then presented a petition to this Court, " to apply the judgment of the House of Lords, and to reverse the judgment pronounced in this Court, finding that the petitioners were not entitled to the expenses incurred by them in this Court previous to the appeal ; to find them entitled to these expenses, and to allow an account thereof to be lodged, and to remit the same to the auditor to tax and to report ; and farther, to assuage the petitioners from the whole conclusions of the action, and to find them entitled to the expenses of this application."

Sinclair resisted the prayer of the petition so far as regarded expenses ; and the Court ordered mutual minutes.

Pleaded by Sinclair—

It is incompetent for this Court to award the expenses incurred here prior to appeal, where there is no special finding of the House of Lords to that effect, and no remit is made to this Court to proceed farther in the cause, and the judgment of the House of Lords exhausts the whole merits of the case. The question, indeed, is no longer open, as the cases of Reid and M'Taggart have fixed the incompetency of such application.

Pleaded by Wilson and Others—

As the interlocutor of the Lord Ordinary was complained of in so far as it had not found them entitled to expenses, and it has been specially reversed so far as complained of, the effect of this is to pronounce an actual finding of expenses in their favour, though expressed with some circumlocution. This case is not identical with that of Reid, in which there was a special remit to repel the defences and decern, without saying any thing as to expenses ; nor with that of M'Taggart, in which the whole cause was exhausted in the House of Lords. But here there was no remit as in Reid's case, which can be construed to exclude expenses :

No. 316. and the cause was not exhausted, as no judgment on the claim of relief was pronounced in this Court prior to appeal.

June 12, 1832. Wilson, &c. v. M'Taggart. Besides, in the case of M'Taggart, after an appeal had been entered against the judgment, the respondent abandoned the case, and paid the Binnie v. M'-Millan. appellant full costs.

LORD PRESIDENT.—The cases of Reid and M'Taggart are so much in point, that I think we cannot unsettle the law upon the subject. The distinctions pointed at by Wilson and Others are too thin to entitle us to view this case as substantially differing from them. I apprehend, therefore, that we have no alternative, and must pronounce the same judgment in this case as we did in M'Taggart's.

LORD CRAIGIE.—I have much doubt as to the propriety of reiterating that judgment. The question before us is one of interpretation. What is the import and effect of the judgment of the House of Lords? An interlocutor of a Lord Ordinary assizes a party, but finds him entitled to no expenses. He complains against it in so far as it finds him entitled to no expenses, and the House of Lords reverse the judgment in so far as it refuses these expenses. What is the import of such a judgment? Is it not equivalent to finding that the party is entitled to his expenses? It appears to me to amount precisely to this; and though there are other proceedings in the case, yet the substance of all that bears on the point now before us, is precisely what I have stated. I would propose that we should at least consult with the other Judges before refusing the petition of Wilson and Others. Our refusal at present may just drive the parties into another appeal; and the statement made as to the appeal taken by M'Taggart, seems worthy of attention.

LORD GILLIES.—The case of M'Taggart is so similar to the present, that I think we certainly could not pronounce a different judgment, without first consulting our brethren. But I incline to pronounce the same judgment.

LORD BALGRAY concurred with the Lord President and Lord Gillies.

Dean of Faculty, for Petitioners.—In refusing the petition, I move the Court to pronounce their judgment in the same terms as in M'Taggart's case, so as to enable the petitioners to appeal.

LORD PRESIDENT.—Certainly.

THE COURT then repeated the same judgment as in M'Taggart's case, and found no expenses due, in respect they had no power to award any.

Respondent's Authorities.—Geddes, Feb. 16, 1816 (F. C.); Wilson, June 18, 1818 (F. C.); Reid, Nov. 18, 1825 (ante, IV. 198); M'Taggart, Feb. 12, 1832 (ante, IX. 431).

H. MACQUEEN, W.S.—A. CLASON, W.S.—Agents.

No. 317.

GEORGE BINNIE, Suspender.—*Skene—Somerville.*
NEIL M'MILLAN, Charger.—*Cunningham.*

Expenses.—A party illegally imprisoned found entitled to expenses.

June 12, 1832. In a suspension and liberation at the instance of a party imprisoned under 2d Division. a warrant of lawburrows, on the ground of irregularity and illegality in the Ld. Mackenzie. procedure, the Lord Ordinary, while he suspended simpliciter, found no expenses due; but the Court, on a reclaiming note by the suspender, altered, and awarded expenses.

J. KENNEDY, C.S.—J. PATTEN, W.S.—Agents.

GEORGE GORDON and ALEXANDER STEWART, Pursuers.—Shene—Neaves. No. 318.

Gordon, &c. v.
Lawrence.

Young, &c. v.
Hutchison.

June 13, 1832.
1st Division.
Ld. Corehouse.
B.

Contract.—This was a special case. Lawrence, a slater, was employed to execute some work at Gordon Castle. Gordon and Stewart contracted to provide Corskie slates, according to a specification. Their stock of these slates becoming deficient, they supplied Kirkney slates, with which the work was completed, and a question arose, whether, under the circumstances, they were entitled to charge £3, 15s. per rood, or only £3, 5s., as offered by Lawrence. They raised an action, concluding for the higher price, and the Lord Ordinary found them entitled to it, reserving to Lawrence “such deduction as he may be entitled to, either on account of delay on the part of the pursuers in furnishing the slates, or of additional trouble or expense occasioned to him in the execution of the work, in consequence of the substitution of a different kind of slates from that to which his contract referred; and found the defender liable in expensea.”

Lawrence reclaimed, but the Court adhered.

H. INGLIS and DONALD, W.S.—A. SCOTT, W.S.—Agents.

**GEORGE YOUNG and Co., Pursuers.—Shaw.
JOHN HUTCHISON, Defender.—Russell.**

No. 319.

Jurisdiction.—Held by the Lord Ordinary, after advising with the Inner House, that where a libel concludes for a sum above £25, the action is competent in the Court of Session, though the defender alleges that he had previously offered payment of the whole, except £4, 16s. 8d.

YOUNG and Co. pursued Hutchison, before this Court, for a sum of June 13, 1832 £29, 19s. 4d., for alleged furnishings of rum. Hutchison stated that 1st Division. he had repeatedly offered to pay £25, 2s. 8d., and that the only part of Ld. Corehouse. the account about which there was any dispute, was a single item of 10 gallons of rum, charged at £4, 16s. 8d. This being the only subject in question, and an offer of payment of the rest having been made, the jurisdiction of the Court of Session was excluded, as was held in the case of Allan and Others. Young and Co. answered, that the conclusion of their libel being for a sum above £25, the action was competent. The case of Allan and Others was not a unanimous judgment, and was passed without adverting to the previous cases of M'Ewan,² Taylor,³ or Giffen.⁴

¹ July 9, 1828 (ante, VI. 1106).

² Nov. 17, 1824 (ante, III. 286).

³ Feb. 12, 1824 (ante, II. 696).

⁴ Nov. 19, 1824 (ante, III. 301).

No. 319. The Lord Ordinary, in order to have the question settled, reported it verbally to the Court.

June 13, 1832.

Young, &c. v. Hutchison. LORD PRESIDENT.—The action is competent. If a pursuer concludes for a sum of £50, and the defender produces a receipt for £40, or for the whole sum, that may be a very good defence on the merits, but it does not affect the competency of the action.

The other judges concurred, and the Lord Ordinary “having advised with the Lords of the First Division of the Court, and called the cause, repelled the preliminary defence pleaded,” &c.

A. HUTCHISON,

—Agents.

No. 320.

ROBERT HENRY, Pursuer.—*Shene—A. Wood.*
WILLIAM WATT and Others, Defenders.—*Rutherford.*

Entail—Clause—Succession.—An estate being disposed to Robert Henry, and the heirs-male of his body: whom failing, “to Robert Watt, and the heirs-male of his body; whom failing, to his heirs and assignees whomsoever;” and infestment being given to Henry, under the condition that he, and the heirs-male of his body, were prohibited from altering the order of succession, &c., or doing any deed “whereby the right of succession of Watt and his foresaids thereto, in the event of the failure of Henry and the heirs-male of his body, may be prejudiced,” &c.; and the prohibition being fortified by irritant and resolute clauses; and Watt having died without heirs-male—held that Henry was a proprietor in fee-simple, in any question with the heirs whatsoever of Watt.

June 13, 1832.

1st Division.
Ld. Corehouse. D. ROBERT WATT executed the following disposition:—“ I do hereby give, grant, and dispone to the said Mungo Henry, my cousin-german, in liferent, and to Patrick Henry, only son now in life of the said Mungo Henry, also in liferent, for his liferent use only, after the death of the said Mungo Henry, and to Robert Henry, only son of the said Patrick Henry, in fee, and the heirs-male of the body of the said Robert; whom failing, to Robert Watt, lawful son of Andrew Watt, present tacksman of Campsie, my cousin, and the heirs-male of his body; whom failing, to his heirs and assignees whomsoever.” The deed contained procuratory to resign for infestment to “Mungo Henry in liferent, and to the said Patrick Henry, his son, also in liferent, for his liferent use only, after his father’s said decease, and to the said Robert Henry, in fee, and the heirs-male of his body; whom failing, to the said Robert Watt and the heirs-male of his body; whom failing, to his heirs and assignees whomsoever, heritably and irredeemably, but with and under the conditions, restrictions, and clauses, irritant and resolute, after written, viz., with and under these restrictions and limitations, as it is hereby expressly conditioned and provided, that it shall not be lawful to, nor in the power of the said Robert Henry, or the heirs-male of his body, to alter this present disposition or order of succession hereby prescribed, or to sell, alienate, or dispone the lands and other heritages before resigned, or to do or grant any deed, directly or indirectly, whereby the right of succession of the said Robert Watt and his foresaids

thereto, in the event of the failure of the said Robert Henry and the No. 320. heirs-male of his body, may be any ways hurt, prejudged, or disappointed." The prohibitions were followed by clauses irritant and resolutive.

June 13, 1832.
Henry v. Watt,
&c.

After the death of Mungo Henry, and Patrick Henry, and Robert Watt, without issue, Robert Henry raised a declarator against John Watt and Others, the heirs of line of Robert Watt. He concluded for declarator, "that the pursuer, in consequence of the death of the said Robert Watt, his immediate successor under the foresaid entail, without lawful issue of his body, holds the said lands and estate of Woodend, and others particularly above described, in fee-simple, except as in a question with the heirs-male of his own body, and is entitled to dispose thereof at pleasure, and that the said John Watt, and his said children, have no right or title whatever to the said lands and estate of Woodend, under the deed of entail above narrated, and that the said entail was at end by the death of the said Robert Watt, without lawful issue of his body, excepting in a question with the foresaid heirs-male of the pursuer's own body."

Watt and others pleaded in defence, that the object of the granter of the deed was to secure the succession to his estate, failing Robert Henry and the heirs-male of his body, to Robert Watt and his heirs in fee-simple. In order to secure this, the granter had executed a conditional settlement in favour of Henry, who was barred, by the condition under which he took the estate, from prejudicing the right of Robert Watt, or his heirs, to take up the fee-simple of the estate on the failure of Henry and his heirs-male.

The Lord Ordinary "repelled the defences, and decerned against the defenders, conform to the conclusions of the libel; of consent, found neither party entitled to expenses," &c.

Watt and others reclaimed. The Court, without hearing counsel in support of the interlocutor, adhered.

LORD GILLIES.—It is time that some point in the law of Scotland should be considered fixed. I would incline to give expenses here.

LORD PRESIDENT.—It is a benefit to the pursuer that he holds a judgment of the Court, after a contested cause. In the whole circumstances, I think no expenses should be given.

LORDS CRAIGIE and BALGRAY concurred with the Lord President.

Pursuer's Authority.—Earl of March, Feb. 27, 1760 (15412 and 15415).

C. C. STEWART, W S.—G. HEGGIN, W.S.—Agents.

No. 321. PHILIP FORSYTH and JOHN PHILLIPS (Phillips' Trustees), Raisers.—
Boswell.

June 14, 1832.
 Forsyth, &c.
 v. Fergusson.

WILLIAM FERGUSSON, Claimant.—*D. F. Hope.*

Clause—Trust—Succession—Entail.—Terms of a trust-deed, by which, trustees being enjoined to convey the residue of a trust-estate to Fergusson, “as his own property,” on attaining the age of 35 years; but in case he “shall die without heirs of his own body lawfully begotten, then the said residue shall pertain” to Shirley; and the trustees being farther enjoined to make their conveyance to Fergusson, in the form of a deed of strict entail, so as to secure the interests of Shirley—held, that although Fergusson had lawful children on attaining the age of 35, the trustees were bound to make a conveyance to him, only, in the form of a strict entail.

June 14, 1832. THE late Robert Fergusson executed a trust-disposition and assignation of his whole estate, in favour of trustees, who were invested with full
 1st DIVISION.
 Ld. Corehouse. powers of administration, and enjoined to pay debts and legacies. The

D. deed provided that the trustee should invest or secure the residue of the trust-estate for the behoof of William Fergusson, grandson of the testator, the interest to be expended on his maintenance, &c., during his minority; “and after he attains the age of majority, the said interest or annual income is to be paid annually, as it can be recovered, to the said William Fergusson, until he arrives at the age of 35 years complete, and at which time the said William Phillips and his foresaids bind and oblige themselves, as they are hereby bound and obliged, to convey to the said William Fergusson the said whole residue of my real and personal estate, as his own property, and to denude and divest themselves fully thereof: And also providing and declaring, that in case the said William Fergusson shall die without heirs of his own body lawfully begotten, then the said residue of my real and personal estate shall pertain and belong to the said Sarah Shirley, Margaret Shirley, and Grizel Shirley, my nieces, and the said William Phillips, equally amongst them, share and share alike, and to their heirs, executors, or assignees, to whom I hereby assign, dispone, and convey the same: And the deed to be granted by the said William Phillips or his foresaids to the said William Fergusson, conveying the said residue to him when he obtains the age of 35 years complete, shall be conceived in the foresaid terms, in form of a deed of entail, containing all clauses, irritant, prohibitory, and resolutive, necessary for vesting the property in the persons of the said Sarah Shirley, Margaret Shirley, Grizel Shirley, and William Phillips, or their heirs or assignees.”

After William Fergusson had reached the age of 35, and had children living, Messrs Philip Forsyth, and John Phillips, (on whom the trust had, in the interim, been devolved,) raised a multiplepoinding in order to obtain themselves exonerated, upon conveying the residue of the trust-estate in terms of the trust-deed. They pleaded that they were

bound to convey it to Fergusson and his children, under the fetters of a strict entail, in which the Shirleys should have their right of succession secured, in the event of Fergusson being survived by none of his children. No. 321.

June 14, 1832.
Forsyth, &c. v.
Fergusson.

Fergusson alleged that the residue of the trust-estate was extremely insignificant, and he claimed an absolute conveyance of it in fee simple. He contended that the Shirleys were merely conditional institutes, and that as he had lawful children, their right was evacuated. Stein's Assignees v. Stein's Trustees.

The Lord Ordinary found, "that the conveyance to be granted by the pursuers, must be framed in terms of a strict entail, and appointed the pursuers to prepare and lodge in process a draft of the deed of conveyance, for the consideration of the Lord Ordinary."

Fergusson reclaimed: but the Court adhered.

LORD BALGRAY.—The trustee expressly enjoined his trustees, in conveying the residue of the estate to Fergusson, to do so by a deed of strict entail, so as to protect the interests of the Shirleys, in the event of Fergusson leaving no surviving children at his death. The Lord Ordinary's interlocutor is well founded.

LORD CRAIGIE.—I concur; and would only observe in addition, that I perceive the parties dispute in the record as to the extent to which the trustees, in administering the estate, have changed the form of it from its condition at the trustee's death. This is a circumstance which is perfectly immaterial, since our judgment on the right of Fergusson, as arising out of the trust-deed, must be formed from an examination of the deed itself, and not of the conduct of the trustees.

LORDS PRESIDENT and GILLIES concurred.

J. PHILLIPS, S. S. C.—T. THORBURN, W. S.—Agents.

H. A. DOUGLAS and WILLIAM THOMAS, (Stein's Assignees,) Pursuers. No. 322.

—*Forsyth—Sandford.*

SIR JAMES GIBSON-CRAIG, and WALTER BROWN, (Stein's Trustees,) Defenders.—*Rutherford.*

Partnership—Bankrupt—1696, c. 5.—Circumstances in which the Court reduced a trust-conveyance of the estates of a Scottish Company, granted in 1812 for be-hoof of the creditors, and, at their desire, by one of three partners.

JOHN STEIN, Thomas Smith, Robert Stein, James Stein, and Robert Smith, were partners of a company which carried on the business of banking in London, under the firm of Stein, Smith, and Company, and in Edinburgh, under the firm of Scott, Smith, Stein, and Company. John, James, and Robert Stein, at the same time, carried on business in partnership as Scottish distillers, at Canonmills, under the firm of John Stein, and at Kilbagie, under the firm of Robert Stein and Company. On the 22d of July, 1812, the banking-house in London stopped payment; and on the 23d, four separate commissions of bankruptcy were issued against Thomas and Robert Smith, and Robert and James Stein, who were then in London. No commission was then issued against John Stein, who was in

June 15, 1832.
1st DIVISION.
Lord Newton.
H

No. 322. Scotland. On the 25th, the banking-house in Edinburgh stopped payment. The affairs of the distillery concern being embarrassed, a meeting of their creditors was held on the 3d of August, who "declared their unanimous opinion, that, in the situation of the affairs of the Distillery Company, of which the funds so far exceeded the debts, it would be much more for the benefit of the creditors that the affairs should be managed by a voluntary trust, than by a sequestration; and they directed Messrs Stein to execute a voluntary trust of the whole estates of the Companies at Canonmills and Kilbagie, in favour of Mr Walter Brown, merchant in Edinburgh, and James Gibson, writer to the signet, as trustees for behoof of the whole creditors, and of the survivor of them."

On the 6th of August, John Stein executed a trust-deed, commencing in these terms:—"We, John Stein and Robert Stein and Company, distillers at Canonmills and Kilbagie, considering that John, Robert, and James Stein, having for many years past carried on business as distillers at Canonmills, under the firm of John Stein, and at Kilbagie, under the firm of Robert Stein and Company, and having been indebted to sundry persons in various sums of money, a meeting of their creditors was held at Edinburgh, upon the 3d day of August current, at which the creditors declared their unanimous opinion, that, in the situation of the affairs of the Distillery Companies, of which the funds so far exceeded the debts, it would be much more for the benefit of the creditors that the affairs should be managed by voluntary trust than by a sequestration; and they directed Messrs Stein to execute a trust of the whole estates of the Companies at Canonmills and Kilbagie, in favour of Mr Walter Brown, merchant in Edinburgh, and James Gibson, writer to the signet, as trustees for behoof of the whole creditors, and the survivor of them: Therefore, in compliance with the directions of our said creditors, we, the said John Stein and Robert Stein and Company, have alienated and disposed, as we, by these presents, sell, alienate and dispone, to and in favour of the said Walter Brown and James Gibson, and the survivor of them," &c.

The purpose of the deed was to dispone, unreservedly, the property and debts of the Company to the trustees, for payment of debts, and under the obligation to convey the residue to the Company, or their assignees.

John Stein then proceeded to London, and, on the 12th of August, a joint commission of bankruptcy was issued against him and the four other parties already mentioned. Subsequently to this, the four separate commissions were superseded.

It was alleged by Stein's assignees, that John and Robert Stein were rendered bankrupt under the act 1696, c. 5, by letters of caption being raised against them, and an execution of search returned on the 24th of August 1812. There was no bankruptcy of the Distillery Company, which, on the contrary, Stein's trustees alleged to be solvent throughout.

Various acts, approbative of the trust-deed in favour of Sir James Gibson-Craig and Mr Brown, were performed by the English assignees under

June 15, 1833
Stein's Assignees v. Stein's Trustees.

the bankruptcy. Large transactions were entered into by these trustees; No. 322. and, inter alia, a dividend was paid by them to the distillery creditors. A dispute afterwards arose between the English assignees and the Scottish trustees, the former denying the validity of the trust-deed, and alleging that the latter had no legal power to intromit with any of Stein's effects, except as their attorneys. An arrangement was eventually entered into between the English assignees and the distillery creditors, under which the creditors renounced all claim on the distillery effects, on being paid 15s. per pound, and bound themselves to "discharge the trust-deed in so far as they are respectively interested therein." New assignees being appointed, they raised a summons against the trustees, Sir James Gibson-Craig, and Mr Brown, concluding that the trust-deed should be reduced, and all that had followed on it; that the commissions of bankrupt should be declared to extend over the whole estates and effects of the Distillery Company, and likewise of all its individual partners; that the pursuers, as assignees, had the only good right to realize and distribute these estates and their proceeds; and that the defenders could not lawfully realize or distribute them, but were liable to account to the pursuers for their whole intromissions had under the trust-deed.

In defence it was maintained, inter alia, that the English assignees had homologated the trust-deed, and were barred by personal exception from impeaching its validity. An opinion of English counsel being obtained, to the effect that the assignees had power to homologate the trust-deed, this Court, on the 2d of June 1829,¹ found that they had homologated it, and assailed from the reductive conclusions of their action. Under an appeal, the House of Lords, on the 23d of February 1831, pronounced a judgment, declaring "that the assignees of Stein, Smith, and Company, had no power to homologate the trust-deed executed by John Stein in favour of the respondents, for behoof of the creditors of the Distillery Companies; and it is therefore ordered and adjudged, that the several interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is farther ordered, that, with the said declaration, the cause be remitted back to the Court of Session, to proceed therein as shall be just."

This Court then applied the judgment, altered their previous interlocutor, found in terms of the declaration in the judgment of the House of Lords, "and remitted to the Lord Ordinary to proceed farther in the cause, as to his Lordship shall seem just."

The Lord Ordinary "reduced, decerned, and declared, conform to the reductive conclusions of the libel, and appointed the defenders to lodge in process a particular state or account of their whole management, actions, and intromissions, reserving consideration of the question of expenses till the issue of the cause."

June 15, 1832.
Stein's Assignees v. Stein's Trustees.

¹ Ante, VII. p. 686; vide Report, especially the opinion of English counsel (p. 680) as to other points, independent of the homologation.

No. 322. The trustees reclaimed, and the Court ordered Cases.

June 15, 1832.
Stein's Assignees v. Stein's Trustees.

Pleaded by the Assignees—

1. The trustees have no legitimate interest to defend a trust-deed for the benefit of creditors, all of whom have discharged it.

2. A disposition, conveying the whole effects of a partnership to trustees, is an act of extraordinary administration, which a single partner cannot effectually perform without special authority from his copartners; still less can he do so after the dissolution of the copartnery.

3. The disposition was reducible under 1696, c. 5, being granted within 60 days of bankruptcy, and in favour of prior creditors. Besides the English bankruptcy, John and Robert Stein were made bankrupt under the Scottish statute, on the 24th of August 1812. The assignees were entitled to plead this ground of reduction, not only as assignees for the creditors of the banking-house, but also, as being now the onerous assignees of the proper creditors of the Distillery Company, under the agreement by which the latter received 15s. per pound on their debts.

4. The rights of Robert and James Stein, as partners in the Distillery Company, and their property wherever situated, were vested in the English assignees from and after the acts of bankruptcy on the 22d of July 1812. John Stein, therefore, could not validly convey the whole distillery estate to other parties on the 6th of August following.

Pleaded by the Trustees—

1. The trustees have an interest to defend a trust-deed under which they entered into large transactions with third parties, as trustees; but the assignees have no interest to reduce, since they could only claim an accounting from the defenders as parties acting bona fide as trustees, and induced by them to believe that they were entitled so to act. Such accounting the trustees were always ready to give without any action.

2. When the separate commissions of bankruptcy issued against James and Robert Stein in London, as partners of the banking concern, this had the effect of dissolving the Distillery Company. But the Distillery Company was solvent; John Stein, the acting partner, was not yet made bankrupt, even as a partner of the banking-house; in these unusual circumstances, as the Distillery Company were bound to meet all their obligations, John Stein had power to wind up the concern. Had he himself collected the debts in detail, and sold off the company effects piece-meal, and paid off their obligations, his proceedings would have been unchallengeable at the instance of James and Robert Stein, or the assignees in their right. But if he could do this directly, he could do it indirectly, by the intervention of a trustee.

3. The conveyance of the estates of the Distillery Company, for the benefit of the distillery creditors, to trustees, who were bound to pay the residue to the assignees of the partners, was an onerous and bona fide deed, not reducible at common law. But as the Distillery Company was never rendered bankrupt, the deed could not be struck at by 1696, c. 5;

and, as it was found in the case of Hunter and Co.,¹ that arrests used prior to the English commission of bankruptcy, but within the 60 days, were effectual, so must a voluntary onerous conveyance be so.

4. The Distillery Company was domiciled in Scotland, and the English commissions against the banking-house, or its individual partners, did not reach the Distillery Company as such. The Distillery Company was never made bankrupt. John Stein was not a bankrupt, in any character, at the time of executing the trust-deed. He was never made bankrupt as a partner of the distillery concern. The English assignees, therefore, never acquired any right, even under the joint commission, except to recover the residue of the trust-funds after paying the distillery creditors.

June 15, 1832.
Stein's Assignees v. Stein's Trustees.

Besides these pleas, the parties were at issue, whether, by the law of England, the joint commission of 12th August 1812 placed John Stein in the same position as to the trust-deed, as if such commission had issued against him of the date of the acts of bankruptcy, on the 22d of July; or whether the superseding of the separate commissions did not place the other partners, as well as John Stein, on the same footing as if no commission had issued against any of them till the 12th of August.

On advising the Cases, the Court adhered to the interlocutor of the Lord Ordinary.

LORD BALGRAY.—As the House of Lords has declared, that by the law of England the assignees had no power to homologate the trust-deed, the question remains, whether it can be supported on any other ground. At its date, the whole of the individuals composing it had become insolvent, and the greater part of them were in London, where a commission of bankruptcy was issued against the banking-house, and against those individuals in London who were also partners in the distillery concern. By the common principles of the law of partnership, the Distillery Company was dissolved by this bankruptcy of the partners who were in London. In these circumstances, could the single remaining partner in Edinburgh make a voluntary conveyance of the whole estate and effects of the Company? It was entirely beyond his powers. It was an act of extraordinary administration, by which he could not bind the Company, or those who became possessed of the rights of the other partners. Even where a person has the fairest prospect of ultimately being able to pay all his debts, and executes a trust-conveyance for the general behoof of his creditors, yet if bankruptcy follow within 60 days, the deed is reducible under the act 1696. I have no doubt that we ought to adhere to the interlocutor of the Lord Ordinary.

Rutherford, for defenders.—There was no Scottish bankruptcy here.

LORD GILLIES.—When a man is made bankrupt in London, he is a bankrupt here.

LORD PRESIDENT.—I do not mean to express any opinion at present as to the principle on which the defenders shall account to the pursuers, or whether they shall not be entitled to account precisely as if the trust-deed had been susceptible of

¹ Feb. 25, 1825 (*ante*, III. 586).

No. 322. homologation by the assignees. For although the House of Lords have declared that the assignees could not homologate the trust-deed, and therefore are not barred by personal exception from reducing it, it is quite a different question, whether they may not be effectually barred from challenging the actings of the defenders, so far as it can be shown that the assignees either adopted, or authorized such actings. *June 15, 1832.* *Stein's Assignees v. Stein's Trustees.* But laying this point aside at present, and confining ourselves solely to the validity of the trust-deed, which is now to be viewed as unsusceptible of homologation by the assignees, I think the interlocutor of the Lord Ordinary is right, and that we must adhere to it.

LORD CRAIGIE assented.

Rutherford.—There are several grounds of reduction pleaded, quite distinct from each other. Do the Court mean to express in their interlocutor the special ground on which it is rested?

LORD GILLIES.—I think the interlocutor of the Lord Ordinary is perfectly well expressed, and see no good reason for altering any part of it. I would propose simply to adhere.

The other Judges concurred.

Pursuers' Authorities.—(1.) 3 Erak. 3. 20; 2 Bell, 615 and 644; Blair and Miller, Jan. 22 1811 (F.C.); Arden, 2 Espin. 523; Shirreff, 1 East. 48; Kilgour, 1 H. Black, 156; Abel, 3 Espin. 108.

(3.) Strother, July 1, 1803 (Morr. App. l. Forum Comp. 4.); Royal Bank, Jan. 20, 1813 (F.C.); Selkirk, March 23, 1814; 2 Dow's App. Cases, 230; Cullen (Bankt. Law), 457; Whitemarsh (Bankt. Law), 303 and 305; Coeks (Bankt. Law), 524.

Defenders' Authorities.—1 Montague (Bankt. Law), 613; Brown, 1 Ross's Rep. 434; Hunter and Co., Feb. 25, 1825 (ante, III. 586).

D. FISHER, S. S. C.—GIBSON-CRAIG, WARDLAW, and DALSIEL, W. S.—Agents.

No. 323.

WILLIAM MEEK, Advocate.—Jameson—Russell.

A. SMITH and A. H. RENNIE, Respondents.—Skene—Brown—Murdoch.

Landlord and Tenant.—Where lands partly entailed and partly unentailed, but belonging to the same proprietor, were let as one farm for a rent, (the proportions of which relating to the entailed and unentailed parts, were specially set forth;) and the proprietor's right to the different parts was attached by separate creditors, and separate sequestrations as to each part used by the creditors, with concurrence of the landlord, and the whole effects on the farm were included in the inventories in each sequestration,—held in a question with a poinding creditor, that although the whole effects sequestered had been at the execution of the sequestration situated on the entailed portion of the farm, they were effectually attached, not merely for the rent of that portion, but for the rent of the whole farm.

June 15, 1832. **ARCHIBALD HILL RENNIE** of Balliliesh, let to Thomas Meek, as one farm, certain lands, whereof part were entailed and part held in fee-simple, at a rent of £125 for each of the portions, making £250 for the whole. **2d DIVISION.** **Ld. Fullerton.** Over the entailed lands one Wright held an heritable security, and a similar security over the unentailed lands was held by the Stirling Banking

Company, of which Wright was a partner. The estates of the Banking Company, and of Wright as an individual, having been sequestrated, the respondent Smith was appointed trustee on the Company estate, and on the individual estate of Smith. In February 1830, Smith presented to the Sheriff of Perthshire two petitions for sequestration of the stock and cropping on the farm, for the arrears due at the preceding Martinmas, amounting to £237—the one in his character of trustee on Wright's estate, and the other as trustee of the estate of the Banking Company. To both petitions Rennie, "for his interest," was a party.

June 15, 1832.
Meek v. Smith,
&c.

The petition, at the instance of Smith, as trustee on Wright's estate, set forth that Thomas Meek was tenant in the entailed portions of the farm, which were specially described, while the other petition related to the unentailed lands, and each prayed for warrant to sequester the crop and stocking on the lands respectively mentioned in each petition, for the rent affeiring to the respective portions. Separate warrants were granted, in virtue of which sequestrations were executed of the whole crop and stocking of the farm, without distinction as to the entailed or unentailed parts. The inventory returned in each contained exactly the same specification of effects sequestrated, although in point of fact the whole cattle, corns, and stocking sequestrated, (with the exception of a harrow,) were at the date of execution situated at the steading, which was on the entailed portion of the farm. No steps were taken by Smith towards a sale; and in July the advocator Meek, a creditor of the tenant, executed a poinding of the stocking and effects on the farm, and on the 5th of August he obtained warrant to sell. On the day preceding, viz. the 4th, Smith had obtained sequestration for the rent of the current year, to fall due at Martinmas, the subjects sequestrated being the same with those contained in the inventories of the sequestration used in February; and on the 9th of August, he, as trustee both on Wright's estate and on that of the Stirling Bank, with the concurrence of Rennie for his interest, presented a petition to the Sheriff, praying for an interdict against the sale under the poinding, until Meek should have paid the arrears of rent for crop 1829, and the rent of the current year to fall due at Martinmas thereafter. Meek immediately consigned £237 as the arrears of rent for crop 1829, and £251 as the rent of the current year, whereupon the interdict which had been granted ad interim, was recalled, and the parties proceeded to discuss their respective rights of preference.

For Meek it was contended, that the sequestration as to the entailed lands could only attach the crop and stocking on these lands, and for the rent of the entailed portion only; and that, in like manner, the sequestration as to the unentailed lands could only attach effects actually situated thereon when the sequestration was executed, and for the rent of that portion only—that the inventories under each sequestration being the same, the sequestrations were ineffectual, as it was not specified what articles were

No. 323. on the several portions of the farm, and so liable to be attached by the sequestration awarded with reference to that portion—that at all events June 15, 1832. Meek v. Smith, the whole effects sequestered having been actually situated on the entailed part of the farm, had only been attached for the rent of that portion; and consequently, that he was preferable under his poinding to all beyond what was necessary to satisfy the rent of that portion, exclusive of the rent of the unentailed part of the farm; and that he was entitled to an assignation to the right of hypothec.

For Smith and Rennie it was maintained, that the lands being possessed and laboured as one farm, the whole crop and stocking of the farm were subject to the hypothec for the whole rent; that both petitions for sequestration being at the instance of the proprietor, as well as of the respective heritable creditors, the whole crop and stocking was properly attached, and that the sequestration was effectually laid on for the rent of the whole farm, and consequently, that Meek was only entitled to the benefit of his poinding on paying the full rent, and not on merely paying that of the entailed portion on which the effects sequestered happened to be locally situated at the date of the execution of the sequestration.

The Sheriff (October 22, 1830) found Smith and Rennie preferable for the rent of the current year, and authorized them to uplift the £251 consigned therefor; and as to the rent of 1829, he allowed a proof, which established that the lands were possessed as one farm, and that at the date of the execution of the sequestration, the whole effects, with the exception of a harrow, were situated on the entailed portion of the farm.

Thereafter the Sheriff found that the effects sequestered had been attached for the rent both of the entailed and unentailed portions, and preferred Smith and Rennie to the sum of £237, consigned for the arrears of rent for the year 1829.

Meek brought an advocation, in which the Lord Ordinary pronounced this interlocutor:—" Finds that the farm of Ballillesh, let to Thomas Meek, by Archibald Hill Rennie, Esq., consisted partly of lands entailed, and partly of lands held in fee-simple: Finds, that although the lease, in the view of the possible separation of the entailed and unentailed lands, appropriated a half of the gross rent respectively to each of the said portions of the lands, the farm was truly let to the tenant as one farm: Finds it proved, that the lands were laboured and possessed by the tenant as one farm: Finds that, in these circumstances, the right of hypothec was not affected by the appropriation of particular proportions of the rent to certain parts of the farm, but that the hypothec for the whole or any part of the gross rent attached to the whole effects otherwise subject to it, without regard to the particular part of the farm on which they happen to be placed: Finds that, while the tenant continued to possess the lands as one farm, the landlord's right in the entailed and unentailed lands was attached by different creditors: Finds, that each of these

creditors, with the concurrence of the landlord, presented on the same day No. 323. a petition of sequestration—that, in virtue of these petitions, sequestration June 15, 1832.
 of the whole crop, cattle, and stocking on the farm, was granted to each Meek v. Smith,
 of the said creditors, and that the present competition has arisen between &c.
 the creditors, who so sequestered, and the advicator, who had pointed Kirk v. Hotch-
 the said effects on the farm: Finds that the sequestrations in question, kis, &c.
 though separately applied for by the respondents, were effectual to the full extent of the right of hypothec originally held by the landlord, and, consequently, did validly affect the whole subjects on the farm, in security of the portions of rent respectively due to each of the said creditors, without regard to the particular part of the farm on which these subjects happened to be at the time; and therefore repels the reasons of advocation, remits the case simpliciter to the Sheriff, and decerns: Finds the advicator liable in expenses, of which allows an account to be given in, and to be taxed by the auditor."

Meek reclaimed, and in addition to his pleas as to the effect of the sequestrations, contended, that at all events Smith and Rennie were bound to grant him a valid assignation to the sequestered effects, and that as they had precluded themselves from doing this, by sequestering the very same effects for the rent of the year 1830, to which he had only obtained right on paying the rent of that year, they were not entitled to the sum consigned for the arrears of the rent of 1829, seeing this would be making him pay twice for the same effects.

The Court adhered.

WOTHERSPOON and Mack, W.S.—DALLAS, INNES, and DALLAS, W.S.—Agents.

MRS KIRK, Petitioner.—Moir.
 HOTCHKIS and MEIKLEJOHN, Respondents.—D. F. Hope—Thomson.

No. 324.

Process—A.S. 17th Feb. 1829—Jurisdiction.—Incompetent for parties, even by a series of repeated enrolments before a Lord Ordinary, to prorogate his jurisdiction in a cause not regularly depending before him.

By A.S. 17th Feb. 1829, a general remit was made to the late Lord June 16, 1832.
 Newton, of all the processes which were depending before the late Lord Eldin, or before Lords Meadowbank or Corehouse, acting for Lord Eldin. 1st Division.
 But it was provided, that the remit should only have effect on those processes in which some step was taken within six months after the A.S.; beyond which time, a remit was only to be made upon petition in common form.

An advocation at Mrs Kirk's instance, being enrolled before Lord Meadowbank, was remitted, ob contingentiam, to a previous process between the same parties, depending before Lord Corehouse. Various

No. 324. proceedings ensued, before it was discovered that the previous process was originally proper to Lord Eldin. The advocation was inadvertently considered to be in the same situation, and Lord Corehouse having declined to proceed with them, they were both enrolled before Lord Newton. The last interlocutor of Lord Corehouse, in the advocation, was pronounced on 18th December 1829.

June 16, 1832.
Kirk v. Hotch-

kis, &c.

Mrs Kirk now presented a note to the Court stating these facts, and submitting, that if, on the one hand, the advocation were viewed as a process depending properly before Lord Corehouse, in December 1829, it could not have been regularly before Lord Newton, having never been remitted, by interlocutor, to his Lordship; but if, on the other, it were viewed as identified with the previous process which was proper to Lord Eldin, then it was withdrawn from Lord Corehouse under the A.S. 17th Feb. 1829; but not having been enrolled before Lord Newton within six months after that A.S., it could not be brought before his Lordship, except under a petition in common form. In either case the procedure was null, as every interlocutor of a Lord Ordinary pronounced in a cause which is not regularly before him is void.¹ Mrs Kirk, therefore, submitted that a new remit of the cause to Lord Corehouse should be made.

On moving the note, the Lord President directed that the subject of it should be brought before the Court, in the form of a petition. This having been done, the respondents stated that the transmissions of the process, which were alleged to be irregular, had been homologated by a series of enrolments, in which Mrs Kirk herself had craved, and obtained orders from the Judges, to whose competency she now objected.

LORD GILLIES.—I conceive that the jurisdiction of the Lord Ordinary could not be prorogated by these parties. Their acquiescence will not suffice. I think the proceedings inept and irregular. It will be necessary to make a new remit, but probably the Lord Ordinary, under the peculiar circumstances, may be able to expedite the cause when it comes before him.

The other Judges assented, and

THE COURT remitted the cause to Lord Corehouse.

J. SHAND, W.S.—HOTCHKIS and MEIKLEJOHN, W.S.—Agents.

¹ M'Kenzie, Jan. 20, 1831 (*ante*, IX. 307.)

DAVID JOHNSTONE, Pursuer.—*Jameson—G. G. Bell,*
 ROBERT CARLYLE and Others, Defenders.—*Shene—Reid.*
 DR and Miss ARNOTT, Defenders.—*D. F. Hope—More.*

No. 325.

June 16, 1832.
 Johnstone v.
 Carlyle, &c.

Bankrupt—Sequestration—Trustee—Expenses—1. Creditors who have claimed on a sequestered estate, but not attended meetings, are only responsible for the expenses of proceedings regularly undertaken. 2. Irregularities held sufficient to relieve such creditors. 3. Trustee must recover the funds of the estate before insisting against creditors personally for expenses incurred by him.

THE estates of George and John Arnott, limeburners at Hall of Ecclefechan, were sequestrated in 1808, and Joseph Johnstone, of Dalton-hook, was elected trustee. In 1810, part of the estates was sold to the bankrupts' brother, Dr Arnott, and to one Bell, who were creditors of the bankrupts, and who were allowed to retain out of the price the dividend expected to be allocated to their debts. Some disputes having arisen as to the claims, it was not till 1814 that a rectified scheme of division was prepared; and the trustee having thereafter failed to advertise the scheme, a meeting of creditors was called in the beginning of 1816, by two of the commissioners, for the purpose of investigating his proceedings. Other meetings were thereafter held in reference to this matter, at one of which, (28th March 1816,) the trustee offered to find caution for payment of the dividends in the rectified scheme, and of the expenses of the sequestration. This offer was unanimously accepted by the meeting, and a bond was accordingly executed on the 3d June, by the trustee and Mr Carruthers of Nutholm, whom the creditors agreed to receive as a sufficient cau[n]tioneer. This resolution of the creditors was not complained of, the minutes were reported, the bond was transmitted to Edinburgh and recorded, and the rectified scheme was duly advertised. On the 4th of September, however, a meeting of creditors, called by anonymous advertisement, “to consider the conduct of the trustee,” was held, and was attended by three persons, alleged agents for creditors, and a resolution adopted to apply to the Court for removal of the trustee. No steps were taken in consequence of this resolution, but in the month of February following, a second anonymous advertisement appeared in the Gazette, calling a meeting of the creditors, to decide whether an application should be made for the removal of the trustee. This meeting was held on the 21st February, and was attended by four agents as mandatories for creditors. Among these Mr Shortt, writer in Dumfries, appeared as mandatory for Dr and Miss Arnott. From Miss Arnott he held no mandate or authority whatever, nor was any mandate held by him or any one else, for any of the creditors, defenders in the present action, except Dr Arnott, who had written certain letters, which were alleged to import an authority and sanction, but to which it is unne-

June 16, 1832.
 2d Division.
 Lt. Medwyn.
 T.

No. 325. necessary specially to advert, as the Court pronounced no judgment regarding him. At the above-mentioned meeting of the 21st February, it was June 16, 1832.
 Johnstone v. resolved that an application should be made for the removal of Joseph Carlyle, &c. Johnstone, and for the election of a new trustee. An application to this effect was accordingly presented in name of Shortt and of Dr and Miss Arnott, and others, in which the Court pronounced a judgment removing the trustee, and granted warrant for the election of another in his place. A meeting was called for this purpose, and the pursuer, David Johnstone, was duly elected trustee. The same meeting, without any authority or previous intimation, proceeded to elect three new commissioners, (the original commissioners never having been removed,) and they made choice of three persons, of whom one was admitted not to be a creditor. They at the same time instructed the new trustee to obtain himself confirmed, "and thereafter to meet with the commissioners, and advise the proper steps for the purpose of obtaining a count and reckoning with the former trustee, and to recover the funds." The pursuer obtained himself confirmed, and by advice of the new commissioners, (having never consulted those originally chosen,) sisted himself as a party to the original application against the former trustee, which was still in dependence before the Court, as to a demand for penal interest; and he also raised an action of count and reckoning against him, which was conjoined with that application. At this meeting Shortt again appeared as mandatory for Dr and Miss Arnott, but without any authority from the latter, and no one authorized by any of the other defenders appeared, or otherwise concurred in the proceedings, though it was not alleged that any of them intimated any objection thereto.

A long litigation ensued with the former trustee, in which, while he was assailed from the demand for penal interest subsequent to the date of his removal,¹ a considerable balance was found due by him to the estate. Of this balance only 5s. in the pound could be recovered from him, so that the expenses greatly exceeded the amount realized. The pursuer, having no trust-funds in his hands, raised an action for payment of the amount against Dr and Miss Arnott, who he alleged had directly authorized the proceedings, although in his summons he merely concluded against them on the ground of their being creditors on the estate. These parties, as a preliminary defence, pleaded that the pursuer was bound to call all the creditors who had ranked, and after considerable litigation on this point, the Court so held, and remitted to the Lord Ordinary to sit procedure till this should be done.² The pursuer thereupon raised a supplementary summons, in which, along with Dr and Miss Arnott, he called all the other creditors who had ranked on the estate.

Besides special pleas applicable to certain of the parties called,—

¹ February 28, 1826 (*ante*, IV. 482.)

² January 23, 1830 (*ante*, VIII. 383.)

Carlyle and others, (who had attended no meetings, and in no way sanctioned the proceedings,) *pleaded*—Although creditors who have ranked on a sequestrated estate, whether they have attended meetings or not, are responsible for proceedings instituted by regularly called meetings, and for the acts of the trustee within his powers, they can only be so held liable where the proceedings have been in all respects regular, as they are entitled to rely on every thing being conducted according to law. In the present case, the greatest irregularity has taken place, and to the injury of the creditors. Although the resolution of the general meeting of creditors which accepted Mr Carruthers of Nutholm's security for payment of the dividends, and thereby effectually provided for the interest of the creditors, was allowed to become final, the subsequent meeting entirely disregarded it, and authorized proceedings for removing the former trustee, whereby Mr Carruthers was liberated. Then having obtained the removal of this person, a few creditors, without warrant or previous intimation, elect new commissioners, those originally elected being still in office; and the trustee, instead of advising with the legal commissioners, acts by advice of these persons, and on their authority alone institutes proceedings of so serious and important a character, as undoubtedly to have required the authority of a general meeting of creditors. By these, great expense has been incurred, besides losing to the creditors their only chance of recovering the balance due by the former trustee under Mr Carruthers' bond, and whatever claim the pursuer may have against the individuals whom he may show to have sanctioned these proceedings, he can have none against creditors who never authorized them, and who can only be made responsible in respect of proceedings regularly and properly conducted.

Dr Arnott (besides maintaining that he had not authorized or sanctioned the proceedings) *contended* further, that at any rate, a creditor who concurs in authorizing certain proceedings, must be held to do so on the understanding and condition that the trustee shall take care so to conduct every thing, as to bind all the creditors; and that the pursuer having failed to do so in the present case, the authority given by him could not be founded on for the purpose of making him individually liable for the whole expenses.

The Trustee pleaded—

Where proceedings under a sequestration are publicly notified, all creditors who do not object or complain, must be held to acquiesce in the resolutions of those who do attend and take part therein, and they cannot be allowed to let measures go on without objection, and afterwards contend that these have been irregular. In the present case, there was no such irregularity on the part of the pursuer, as to free the creditors generally from their obligations to relieve him of expenses incurred for behoof of the estate. He was elected at a meeting duly called, in consequence of a judgment of the Court, pronounced on a perfectly com-

June 16, 1832.
Johnstone v.
Carlyle, &c.

No. 325.
June 16, 1832.
Johnstone v. Carlyle, &c.

petent application. At the same meeting he was directed to advise with the commissioners then appointed, as to the proper steps for bringing his predecessor to account. He only obeyed his instructions, and if the commissioners were irregularly chosen, he was not to blame, and the creditors who failed to complain of such appointment, and acquiesced therein, cannot now object that he was not entitled to advise with them according to his instructions. But, at any rate, it was his duty as trustee, without authority of the commissioners, to take measures for recovering the funds of the estate in his predecessor's hands; and the expenses incurred by him in so doing, are a proper charge against the estate, and all the creditors ranked thereon. Then, as to Dr Arnott, he specially authorized the whole proceedings, and whatever may be thought as to those creditors who never appeared or consented, there can be no doubt in regard to such as specially directed the measures in which the expense was incurred.

The Lord Ordinary pronounced the following interlocutor, adding the subjoined note.* "Finds, that on a petition and complaint to the Court, in the name of Dr Arnott, and others, creditors of George and John Arnott, Joseph Johnstone was removed from the office of trustee, and the creditors were appointed to meet for the election of a new trustee: Finds, that at a meeting, regularly advertised and held, though attended by but

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The defenders reclaimed.

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few creditors, David Johnstone, the pursuer, was duly elected trustee, and he was confirmed by the Court: Finds, that besides its being his duty to call the former trustee to account, he was specially instructed by the meeting which elected him, to take the proper steps for obtaining a count and reckoning with him: Finds, that such an action was accordingly instituted by the pursuer, and that he obtained a decree for a considerable sum, on which, on account of the bankruptcy of the former trustee, only a dividend has been recovered: Finds, that the defences set up by several of the creditors who were ranked on Arnott's estate,—1st, That they did not interfere in any of these proceedings, but were satisfied with the arrangement proposed by the first trustee, and his cautioner, Mr Carruthers; and, 2d, That the proceedings were not duly authorized, as the pursuer did not advise with the legal commissioners, are not well founded, in respect,—Primo, That these creditors never attempted to claim fulfilment of the proposed cautionary undertaking by Mr Carruthers, nor ever objected to the proceedings of the other creditors who complained of the conduct of the first trustee and elected the other, and instructed him to call his predecessor to account: And, secundo, because the meeting which elected the pursuer trustee, at the same time elected new commissioners, with whom they instructed him to advise; besides, that the duty of calling his predecessor to account was imposed upon him, both by law, and by the meeting of the creditors, without the necessity of any further instructions from the commissioners: Finds, therefore, that the whole other defenders are liable, conjunctly and severally, with relief against each other, as accords, for the expenses necessarily incurred by the pursuer in the business of the trust, after giving credit for the sums recovered from the estate of the former trustee, as well as the sums retained by Dr and Miss Arnott in 1810, with interest from the date of retention, which, as part of the fund of the trust-estate, must be first exhausted: Finds the defenders also liable to the pursuer in the expenses of the conjoined actions, as well as of the expenses awarded to the defenders, who have been assoilzied; and remits the accounts of these expenses to the auditor to be taxed when given in; and further, remits the accounts of business also to the auditor for the purpose of taxation, and to report."

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June 16, 1832.
Johnstone v.
Carlyle, &c.

No. 325. be informed why the trustee has not taken steps to recover the dividends allowed to be retained by Dr Arnott, out of the price of the property purchased by him.

Jane 16, 1832. *Jameson, for the Trustee.*—We conceive, that the fact of his having this fund in his hands, affords grounds for a decerniture against him in this action.

LORD MEADOWBANK.—The trustee can only go against the creditors, on the estate proving insufficient to answer his expenses; and he should first of all recover the whole funds.

LORD GLENLEE.—I wish to know why the trustee did not follow the instructions of the creditors, as to that matter, and get repetition of the dividends allowed to be retained by Dr Arnott. Instead of that, he brings a direct action for payment of these expenses.

Jameson.—These dividends are within the amount now claimed; and this action is the same in substance.

LORD MEADOWBANK.—The trustee must first recover all the funds, because we cannot give decree against creditors personally till the estate is exhausted.

LORD JUSTICE CLERK.—It is clear that we are not in a condition to give a decerniture until the whole funds belonging to the estate be recovered. But as to those creditors who were not present at any of the meetings, there has been such irregularity, that I am prepared now to find that they cannot be made liable. When the former trustee was removed, the creditors were only authorized to elect another trustee. The commissioners were not removed. A meeting was called, and the advertisement was confined to the election of a trustee. But the meeting not only elect a new trustee, but new commissioners also, and direct him to meet with them to advise proper steps for bringing the former trustee to account. Now, not only was there no authority to elect commissioners, but one of them confessedly was not a creditor; and as the election was beyond the power of the creditors, it was funditus null and void, and there was no need to complain of it. Then there was no special authority by the creditors to prosecute the former trustee. All the instructions to the pursuer were, to advise with the commissioners as to the proper steps to be taken. But there was no direct authority to proceed at once against him. He no doubt goes to these persons and gets their advice, but there was no meeting of the creditors authorizing the proceedings. I lay special instructions out of view, as there were none from these creditors. Then, is the mere election of a new trustee sufficient to warrant this long litigation, not only to recover funds, but to enforce penal interest? This is one of those extraordinary steps which requires the authority of the creditors. Johnstone may have relief against the commissioners, who took upon them to act without authority, and to authorize him to proceed; but he can have none against the creditors who never appeared. Then, as to Dr and Miss Arnott:—As to the latter, she once granted a mandate to one Clarke, but he did not appear; and there is no evidence of a new mandate to Shortt. I therefore think she is in the same situation with the others, to whom I have already alluded. As to Dr Arnott, I have come to a different conclusion. Independent of every thing else, the letter of April 1818 shows he approved and sanctioned the proceedings, whether for good or bad reasons, is of no consequence. He both knew of his name being used, and refused to withdraw it, and I cannot go the length of holding that he relied on every thing being done to make the other creditors liable; and therefore I think he is responsible for the expense of the proceedings so sanctioned. But the Lord Ordinary has found him liable in the expense of the action against himself, although we found no judgment could be pro-

bounced, till the others were called ; I do not think him liable for them. Even, however, as to that for which I think he is liable, no decree can go out till the whole funds are recovered.

LORD CRINGLETIE.—I entirely agree. It is clear, when creditors claim, if all things are regularly done in their absence, they must be presumed to consent ; but such consent cannot be presumed when the proceedings are irregular ; and therefore, I think, all but Dr Arnott are free. Dr Arnott was at the bottom of all the proceedings, and he must pay for them.

LORD MEADOWBANK.—I concur generally with the chair, but I am anxious not to preclude any pleas competent to any of the parties. If it turn out that Dr Arnott had no means of knowing that the proceedings were irregular, I doubt if the letter would make him responsible. Further, we cannot now find that the fund to be recovered is to be appropriated to these expenses, to the injury of the general creditors ; and all I would do, would be tosist proceedings in this action till the funds are recovered, as the result may affect the question of expenses in this action.

LORD GLENLEE.—I am not inclined to disagree with what your Lordship has said. The trustee libels as his title, that he, as duly elected trustee, took steps under the authority of the commissioners, &c. Now, it is clear that the commissioners under whom he acted, were not valid commissioners, so as that their acts could bind the creditors, though I would not say the trustee would be cut out of his claim, if his actings were beneficial to the estate. But that is not the ground of the action, which is rested on the statutory character and concurrence of the commissioners. In the interlocutor, however, there is no special ground taken as against Dr Arnott, and so we cannot adhere to it as it stands. No doubt, one creditor, by acquiescing, may be liable, though I doubt if that is sufficiently before us. At the same time, I am clearly of opinion that Dr Arnott is to be held as having approved of the proceedings. Only, I doubt of going further than suggested by Lord Meadowbank.

LORD JUSTICE CLERK.—My meaning was the same as the opinion of Lord Meadowbank, that all questions should be left open.

Jameson, for the trustee, craved, that in the judgment to be pronounced by the Court, a reservation should be inserted, of a claim on his part against Dr Arnott, for the expenses of the supplementary action, on the ground, that if it should ultimately be decided that Dr Arnott was personally liable in respect of his own special actings, then his insisting on the other creditors being called as parties was unnecessary and improper.

THE COURT, however, refused this, and pronounced the following interlocutor :

“ Find, that the pretended election of commissioners, at a meeting of the creditors of George and John Arnott, at a meeting held on the 25th of July 1817, was unwarranted and inept ; and that the subsequent proceedings of the pursuer as trustee, under the direction of those pretended commissioners, were in that respect irregular ; and, also, were not duly authorized or approved by the defenders, Robert Carlyle, John Bell, George Ferries, George Bell, and Margaret Arnott ; sustain the defences for the said defenders—assoilzie them respectively from the conclusions of the present action, and decern. Find them entitled to their expenses respectively, of which allow the account to be given in, taxed, and reported on, in common form ; reserving to the pursuer any claim of relief that

No. 325.
June 16, 1838.
Johnstone v.
Carlyle, &c.

No. 325.

June 16, 1832.
Johnstone, v.
Carlyle, &c.

Tierney v.
Court.

he may have against the pretended commissioners above referred to. But before answer, quoad ultra, sist further proceedings in this process, until the pursuer, as trustee, shall have completed the necessary proceedings for recovering all debts owing to the sequestered estate of the said George and John Arnott, or any such sums as may have been allowed to remain in the hands of creditors, under pretext of satisfying any future dividenda, and thereby ascertaining what sum, if any, may be divisible among the creditors generally, or what sum, if any, may be justly claimed by the pursuer, in the present action, from such creditors as have not been previously ascertained from its conclusions."

W. DOUGLAS, W. S.—Thos. JOHNSTONE, S. S. C.—W. DICKSON, W. S., Agents.

No. 326.

Mrs ANNA MARIA TIERNEY, Claimant.—Jameson—A. Wood.
JOHN COURT, S.S.C., Common Agent.—Keay—Currie.

Right in Security—Clause.—Construction of a clause regarding the extent of claims to be covered by a right in security, constituted by an *ex facie* absolute disposition to one party, and a relative correspondence with the creditor.

June 16, 1832. THE late Lewis Cuthbert of Jamaica, was indebted by bill, of date

November 19, 1793, to the late Right Honourable George Tierney, in the sum of £840; and by intromissions with the estate of a deceased brother of Mr Tierney, he became indebted to him in an additional sum of

considerable amount. Mr Cuthbert was in like manner indebted to a large extent to his correspondent and consignee in London, Mr Abram Robarts. In 1795, Mr Cuthbert transmitted to Mr Robarts a conveyance of an estate belonging to him in Scotland, to be held by Mr Robarts in security, and he at the same time, May 27, 1795, wrote to Mr Tierney, mentioning the amount due by him on account of the estate of Mr Tierney's brother, and proposing to pay it by certain instalments, and further stating as follows:—"In the contemplation that the several instalments proposed shall be punctually paid at maturity, it will evidently be for your advantage to accede to the offer now made; and, in order to secure such punctual payment being made, I have transmitted by this conveyance, to our friend Mr Abram Robarts of London, an absolute conveyance and disposition of all the property I possess in Scotland, with authority, in the event of my being indebted to him on any account at the expiration of two years from this date, that he shall have liberty, with full power and authority, to sell that property in any manner he shall deem most advantageous for me, and, out of the price thereof, to reimburse himself in the first instance. I have well-founded expectation that, in the course of the present year, the greatest part, if not the whole, of what I am indebted to him will be paid. Should that be the case, he may be induced to guarantee the several payments to be

made to you, holding the same stake as an indemnification. But should he decline this, I will agree that he shall hold the property vested in him, as before-mentioned, in trust, to secure the several payments to you." No. 326.

June 16, 1832.
Tierney v.
Court.

In the letter to Mr Robarts which accompanied the conveyance he stated: "I send enclosed a packet for Mr George Tierney, which I request you will be pleased to forward him. As he will communicate my letter to you, it becomes unnecessary to mention the purport of it to you in this. I therefore content myself with declaring, that if he shall accede to my proposal, he will be entitled to the security now sent in the fullest latitude in the terms specified; and I consent and agree, that you shall be, in that case, vested in the property as trustee in his behalf, to secure the instalments offered him. Having the prospect of enabling you to pay my note to him for £840, with interest, in the course of a few months, I deem it unnecessary to say any thing to him on the subject."

The conveyance thus transmitted being defective in point of form, a regular disposition in favour of Mr Robarts *ex facie absolute*, was sent out to Jamaica to Mr Cuthbert, by him executed and returned to Mr Robarts, accompanied by a letter dated 17th April 1796, in which he said: "I again beg leave to repeat, that by the deed now sent, you are to stand secured, in the first place, for the debt I now owe to you on account current, with interest; after which, to stand in like manner as security for what I stand indebted to Mr George Tierney." This was communicated to Mr Tierney, who acquiesced in the arrangement, and matters remained on this footing, no part of his debt being paid at Mr Cuthbert's death, which happened in 1802.

Thereafter Mr Robarts, who had been infest on Mr Cuthbert's disposition, sold the lands thereby conveyed, and brought a process of multipoinding as to the disposal of the price. Among others, a claim was lodged for Mr Tierney, who demanded to be preferred next after Mr Robarts, for the whole debt due him at the date of Mr Cuthbert's letter of 17th April 1796, including the bill for £840. After some procedure, a remit was made to an accountant, who, in regard to Mr Tierney's claim, reported that he was entitled to be preferred for the instalments due in respect of his brother's estate, and mentioned in Mr Cuthbert's letter to him of date 27th May 1795, but only to be ranked *pari passu* with the personal creditors on the bill for £840, and other claims. The Lord Ordinary allowed all parties to see and object to the report within a certain period; but before the date of this interlocutor, Mr Tierney had died, and his widow, the present claimant, had not sisted herself.

Some months thereafter, Mrs Tierney sisted herself, and gave in objections to the report, in so far as it did not propose to rank Mr Tierney preferably next after Mr Robarts, for the whole debt due to him by Mr Cuthbert at the date of the letter of 17th April 1796. The Lord Ordinary, on

No. 326. considering these, found, "that Mrs Anna Maria Tierney is entitled to be ranked preferably to the extent of the whole debts due by Lewis Cuthbert to the late Mr Tierney, at the date of Mr Cuthbert's letter to Mr Robarts, of 17th April 1796;" and to that extent sustained the objections, repelling them as to certain other points, which it is unnecessary to notice.

Young v. Colt's Trustees.

Against this interlocutor the common agent reclaimed on the grounds—

1. That the note of objections had not been lodged in due time, and ought not to have been received; and,
2. That the security in favour of Mr Tierney was limited by the correspondence to the amount specified in the letter of 27th May 1795 as to be paid by instalments.

The Court, however, holding, that in consequence of Mr Tierney's death prior to the interlocutor allowing objections, and there being then no party to the process, it was competent for Mrs Tierney to lodge objections when she sisted herself, and that the terms of the letter 17th April 1796 covered all debts then due, adhered to the interlocutor of the Lord Ordinary.

ANDREW CLASON, W.S.—JOHN COURT, S.S.C.—Agents.

No. 327.

*WILLIAM YOUNG, Suspender.—Jameson—Montith.
COLT'S TRUSTEES, Chargers.—Rutherford—Brown.*

Landlord and Tenant—Reparation—Compensation.—1. A landlord having in a lease reserved right to work coal, &c., on payment of damages occasioned by his operations—held, that the tenant was not entitled to damage for injury by unauthorized trespasses by the colliers. 2. The landlord entitled to set off against the tenant's claim of damages, a claim for repairing fences, so as to enable him to let certain parks, on the desertion of the tenant before the expiry of the lease.

June 16, 1832. THE suspender Young was tenant of a farm belonging to Mr Colt of Gartsherrie, under a lease for 19 years from Martinmas 1810, at a rent of £250 per annum. By the lease, power was reserved to the landlord to work the coal of the lands, and to do every thing necessary for this purpose, on payment of the damage to be sustained by his operations, as it should be fixed by two neutral persons; while he was taken bound to erect a new farm steading, and to put the whole fences in proper order, the tenant being obliged, on the other hand, thereafter to keep all in repair. Young not requiring to reside on the farm, it was agreed, that instead of erecting the new farm steading, a deduction of £45 should be made from the rent, which was accordingly settled for as at £205 per annum.

In the course of the operations in working the coal of the lands, pits were opened, and some colliers' houses erected on the farm, in consequence of

*2d DIVISION.
Ld. Mackenzie.*

R.

which, Young sustained damage, which, down to 1821, was settled at £4, No. 327. 4s. per annum. In 1827, Young having fallen into arrear of rent, Colt's trustees sequestered the crop; and in the summer of that year, the farm June 16, 1832. *Young v. Colt's Trustees.* having been deserted by Young, they obtained decree of ejection. The crop having been sold, and applied in extinction of the rents, there re-Brown v. remained due of rents payable down to Martinmas 1827, the sum of £40; Rollo, &c. but Colt's trustees having drawn £18 for certain grass fields for the summer 1827, they also imputed that to the rents (under reservation of a claim for repairing the fences of the fields, to put them in a condition to be let), thus leaving a balance of £22. For this sum they charged Young, and they also subsequently charged him for payment of the remaining half year's rent for crop 1827, which fell due at Martinmas 1828.

Young thereupon brought a suspension, on the ground that he was entitled to set off against the rents charged, (being all that now remained due under the lease,) the damages expressly stipulated for, and that these exceeded the balance of rent due. The Lord Ordinary of consent allowed a proof, in which, among other claims of damages, Young endeavoured to substantiate loss incurred by him in consequence of the colliers trespassing on his farm, and making paths through it in going to and from their work; but to this it was objected, that the landlord could not be liable for the unlawful acts of the colliers, which the tenant was entitled to have prevented, and might have prevented if he had chosen. The Lord Ordinary, as to this matter, found, "that in estimating the damages due to the suspender by the chargers from coal operations, the mischief done by the trespasses of the colliers cannot be taken into account;" and as to the other claims of damage, found them proven to amount to £4, 4s. per annum. And he further found, "that the chargers have right to set off against the said claim for damages the expense of repairing fences," and appointed the cause to be enrolled for the application of these findings.

Young reclaimed, but the Court adhered.

WOTHERSPOON and MACK, W.S.—BAODIES and KENNEDY, W.S.—Agents.

DAVID BROWN, Pursuer.—*Shene—Cuninghame—A. Grahame.*

No. 328.

LORD ROLLO and Others, Defenders.—*D. F. Hope—Keay.*

Contract—Homologation.—Road-trustees stipulated in a contract with a road-contractor, that "no additional work should be done, with a view of extra payment, without a written order from the trustees, or their surveyor;" the contractor made a claim for additional work for which no written order was produced, and offered to prove that the trustees lived near the road, took great interest in its progress, and went frequently amongst it during the time of these operations, without challenging them as unauthorized—held that the trustees were not liable to pay the sum claimed.

No. 328.

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Jane 19, 1832.
1st DIVISION.
Ld. Corkehouse.
S.

Brown v.
Rollo, &c.

BROWN entered into a contract in 1820, with Lord Rollo and Other, the Dunning road-trustees, for making a road in Perthshire according to a given specification. The contract contained this clause: "No additional work to be done, with a view of extra payment, without a written order from the trustees or their surveyor." In making the road, Brown worked a quarry belonging to one Dick, who brought an action against him, under which he recovered a decree, and got payment of damages and expenses. Brown alleged that he had wrought in the quarry by the express order of Robert Drysdale, a surveyor appointed by the trustees.

In December 1821, Brown raised an action libelling on his contract, and setting forth, that the trustees were owing him a sum of £7234, "in executing and performing the several works specified in the contract, agreeably to an account thereof made and subscribed by Robert Drysdale (exclusive of certain claims for extra work not yet settled by the said Robert Drysdale), with interest thereon," &c., under deduction of £600 paid to account. He also claimed a sum of £600 for building a bridge over the Devon, in reference to which a special arrangement had been entered into, owing to the unforeseen difficulty of building the bridge. Previous to raising the action, he had rendered an account to the trustees of the sum claimed, in which there was an article for extra work on the road left blank. His summons concluded for payment, "reserving his claim for extra work," &c.

The trustees pleaded, in defence, that the work was insufficiently executed, and not according to the contract. They also, in December 1821, raised a summons of damages against Brown and his cautioner, on account of Brown's failure to fulfil the contract, and against Drysdale, for failing to perform the duty of surveyor. In 1822, Brown obtained decree from Lord Alloway, in terms of his libel, his Lordship considering that Brown's claims, under the special terms of the contract, were liquid, and that their payment should not abide the issue of the counter action of damages.

Brown raised a new action in 1830 against the trustees, in reference to the same contract, subsuming, "that, during the progress of the operations of the said line of road, certain additional cuttings, &c. were ascertained to be requisite or proper, and having been authorized by the trustees, were performed by the pursuer; that the expenses of these operations were £2477," &c. He concluded for payment of this sum, and also of the amount of damages and expenses, for which Dick had obtained decree against him. He did not produce a written authority from the trustees or their surveyors for any of the work now sued for; but in making up the record, he alleged, that the greater part of the trustees "lived in the neighbourhood of the said road, took a great interest in its progress and formation, according to the most approved plan, and went frequent along it whilst it was in the course of execution," and that they had fully assented to the line and levels of the road as finished. A part of the sum

claimed was for damages incurred at building the bridge over the Devon, No. 328. in consequence of Brown's workmen having been stopped, the work delayed unseasonably, &c., through impediments occasioned by the trustees. June 19, 1832.
Brown v.
Rollo, &c.

The trustees pleaded in defence, 1. that all claim for extra work was disposed of under the previous action; and, in particular, that relative to erecting the bridge over the Devon; 2. that at all events, as no written order for it had been given by their surveyor or themselves, the clause in the contract exempted them from liability; and, that though they occasionally looked at the progress of the work, they relied on there being no extra work performed, except in so far as there were written orders for it, and could not be held to have homologated such extra work in ignorance of its being done; and, 3. as to the demand of payment of the damages and expenses incurred by Brown to Dick, the trustees alleged that Dick's claim of damages could not have arisen but for the improper manner in which Brown or his servants worked in the quarry.

The Lord Ordinary "sustained the defence as to the claim for payment of extra work upon the road, and as to the claim for damages said to have been occasioned by the difficulty of finding a foundation for the Devon bridge; assailed the defenders, and decreed; but in respect that parties differ with regard to the facts connected with the working of the quarry on Mr Dick's property, remitted the case, in so far as the pursuer's claim of relief is concerned, to the jury roll."*

Brown reclaimed.

LORD PRESIDENT.—I think it impossible to supply the want of a written order by the averment that the road-trustees frequently saw the progress of the work, and

* "NOTA.—Under the decree in 1822, the pursuer received payment of the contract price of the whole undertaking, and about £600 more for extra work, arising from the difficulty in finding a proper foundation for the Devon bridge. In the account which he rendered to the trustees previous to that action, there is an article for extra work upon the road left blank; and a claim to that effect is also reserved in the summons. The competency of that claim, therefore, in the present action, is indisputable; but the defence against it seems equally clear. A clause in the contract expressly provides, that no additional work shall be done by the contractor, with the view of extra payment, without a written order from the trustees or their surveyor; a clause essentially necessary for the safety of persons executing undertakings of this kind by contract, and more especially road-trustees. But no written order by the defenders or their surveyor is produced, or alleged to have been given, for the extra work in question.

"In consequence of Lord Alloway's judgment in 1822, the pursuer was paid for all the extra work done under the supplementary contract at the Devon bridge, which extra work arose chiefly from the difficulty of finding a proper foundation. He made no claim for damages at that time on account of his workmen being stopped; the work delayed to an unsuitable season; his materials being carried off by the floods, or on any other account; and no claim of damages was reserved in the summons. It must be presumed, therefore, that his charge for extra work at that time

No. 328. took an interest in it, and must be therefore barred from objecting now to pay for the additional work and cuttings claimed, since they did not challenge them at the time. They were not bound to suppose that Brown was working without reference to his contract, or was performing extra work, so long as they were aware that he had no written order to do so.

June 19, 1832. Brown v. Rollo, &c. Nicoll v. Kirk-Session of Dundee. **LORD BALGRAY.**—I am of the same opinion. The express purpose for which a clause was inserted in the contract requiring a written order, was just to provide for the case which has occurred. Its object was to secure the trustees against the claim now made for unauthorized extra work; and it is impossible for us to deny effect to that clause.

LORD CRAIGIE thought the Lord Ordinary's construction of the contract produced a hardship against Brown; but that it was nevertheless the true legal construction.

LORD GILLIES was also for adhering.

THE COURT accordingly adhered.

GRAHAM and ANDERSON, W.S.—PHIN and PITCAIRN, W.S.—Agents.

No. 329. **THOMAS NICOLL, Advocator.—Marshall.**
MAGISTRATES, HERITORS, and KIRK-SESSION of DUNDEE, Respondents.
—Christison.

Aliment—Parent and Child—Poor.—The maternal grandfather of a bastard pauper not liable to aliment him.

June 19, 1832. A DAUGHTER of the advicator Nicoll, an inhabitant of Dundee, had a bastard son to a person named Jamieson, who was in destitute circumstances, and unable to maintain it. Nicoll in consequence brought up the boy in his house, and put him to a trade; but after some time the boy became insane, and was obliged to be confined in a lunatic asylum. In the meantime, the mother had married, and was since dead. Nicoll, who was an old man, and stated that he was incapable of doing more than to support himself

was framed so as to cover any loss or inconvenience of that nature; and, after the lapse of so many years, and the settlement of his account without reservation, it is too late to bring forward a claim on account of it.

"With regard to the quarry on Mr Dick's ground, the pursuer expressly avers, that Drysdale, the surveyor for the trustees, ordered him to work that quarry (an order which, under the contract, it was not necessary to put in writing), and that he wrought it accordingly in a proper manner, and with as little loss to the proprietor as circumstances permitted. If that be the case, it appears to follow, that the trustees are bound to relieve him of the decree for damages obtained by Mr Dick, and the expenses of the action. But if, on the other hand, as the defenders allege, all the damage arose from the careless and improper manner in which the quarry was wrought, the loss must fall on the pursuer himself."

and his wife, applied to the Heritors and Kirk-Session of Dundee, to take No. 329.
 his lunatic grandson off his hands. They offered to advance him four shillings a-week, but declined doing any thing further. This Nicoll re-fused, as totally inadequate to support the lunatic in the asylum, and presented a formal petition to the Heritors and Kirk-Session, praying them to relieve him of the burden, and take charge of the lunatic. The petition having been refused, he brought an advocation, in which the Lord Ordinary ordered Cases to the Court, on the abstract question, "how far a maternal grandfather is liable for the support of an illegitimate child, when the same becomes a pauper."

For Nicoll, it was pleaded—

From favour to the institution of marriage in Scotland, as in all Christian countries, the law sanctions and enforces the reciprocal rights and duties of parents and children, in the case of legitimate offspring alone. Between an illegitimate child and its parent there is no succession, nor is a bastard bound to aliment its parent, whether father or mother, nor in any of the duties owing by a child. A bastard is not a member of his parent's family; and although the legitimate offspring of a child may be considered as members of the grandfather's family, this can never hold as to illegitimate offspring. It is true, the parents are bound to maintain their bastard children while in infancy, but this obligation arises *ex delicto*, and cannot attach to any but the very parties through whose delinquency the obligation arises, and so it was held, (when claims of damage were considered not to pass against heirs,) that the heir of the father of a bastard was not liable in the obligation of maintaining him,¹ and much less can such obligation transmit against the father of the parent of the bastard. There is no precedent for subjecting him, and every principle of our law, and of sound policy, is against it.

For the Magistrates, Heritors, and Kirk Session.

The obligation on the parent of an illegitimate child, arises not *ex delicto*, but *ex debito naturali*, and aliment is considered to be due "super jure naturæ," or "ex equitate et caritate sanguinis." If this is the source of the obligation, it is clear there can be no distinction as to the mere subsistence of the obligation between natural and legitimate children, particularly with reference to the mother and her parents, since as to her there can be no uncertainty in regard to the fact of parentage; and there being thus an obligation to some extent on the mother and her ascendants, *ex caritate sanguinis*, the maternal grandfather ought, at all events, to be made liable before the public, who can only be called upon in the very last instance to supply aliment on the failure of all against whom any natural obligation lies.

The Court found "that the advocator is not liable for the expenses in

June 19, 1832.
 Nicoll v.
 Kirk Session
 of Dundee.

¹ Ker v. Morriston, Dec. 7, 1692 (1363.)

No. 329. question, 'or any part thereof,' and remitted the cause to the Lord Ordinary to proceed accordingly."

June 19, 1832.

Nicol v.
Kirk Session
of Dundee.

C. SPENCE, S. S.C.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

Walker v.
M'Nair.

Sir PATRICK WALKER, Pursuer.—Forsyth—Christison.

No. 330.

JAMES M'NAIR, Defender.—D. F. Hope—A. McNeill.

Agent and Client—Triennial Prescription—Accounts incurred to an attorney in Exchequer, employed by the distillers of Scotland to attend to their interests, in regard to certain legislative measures affecting their trade—Held to have arisen ex mandato, and not to fall under the triennial prescription of writer's accounts.

June 19, 1832. BETWEEN the years 1785 and 1797, the late William Walker, attorney in Exchequer, was repeatedly employed by the general body of the

2d DIVISION. Ld. Mackenzie. Lowland Scotch distillers, to attend to their interests in regard to diverse R.

legislative measures affecting their trade. Mr Walker accordingly proceeded at different times to London with reference to these matters, and was otherwise much occupied in the performance of the business intrusted to him. Certain proceedings took place for settling the accounts thereby incurred to him, but several of the parties alleged to have concurred in his employment, having declined to pay their shares, he raised actions against them, at a period considerably more than three years after the date of the last item in his accounts. In two of these actions the defence of the triennial prescription was pleaded, but in both cases it was repelled by the late Lord Meadowbank, on the ground that the claim arose ex mandato, and was on a totally different footing from a writer's ordinary business account, and his Lordship's judgment was adhered to by the Court.¹

¹ Walker v. Aikman, Nov. 18, 1812, and Walker v. Simpson, June 9, 1813. Lord Meadowbank's interlocutor in the last of these cases was as follows:—"Having considered the condescendence for the defenders, with the answers and replies, and whole process, finds that the pursuer was employed to conduct a common interest, where attendance in a country foreign to his professional residence was requisite, and considerable knowledge, experience, and very varied attention, during a tract of years, were to be exerted by him for persons engaged in the distillation of spirit in Scotland; that his employments, whether continued or reiterated, must unavoidably have been known to the whole trade; and that it is not disputed that the expense has been usefully incurred, and the accounts properly stated and charged against the individuals concerned, on a fair principle of distribution: Finds that this is a case of mandate, and, as well as negotiorum gestio, falls not under the statute 1579: Finds, that if in this case some doubts might have been entertained, whether the pursuer would have been entitled to his action against the defenders on a principle of gestio only, such doubts would have been entertained with regret, on account of the equitable claim of the employers of the pursuer, to a proportional relief against those benefited by the measures accomplished; but finds the attendance

The present action was delayed in consequence of some dispute in the summons, but a supplementary action having been raised, the defender M'Nair repeated the defence of prescription which had been repelled in the previous cases. This the Lord Ordinary sustained, but the Court, on a reclaiming note, pronounced this interlocutor.

June 19, 1832.
Walker v.
M'Nair.

A. B.

“In respect of the judgments of this Court in prior cases, repelling the plea founded on the triennial prescription, after the interlocutor submitted to review, in so far as it finds that the accounts of business libelled have, in relation to the defender, fallen under the triennial prescription, and to this effect decern; but quoad ultra remit to the Lord Ordinary to hear parties farther as to the grounds and original constitution and evidence of the pursuer's claim, and to proceed as to his Lordship shall seem fit; reserving all questions as to expenses of process and extracts.”

W. MILLER, S. S. C.—HORNE AND ROSE,—Agents.

A. B., Petitioner.—*Milne.*

No. 331.

Poor's Roll.—Circumstances in which the Court remitted a cause to the counsel for the poor, although the certificate signed by the clergyman was rested solely on the statement of the applicant, and the applicant was not personally known to the clergyman.

THE petitioner craved a remit to the counsel for the poor.

The clerk called the attention of the Court to the circumstance, that the certificate signed by the clergyman was rested solely on the statement of the applicant, who was not personally known to the clergyman.

Milne, for petitioner.—The minister has lately come to his parish, the West Church; there are 70,000 parishioners, so that it is impossible for him, in many cases, to speak from personal knowledge. In a precisely parallel case, the Second Division lately made a remit to the counsel for the poor.

The Court then remitted as craved.

June 21, 1832.
1st Division.

condescended on, and not denied by the defenders, at a meeting of the trade, summoned and held in pursuance of the pursuer's employments, and for conducting that management under which his employment existed, establishes a sufficient concurrence, on the part of the defenders, to subject them as mandants, to the effect craved; therefore, repels the defences, and decerns as craved; reserving to pursuer further recourse, in case of the failure of other obligants, and defences, as accorda.”

No. 332.

DONALD M'LEOD, Suspender.—*Thomson.*ARCHIBALD DUDGEON, Respondent.—*Rutherford—Macdougall.*M'Leod v.
Dudgeon.*Landlord and Tenant.*—Question, whether the pasture in two belts of planting was included in a lease.

June 21, 1832.

1st DIVISION.
Ld. Moncreiff.Bill-Chamber.D.Stewart v.
Stewart.

THIS was a special question, whether the pasture in two belts of planting was included in the lease of M'Leod, or the lease of Dudgeon. The Lord Ordinary, after looking at a plan of the grounds, "in respect of the strict bounding terms of the two leases," found that the pasture belonged to Dudgeon; but as M'Leod had reasonable ground to believe that it had belonged to him, found no expenses due.

M'Leod reclaimed, but the Court adhered.

J. GORDON, W.S.—R. ROY, W.S.—Agents.

No. 333.

JOHN STEWART, Suspender.—*D. F. Hope.*JAMES STEWART, Charger.—*Monteith.*

Legal Diligence—Master and Servant—Apprentice—A master presented to the Sheriff a petition narrating an indenture with his apprentice, his desertion from service, and praying for warrant to apprehend and imprison him till he should find caution to return to his service, and "fulfil his engagement;" warrant was granted accordingly, and the apprentice imprisoned—Held, on a bill of suspension and liberation, that as the warrant must be construed as requiring caution, not merely to return to the service and continue therein, but also to implement all the particular conditions of the indenture, it was illegal, and could not be restricted so as to limit it to the returning to service and continuing therein, and therefore warrant of liberation granted.

June 21, 1832. JOHN STEWART was bound an apprentice for three years with James

2d DIVISION.Ld. Moncreiff.Bill-Chamber.

Stewart, calico-printer at Avonfield, in the county of Linlithgow, by indentures which contained the ordinary stipulations as to conduct, &c., with a penalty in the event of non-performance. In April 1831, the apprentice deserted his service, and, in July thereafter, his master presented a petition to the Sheriff of Linlithgow, narrating the terms of the indenture, and the desertion, and praying for warrant to apprehend him for examination, "and upon his said desertion and breach of engagement being admitted and proven, to grant warrant for committing him to prison until he find caution to fulfil his engagement; or otherwise ordain him to return to the petitioner's service within twenty-four hours after the date of such order, and to continue therein, and fulfil his said engagement, aye and until the expiry of the said indenture; and in the event of his refusing, or at any time ceasing, to obey the said order, to grant warrant for apprehending and committing him to prison, until he give sufficient caution, acted in the books of Court, to obey the same."

The Sheriff immediately granted a warrant, on which the apprentice No. 333. was apprehended and brought up for examination. On advising his declaration, the Sheriff pronounced this interlocutor:—"Having again considered this petition, with the declaration of John Stewart, emitted on paper apart, decerns and ordains the said John Stewart to return to the petitioner's employment within twenty-four hours after service of this petition and deliverance, and to continue in said employment, and fulfil his engagement under said indenture, all in terms of the prayer of the petition; and appoints service of the petition and of this deliverance to be made upon the said John Stewart, and the said John Stewart to answer the said petition, if so advised, within three days after service."

June 21, 1832
Stewart v.
Stewart.

Intimation of this deliverance having been made, the apprentice returned to his work, but having immediately again deserted, this was stated in a minute to the Sheriff, who thereupon granted warrant for his apprehension and imprisonment in the following terms:—"Having again considered the foregoing petition, with the pursuer's motion and execution of service produced, grants warrant to officers of Court, or other executors of the law, to apprehend the person of the before-designed John Stewart, if found within the county of Linlithgow, and to imprison him in the tolbooth of Linlithgow, until he gives sufficient caution, acted in the books of Court, to return to his employment, and continue therein, and fulfil his engagement with the petitioner,—all in terms of the prayer of the petition; and in case the said John Stewart may have left the county of Linlithgow, recommends to neighbouring Sheriffs and other Magistrates to interpose their authority to this warrant, to the effect of putting the same to due execution within their jurisdictions."

Under this warrant the apprentice was apprehended and imprisoned, and after some time he presented a bill of suspension and liberation, on the ground, inter alia, that the warrant was illegal, "in so far as it seeks to compel the complainer, not only to return to his service, but to fulfil his engagement, or the conditions of his indenture, not under the penalty contained in the indenture, but under the new penalty of finding caution, which the indenture itself does not require."

The Lord Ordinary reported the bill, with answers to the Court, by the following interlocutor:—"The Lord Ordinary having considered this bill, with the answers and productions, in respect that the warrant of imprisonment in this case bears to be 'in terms of the prayer of the petition,' and for detaining the complainer 'until he shall find caution,' and that the petition prays for a warrant to commit him to prison, 'until he find caution to fulfil his engagement;' or otherwise, to ordain him to return to the service, 'and to continue therein, and fulfil his said engagement, aye and until the expiry of the said indenture; and in the event of his refusing, or at any time ceasing, to obey the said order, to grant warrant for apprehending and committing him to prison, until he give sufficient security, acted in the books of

No. 333. Court, to obey the same,—whereby the warrant is in substance and effect a warrant of imprisonment, not only till the complainer shall find caution to return to the service, but till he shall find caution also indefinitely to fulfil all his engagements under the indenture: And in respect of the decision in the case of Raeburn v. Reid, June 4, 1824, in favour of the respondent's plea, and of the opinions delivered in the latter case of Wright v. M'Gregor, February 9, 1826, apparently adverse to the legality of the warrant in the present case,—Appoints the bill and answers to be printed, and copies thereof, with this interlocutor and note, to be put into the boxes of the Lords of the Second Division of the Court, in order to be reported.” *

Pleaded for the Apprentice—

The case of Reid v. Raeburn¹ has merely fixed that it is competent, by summary imprisonment, to compel a servant to find caution to return to his service, but it does not warrant the exaction of caution, except with reference to the simple obligation of returning to the service, while the attempt to exact caution to any further extent was strongly discountenanced in the case of Wright v. M'Grigor.² Here, however, the warrant is for imprisoning the apprentice till he find caution, not merely to return to his service, but also “to fulfil his engagement,” which necessarily embraces all the conditions and stipulations of the indenture, and it is consequently illegal.

Pleaded for the Master—

It is settled by the case of Raeburn, that summary imprisonment is competent against a servant, to compel him to find caution to return to his service, and likewise to continue therein till the expiry of his apprenticeship. The extension of the caution to the continuing in the service is absolutely essential for the object intended to be effected, since, if mere returning was all that was required, the apprentice might always return for a day, and desert again the next, without the caution being

* “ NOTE.—The cases of Raeburn and Gentle v. M'Lellan and Company, July 9, 1825, have fully settled the point, that such a contract of service may be enforced by imprisonment, to the effect of compelling the party to return to the service, and even to find caution to do so. But in so far as he is here imprisoned till he finds caution not only to return, but to fulfil all his engagements during the full period of the indenture, the opinions delivered by the Lords of the Second Division in Wright's case, do not appear to agree with the judgment of the First Division in the case of Raeburn, in which the warrant was to that effect. The only difference is, that in the case of Wright the penalty was defined to £.10 (found to be restrictive to actual damage)—which can hardly be thought to render the warrant more objectionable than where it stands in indefinite terms. The case, in other respects, appears to be of importance; and if the statement in the answers is true, of a very unfavourable nature. The man, however, has now been more than eight months in jail.”

¹ June 4, 1824, (*ante*, III. 104.)

² Feb. 9, 1826, (*ante*, IV. 431.)

forfeited; and so, in Raeburn's case, the Court sustained a warrant which No. 333. authorized imprisonment till the party should find caution "that he shall June 21, 1832.
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THE COURT being of opinion that the warrant must be held as for im- prisonment, till caution should be found to fulfil all the stipulations of the indenture, and that a warrant to that effect was illegal, were satisfied that the bill must be passed; but a doubt arose as to the matter of liberation, whether a restriction of the warrant might not be permitted, so as to limit the caution required to the returning to the service, and continuing therein. The cause was delayed for a day or two to consider of this, when the Court, being agreed that they were in this matter exercising powers of police, and that the warrant must be considered of a criminal, rather than of a civil nature, held, that they could not allow a restriction, and their Lordships accordingly passed the bill, and granted warrant for liberation, reserving to the master to apply for a new warrant.

A. HAMILTON, W.S.—J. HENDERSON, S.S.C.—Agents.

R. and A. CARSWELL (HUNTER'S ASSIGNEES), Pursuers.—*Cunninghame.* No. 334.
MUNN'S TRUSTEES, Defenders.—*Brown.*

Trust.—Trustees for creditors disputing the claim of one creditor not allowed to charge the expenses connected with their opposition to him, so as to diminish his share of the trust funds.

SEQUEL of the case mentioned ante, IX. 567, which see. The point June 21, 1832. remaining to be determined after the judgment formerly pronounced, re- 2d Division. lated to whether any thing was due to the pursuers, as assignees of Hun- Ld. Mackenzie. ter, after giving effect on one hand to the defenders' plea of compensa- T.

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June 21, 1832.
Stewart v.
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THE COURT being of opinion that the warrant must be held as for imprisonment, till caution should be found to fulfil all the stipulations of the indenture, and that a warrant to that effect was illegal, were satisfied that the bill must be passed; but a doubt arose as to the matter of liberation, whether a restriction of the warrant might not be permitted, so as to limit the caution required to the returning to the service, and continuing therein. The cause was delayed for a day or two to consider of this, when the Court, being agreed that they were in this matter exercising powers of police, and that the warrant must be considered of a criminal, rather than of a civil nature, held, that they could not allow a restriction, and their Lordships accordingly passed the bill, and granted warrant for liberation, reserving to the master to apply for a new warrant.

A. HAMILTON, W.S.—J. HENDERSON, S.S.C.—Agents.

R. and A. CARSWELL (HUNTER'S ASSIGNEES), Pursuers.—*Cunninghame.* No. 334.
MUNN'S TRUSTEES, Defenders.—*Brown.*

Trust.—Trustees for creditors disputing the claim of one creditor not allowed to charge the expenses connected with their opposition to him, so as to diminish his share of the trust funds.

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No. 334. June 21, 1832. Carswell v. Munn's Trustees. tion on the price of the one half of the Prompt purchased by Hunter; and, on the other, to the pursuers' plea of recompensation, in respect of Hunter's right as a creditor of Munn to a share of that price affording to his claim. This again depended on whether certain expenses incurred

by the defenders, mainly in unsuccessfully opposing the pursuer's claim, should be charged upon the whole trust fund, so as to affect the share claimable by the pursuers, or the dividend to which the pursuers were entitled.

The expenses consisted chiefly of the following items:—

1. Charges incurred by Munn, as his share of the expenses of the submission, in which Hunter's claim against him was sustained; and, in particular, one half of the fee paid to the accountant employed in the submission, the other half having been paid by Hunter.

2. Expenses incurred by the defenders in unsuccessfully resisting the accountant's claim for this half of his fee, when made against the trust estate.

3. A sum expended in the maintenance of Munn, during a period when he was kept in this country to assist the defenders in disputing Hunter's claim.

4. Expenses incurred in regard to the renewals of the bills granted for the price of the Prompt, these renewals having been granted after the assignation by Hunter to the pursuers was intimated to the defenders, without consulting the pursuers, or obtaining their consent to the indulgence thus granted to the obligants.

5. The expenses incurred in this process, in resisting the claim of the pursuers; and,

6. A claim for commission on the price of the Prompt, which was not limited to the price actually recovered from the obligants on the bills granted therefor, but was demanded on the whole gross price agreed for. The ground on which this claim was rested, was, that the defenders, by having their plea of compensation sustained, had truly obtained payment of the full price, by retaining in their hands so much of Hunter's share of the other vessel previously sold by them, as was equal to the balance due, and that this was equivalent to their having recovered payment from Hunter out of any other funds. To this it was answered, that the defenders had already charged, and had been allowed commission on the full price of the other vessel, and that if they were permitted to charge it against that share of the price which they were held entitled to retain for the balance of the price of the Prompt due by Hunter, they would truly draw commission twice over on the same sum.

The accountant to whom the Court had, in pronouncing the former judgment, remitted the process, reported against these various claims being allowed to form a charge on the share of the pursuers, and drew out a state, showing a balance due to them in the event of these charges

being disallowed as charges against the pursuers ; and also showing, that No. 334.
at the date of the assignation to the pursuers, a balance was due on Hun-
ter's share.

To this report the defenders gave in objections, claiming to have the above-mentioned charges sustained as in a question with the pursuers, but the Court repelled them.

June 21, 1832.
Carswell v.

Mann's Trus-
tee.

Bignall v.

W. Young, W.S.—James Dunlop, W.S.—Agents.

Single Bills.

— BIGNALL, Pursuer.—*Skene.*
—, Defender.—*Moir.*

No. 335.

Process.—Commission to examine witnesses abroad renewed to a pursuer, on payment of prior expenses, although his agent had neglected for a year to extract the original commission, the defender not being exposed to any risk of injury, and the witnesses being essential to the pursuer's case.

In this case a commission and diligence had been granted to the pursuer June 21, 1832. witnesses in India, in March 1831, to be reported in a year thereafter. The pur- 2d Division. Jury Cause. R.
suer's agent was at this time in very embarrassed circumstances, and lately decla- red himself bankrupt. This caused the pursuer to employ a new agent, and it was then discovered that the former agent had never extracted the diligence. A motion, therefore, was now made for a renewal, accompanied by affidavit to the above effect, and that the witnesses were essential to the trial of the cause.

This motion was opposed, on the ground that the consequences of an agent's negligence must fall on his own client, and that the other party ought not to suffer thereby.

The Court, while they were agreed that a party ought not to suffer by the negligence of his opponent's agent, considered that in the present case no material injury could attach to the defender by delay, while, by pushing on the trial without the evidence of essential witnesses, the pursuer might unjustly lose his cause, and they accordingly renewed the commission for a year, on payment by the pursuer of prior expenses.

No. 336.

GEORGE TAYLOR, Pursuer.—G. G. Bell.

June 22, 1832.
Taylor v. Bin-

JANET BINNIE OR TAYLOR, Defender.—Cunningham—Myln.

Husband and Wife—Adultery—Remissio Injuriae.—1. The defence of remissio injuriae is not properly prejudicial, in an action of divorce on the head of adultery, and in general the pursuer is entitled to prove his libel, before any proof is led as to the remissio. 2. Circumstances in which a proof of remissio refused before allowing a proof of the libel.

June 22, 1832. ON 28th June 1830, Taylor raised an action of divorce against his wife, before the Commissaries of Edinburgh, libelling eight acts of adultery, particularly with James Thomson. She denied them, and pleaded remissio injuriae as a bar to the action. The process was transmitted to the Court of Session, by 1 William IV. c. 69; and the defender, in support of her plea of remissio, made the following averments:

“The alleged fact of the defender having been guilty of adultery with James Thomson, came to the pursuer's knowledge prior to Whit-sunday 1830; and on Sunday, the 23d of May 1830, the pursuer, for the first time, publicly accused the defender of the said adultery. On that day he also made his complaint to the defender's mother at Carfrae Mill, and he refused to sleep with the defender that night.

“On Monday, the 24th of May, James Thomson was also accused by the pursuer of adultery with the defender; and on the same evening, by the exertions of two mutual friends, peace was restored; the defender and her husband slept together; and on the same night Thomson was engaged as a servant of new by the pursuer, down to the following Martinmas.

“On Wednesday, the 26th of May, Thomson was again openly accused by the pursuer as guilty of the said adultery with the defender, and the pursuer turned him off from his service on the ground of the alleged adultery.

“At the same time (viz. on the 26th May), the pursuer pointedly refused to pay Thomson some cash which the latter had deposited in his hands, and three half-years' arrears of wages, which refusal was grounded solely on the plea that Thomson, by his guilty conduct, had forfeited his claim.

“On Thursday the 27th, and Friday the 28th of May 1830, the defender was again openly accused by the pursuer of adultery, before the servants, and on that day she was ordered to quit the house, which she accordingly did, and came to her brother's house in Edinburgh.

“By the advice of her friends, the defender returned to meet her husband at Whitburn, on Monday the 31st May. After a long interview the parties were reconciled; the defender was reinstated in the management of the house, and she and the pursuer cohabited together as man and wife, sleeping together, and occupying the same bed, till Monday the

7th of June, when she was again obliged to quit the pursuer's house, as No. 326. after specified."

A debate took place before the Lord Ordinary on the plea of remissio, and his Lordship " allowed the defender a proof of the averments made by her, in her re-revised answers, of the remissio injuriarum, or reconciliation between her and the pursuer, posterior to his knowledge of the alleged acts of adultery libelled, and to the pursuer a conjunct probation, and remitted to the Commissaries of Edinburgh to take the proof, and to report quam primum."

June 22, 1832.
Taylor v. Bin-
nie.

The pursuer reclaimed, and craved the Court, " in respect that the defender denies the acts of adultery libelled, and that no proof thereof has been allowed to the pursuer, to remit to the Lord Ordinary, with instructions to allow both parties a proof of their respective averments, and to each a conjunct probation," &c.

The defender also reclaimed, and prayed the Court " to find that she is only bound to prove a reconciliation subsequent to the date of such alleged acts of adultery as are relevantly set forth in the summons, without regard to any charges incompetently attempted to be enlarged or altered in the condescendence, or otherwise to find that the condescendence is not sufficiently specific in point of place and date, and not relevant, in so far as it sets forth an act of adultery alleged to have been committed posterior to the date of the summons of divorce in this case." *

The Court ordered Cases.

Plead by the Pursuer—

1. His wife denied every act of adultery. It was therefore impossible to allow her, in limine, to lead a proof of the pursuer having forgiven those very acts which she alleged never to have committed.

2. The defence of remissio, is a defence on the merits. The proper time to prove such defence, is after the pursuer has adduced his proof of the libel. Until he has adduced that proof, it would often be highly inconvenient to consider any proof of remissio, which is not of an independent, but a relative nature. Besides, if he failed in his proof, no proof of remissio would be required.

3. In some few cases, a proof of remissio might be allowed in limine, as when a defender produced a writing by the pursuer, applicable to the acts libelled, and forgiving them. But in a case like the present, where forgiveness was to be implied from facts and circumstances, it was improper to invert the usual order of proof. Besides, it was an injury to the pursuer to have his proof postponed, because it might be wholly lost by the delay.

4. The practice of the Commissary Court was in favour of postponing the plea of remissio, except in rare cases.

* The argument regarding the regularity of the condescendence is not given, as the question was remitted to the Lord Ordinary.

No. 336. *Pleaded by the Defender—*

June 22, 1932. — 1. The plea of remissio is perfectly well founded, if the husband, in *Taylor v. Bin-* the full belief (though erroneous) of the adulterous acts having been committed, forgave them. The denial of her guilt was therefore not inconsistent with her plea of remissio.

2. The defence of remissio takes away the title to pursue. It bars the pursuer, by personal exception, from insisting, and it is therefore necessary to dispose of it judicially.

3. Wherever the acts, inferring remissio, are sufficient to instruct forgiveness of the acts of adultery libelled, the proof of remissio ought to have precedence in point of expediency, as it is better for the country generally, and for the family of both parties, that the cause should come to an end, if consistent with justice, without a proof of the alleged adultery being led.

4. The practice of the Commissary Court, especially of late years, was to consider the remissio a prejudicial plea.

LORD BALGRAY.—This is a question of importance, and not free from difficulty. I think, from the nature of the plea of remissio, it ought to be judicially disposed of. It resolves itself into a personal exception against the pursuer. If it be well founded, then the pursuer has come here and raised a libel which he is not entitled to prove. The defender undoubtedly must instruct the pursuer's belief of her guilt, at the time when he is alleged to have forgiven it, otherwise there is no remissio. But if she does prove her husband's full belief of the guilt he now alleges against her, and then proves the remissio, his mouth is shut, and he is not entitled to insist in this action. This view, I think, is strengthened by the consideration, in point of expediency, that the children of parties to these suits, though innocent themselves, are deeply affected by the conduct of the process. And where it is possible, consistently with justice to both the spouses, to adopt a course which may prevent distressing details of infamy and disgrace from going on record, I think it due to the children to adopt it. I would therefore incline to allow the proof of remissio judicially; but as the point raised is of general importance, and this is the first time it has occurred since consistorial actions were transferred to this Court, I think it would be right to submit it to the other Judges.

Their Lordships unanimously concurred in this suggestion, and the following interlocutor was pronounced:—"The Lords, considering the important nature of the points involved in the cases in this cause, resolve to require the opinions of the other Division, and of the permanent Lord Ordinary, on the following question: Whether generally, and particularly in this case, the proof of the remissio is prejudicial; and whether it ought to precede the proof of adultery?"

To these questions, LORDS JUSTICE-CLERK, GLENLEE, MACKENZIE, CORE-HOUSE, MEDWYN, and FULLERTON returned this answer:—

"(1.) We do not think it can be laid down as law generally, that proof of remissio of adultery is prejudicial in an action of divorce for adultery. We see no reason for such a general rule. It does not appear to us true, that the plea of remissio stated by a defendant, in an action of divorce for adultery, is a plea against the pursuer's title to pursue, in any strict or proper sense, so as to infer the necessity or propriety of deciding upon that plea before the pursuer is allowed to proceed

upon his libel, and try the question thereby raised. A defender pleading remissio No. 336. of this kind, instead of denying the title to pursue, substantially admits it, and pleads, not for dismissal of the action, as being sued by a party not duly qualified June 22, 1832. Taylor v. Bin- to bring it to decision, but for an absolvitor on the merits, in virtue of a valid de- nile. fence, and that absolvitor final and conclusive, as being obtained against the un- doubtedly fit and proper pursuer in the matter. Neither do we think that this plea can be viewed as a personal objection in any sense inferring that it must be tried before the pursuer is allowed to proceed upon his libel. If it can be viewed as a personal objection at all, it certainly is not one distinct from the merits of the cause.

" Viewing the defence of remissio then as a plea upon the merits, we conceive the general rule to be, that the proof of a defence on the merits, not admitting the truth of the libel, is not prejudicial. Lord Stair says, ' If the defender propone a relevant exception, which doth not import the verity of the libel, a term is assigned to the pursuer to prove the libel, and the same term to the defender to prove the exception.' And we think that this rule substantially obtains in our practice still. Under this rule, then, if the defence of remissio be so qualified as not to admit the libel, the proof of it cannot be generally prejudicial to the proof of the libel. And we are aware of nothing in the nature of that defence that could warrant admitting it to be excepted from the ordinary rule, and being made generally the subject of an opposite rule. It is said that a party ought not to be allowed to prove adultery against his or her spouse, who, after all, may turn out not divorcible. That seems very weak, considering that if the defender be innocent, the innocence will be proved, to the great advantage of both parties; and that if the defender be guilty, the pursuer may safely be left to decide upon his or her own interest, in bringing or not bringing out that guilt judicially,—not to mention that a defender refusing to go into evidence on such a point, and pleading in bar of it remissio, must hold a reputation not sensibly better than if the adultery were proven. This reason of expediency, then, we think inadequate to support a rule by which, in contradiction to the ordinary form of process, the proof of remission was in all cases to be taken and decided upon prejudicially, before the facts of the adultery were either admitted or proven. Besides other objections to such a rule, applicable generally to cases of defence not admitting the libel, there seems this very cogent one, peculiarly applicable to a case where remissio is pleaded, viz. that in general the remission is attempted to be established *rebus et factis*; and that among these, the fact of adultery having actually been committed, and the precise number, time, place, and circumstances of the acts of adultery, must be essential as part of the evidence in the question of remissio. How can it be imagined to be in general possible to judge with accuracy, whether a person knew or believed, and forgave the adultery of his or her spouse, by taking evidence of the conduct of that person, without enquiring whether there actually was adultery or not, or what the circumstances of that adultery were? Can it be generally indifferent in a question of knowledge or belief of any fact, that the fact is true or not true? Can it be generally indifferent in a question of probability of forgiveness, what the nature and circumstances of the injury are? we think not; and therefore that there is the reverse of any peculiar reason why the defence of remissio, in an action of divorce for adultery, should be generally held prejudicial where it is so qualified as not to imply an admission of the libel.

" And as we see no sufficient reason for this, neither do we see any authority for it. No statute, act of sederunt, train of decisions, dictum, or any thing like

No. 336. ancient unvaried practice, establishes any such general rule. There are indeed some cases in which the proof of remissio was allowed to be taken and judged of before the proof of adultery commenced. But that only shows that in certain special cases, this mode of procedure may be allowed, which is quite a different thing from finding that it is generally prejudicial. There seems nothing in relation to cases of divorce for adultery, more than in relation to others, to prevent the Court, when special circumstances make it reasonable and expedient, to allow a proof of the defence prejudicially to that of the libel. In case, for instance, a defender in a process of adultery, without admitting guilt, offers a proof by oath of party, or probative writ, that the pursuer, believing guilt to exist as libelled, did in express words forgive it : In such case, it is obvious that the Court might reasonably allow a proof of such remission before entering upon the proof of adultery. There may even be circumstances in which such a mode of proceeding shall be proper, where the proof is not by writ or oath. Nor is it possible to draw any definite line in this matter. Every case must be determined by the discretion of the Court, applied to its own special circumstances. And this accordingly appears to have been the practice. Whether, in some of the cases that are mentioned in the papers, the discretion of the Court was exercised in a manner that we should have concurred in, we perhaps may doubt. But that is of little consequence. What is important to consider is only this, that these cases certainly do not afford a series of decisions establishing that a general and inflexible rule obtains, that a proof of remissio is necessarily prejudicial, where the party pleading it does not admit the fact of adultery.

"(2.) We incline to answer the second part of the question also in the negative, viz. that in this case the proof of remissio ought not to be held prejudicial. This is a case where not only is the proof of remissio not a proof of express and explicit words of remission, or a proof by writ or oath of party, but where both the knowledge or belief of the acts of adultery, and the forgiveness of these acts, known or believed, are offered to be proven in a great measure *rebus et factis*; and it is a case where, on the whole, we think it plain that until it be ascertained whether adultery was committed or not, and if it was, then until the number, time, place, and circumstances of the acts of adultery be ascertained, it is impossible to expect safely and accurately to judge of the evidence of remissio as applicable to all of these acts.

"(3.) We see no reason why the proof of remissio should precede that of adultery, but the reverse. If the former is not to be held prejudicial, so as to be judged of before the latter is commenced, the taking it first would, we think, be a useless disordering and inversion of the natural order of the cause; and could not fail to produce much confusion, difficulty, and needless length and waste of time in the proof of remissio. For in this way, the proof of remissio, i. e. of the pursuer's knowledge or belief, and his forgiveness, must be applied hypothetically to all the acts of adultery alleged, whether these truly happened or not, and whether they be provable or not; and after all that was gone into, great part of it might turn out wholly useless. Therefore we think this last question must be answered in the negative."

To this answer LORD MONCREIFF subjoined as follows:—

"I entirely concur in this opinion. I have only to add, that, thinking, in point of principle, that there is no ground for laying down any general rule that the proof of remissio ought to precede the proof of adultery, and that the circumstances

June 22, 1832.
Taylor v. Bin-
nie.

of this case are by no means such as to render that course just or expedient, there is evidently this strong reason against it, that the evidence of the adultery might be lost or greatly weakened by the lapse of time during the hypothetical investigation of the question of remissio; and farther, that the husband's remedy, if there be no adultery and no remission, might be unjustly delayed."

June 22, 1832.
Taylor v. Bin-

LORD MEADOWBANK returned this opinion:—

"I am of opinion that generally, and in the present case, the plea of remissio is prejudicial; and both upon principle, and according to the inveterate practice of the Consistorial Court, sanctioned by this Court and the House of Lords, the proof establishing it ought to precede the proof of adultery. In fact, the latter seems to follow as a necessary consequence of the former.

"Before considering more particularly the grounds of this opinion, it is necessary to be kept in view that no proper analogy can be drawn between cases of this description and others, and that no general rule relative to the practice in the latter can be justly made applicable to cases of divorce.

"Questions of this kind are *sui generis*, being questions of status; hence the process does not even originate from the mere consent of the private parties more immediately connected with the result. The public have an interest, that when the relation of husband and wife is once constituted, it should be maintained and not dissolved, except upon those grounds alone which the law has declared to be sufficient to warrant its dissolution. To enforce this interest effectually, the concurrence of the procurator-fiscal is indispensably required as the preliminary step of the procedure in a process of divorce; and moreover, and unlike all other actions, a plea of guilty, or a confession of the fact charged, preferred by the defender in such cases, goes for nothing. Before decree can issue, a proof of the adultery must be adduced and laid before the Court, and even then the Judge, *ex proprio motu*, and on grounds not only not pleaded, but expressly waived by the parties, frequently refuses to grant the divorce. Of this, the decisions in the class of cases relative to the divorce of parties married in England, affords a clear and striking example. I apprehend it therefore to be impossible to find any just analogy between the present and those cases in which there is not a third party, like the public, having an interest, and where there is not also this specialty, that the admission of the defender is in truth construed into a denial, or rather where the plea of guilty or not guilty is precisely similar in effect as to the issue of the cause.

"In questions of divorce, too, the plea of remissio is not a plea to the relevancy of the libel, but is a plea to the competency of the pursuer proceeding in his action. It in truth admits the relevancy, but objects to the competency. It amounts to this, that assuming the statement of the pursuer to be true, he is nevertheless barred, personali exceptione, from originating any proceeding in his action. It neither necessarily admits nor denies the facts libelled, and that upon the principle peculiar to the action to which I have already referred. It barely assumes them to be true, and the pursuer, it is obvious, can suffer no injustice by the defender being allowed to assume the statement to be correct on which his own action is founded, and as sufficient to originate the personal exception to his farther procedure. It hence has, in truth, no necessary connexion with the merits of the action; for these may be all with the pursuer in so far as the truth of the facts is concerned, and yet he may be barred from success by his want of interest to establish their veracity.

"Besides, the favourable principle on which the plea of remissio is admitted, almost entitles it to be taken as preliminary to all other procedure. It supposes

No. 386. the possibility, that the affection of the innocent party may survive the sense of injury. Its object is to heal domestic misunderstanding, and to maintain the parties together in the relation of husband and wife, which, after marriage has been once contracted, is, in contemplation of law, an object of even public importance; but this would of course be, in some measure, counteracted by not admitting the plea of remissio as prejudicial and preliminary. For in many cases the proof of adultery may be defective, yet, in the course of that proof, indiscretions may be established necessarily leading to the future discomfort of the parties, or even to the destruction of their domestic peace, which, if no record of them remained, might soon be buried in oblivion; and yet this evil, it is obvious, would be prevented by determining the effect of the alleged condonation as the preliminary step of the process. It seems therefore to be in truth a plea, the discussion of which the procurator-fiscal even has an interest to insist upon being entertained as preliminary, both with the view I have referred to, and with that of preventing exhibitions of depravity prejudicial to good morals, with which proofs in such cases must necessarily be accompanied.

“ Accordingly, in the cases which have occurred in the Consistorial Court, this general principle seems to have been recognised, and the plea of remissio entertained as preliminary and prejudicial. The first of these to which I would particularly refer is that of Steadman, decided in the year 1741, in which the Commissaries, ‘in regard the defence of reconciliation was laid so strong as to exclude the libel before answer, allowed the defender to prove her defence as laid, and allowed the pursuer a conjunct probation thereanent, and suspended the taking the proof of the libel until the proof of the defence is concluded and advised.’

“ After this came the case of Sir James Colquhoun, in the year 1805. In that case, the acts inferring adultery had, it was alleged, been committed by the defender in the years 1792 and 1793, nearly ten years before the action was commenced. In that action Lady Colquhoun denied the truth of the libel, but alternatively she pleaded, that after the pursuer knew of the facts libelled, he had continued to cohabit with her at bed and board, and had so granted her a remissio injuria. This second plea was entertained by the Commissaries as preliminary; and the pursuer, long after he had taken the oath of calumny, was required to appear and undergo a judicial examination, ‘at what time and by what means he first came to the knowledge of the facts stated in the libel and condescendence to have happened in the year 1793.’ This examination was ordained to be taken on special interrogatories, calculated to bring out answers leading to the result that the pursuer had reason to entertain suspicion of his wife during the period of the cohabitation subsequent to the acts of adultery libelled on, and although some of the interrogatories were objected to, this course of procedure received the sanction, first of the Commissaries, and then of this Court. The defender was then obliged to abandon her plea of remissio; but that makes no difference on the point now under consideration.

“ Then followed the case of Duncan, in which the wife also expressly denied the adultery, and the husband therefore pleaded, that ‘the plea of forgiveness cannot be listened to, when in the same breath the defender pleads she never was guilty of adultery at all; because a crime must be admitted before it can be forgiven.’ But this was disregarded, first by the Commissaries, and afterwards by this Court, and proof of the remissio was allowed as a preliminary and prejudicial defence.

“ Next came the case of Hutchison in 1819, where the proof of circumstances

June 22, 1832.
Taylor v. Binne.

inferring condonation after suspicion of the fact of adultery was entertained, was No. 326.

allowed to proceed before the proof of the libel was permitted to be taken; and immediately thereafter followed the case of Sir William Cunningham Fairley (every Taylor v. Bin-

June 22, 1832.
step of which was anxiously and pertinaciously contested in the Consistorial Court, n*ie.*

before this Court, and in the House of Lords), when the same course was followed. In that case there was a condescendence lodged of the acts of adultery libelled, but the Court, before allowing a proof of those acts, ex proprio motu, ordained the pursuer to condescend upon the time when he was 'first informed, or had reason to believe the criminal intercourse of the defender with James Begbie, mentioned in the process.' The condescendence given in upon this order not being satisfactory, a second, and then a third condescendence was ordered, after which a proof of her plea of condonation was allowed to the defender. This, it will be particularly observed, was all done *ex parte judicis*, in consequence of the interest which the law and the public had to maintain the relation of marriage betwixt the parties, if it could be maintained, and to prevent those disclosures which would be injurious and unnecessary, if the facts inferring condonation were capable of being established, as the first step of proceeding in that case. The pursuer was then ordained to appear and undergo a judicial examination of the facts therein stated; and the declaration not having been held sufficient to instruct the defence of remissio injuriae, first, an additional condescendence was ordered, and then a proof of the circumstances inferring the pursuer's belief of the defender's guilt, and of those relating to the remission of her offence, was allowed in the first instance to be taken. This interlocutor was brought under review, upon the ground that the proof of adultery ought first to be established; but the course of allowing a proof of the remissio was adhered to, and the pursuer was obliged to advance a sum of money to enable the defender to lead that proof. The case was appealed, upon the ground that the proof was inadequate to establish the defence, and the House of Lords remitted the whole generally, and mainly with the view of enabling this Court to consider whether there was sufficient evidence of Sir William Cunningham having been cognisant of the facts on which the libel was founded at the time that those on which the plea of remissio was maintained were alleged to have taken place; but nothing was either said or done in the House of Lords from which it could be inferred that the order of pleading was deemed to have been inverted. On the contrary, the Lord Chancellor expressly laid it down, that 'in those cases where the husband declares that he knows, or that he believes, his wife has been guilty of adultery, or where it is stated to him in an authentic way that she has been, and afterwards he thinks proper to pardon the offence by his conduct, there appears to be no necessity at all to enquire into the proof of the act of adultery; for, taking it that the act of adultery was committed, there has been a remissio injuriae.' Nor was this view of the case disputed when it returned from the House of Lords. It was fairly admitted, in the discussions which took place in the course of the hearing in the First Division, that the defender was placed in a situation in which she was entitled to plead alternatively—in the first place, to deny the alleged guilt, and in the next place, to maintain, that even assuming the guilt, the accuser was barred from complaining, by a course of conduct implying forgiveness of it; in short, that it was competent for the defender to say that she never did inflict the alleged injury; but even assuming that she had, that the pursuer must be held, from the conduct he exhibited, to have forgiven it. In fact, the whole question discussed, after the case was remitted, related to the extent of the antecedent knowledge, which in all cases

No. 336. ought to be required from the party against whom the plea of remissio was proposed; but as to the plea itself being prejudicial and preliminary, no doubt was entertained. Accordingly, in the next case which occurred, namely, that of Macdonald of Staffa, the same course of proceeding was adopted; and although its regularity formed the subject of much discussion and dispute, it received the sanction of the Commissaries, and afterwards of this Court.

June 22, 1832.
Taylor v. Binne.

"No doubt, previous to the first of the cases to which I have referred, some seem to have occurred, in which, at first sight, it would appear a different course had been adopted; but the apparent deviation can easily be accounted for otherwise by an examination of the particulars. First, in the case of Tarbet, it appears that the defender was abroad when the action was instituted, and the proof of her guilt had been allowed and taken before she appeared in the action at all, and had the means of preferring any plea whatsoever. Secondly, In the case of Wauchope, the proof of condonation which was offered was a reference to the pursuer's oath as to the understanding of parties at entering into an agreement, which was said to infer a remissio injuriae; but even there that proof was taken before the proof of adultery was allowed. And, lastly, In the case of Dalimahoy, the proof of adultery had been led before the appearance of the party for whom the plea of remissio was entertained. None of these cases, therefore, at all affect the uniformity of the practice to which I have referred, any more than the proceedings in those (which, in truth, are the most numerous) where the plea in question emerged out of the circumstances established in the course of proving the adultery.

"In the case of Greenhill, June 16, 1824, which is much relied on by the pursuer, the question now under consideration neither was, nor could have been, determined. In fact, only two points were there decided by the Court; 1st, that after the oath of calumny was taken, a proof of collusion was incompetent; and, 2dly, that the decree of divorce must issue without being qualified with certain restrictions. There indeed the parties had expressly waived the plea of remissio, and the proof of the circumstances from which it was inferred had been superseded of consent.

"In opposition to this course of practice, which appears to me to be uniform, and nearly invariable, the only plausible argument which has been relied on is that which arises from the great difficulty of judging with accuracy whether the individual against whom the plea of remissio is preferred knew, or believed, and forgave the injury he complained of, without first ascertaining whether there actually had been adultery committed or not, or what the circumstances were by which the crime had been attended.

"But this view of the subject does not, by any means, seem to me to be well founded.

"In no case with which I am acquainted has it ever been required, that in order to found a plea of remissio, there should be a proof of actual guilt. It can never, therefore, be a pre-requisite to this plea, that either actual observation or certain knowledge of the guilt should be established, for there can be no room for either without the existence of actual guilt. Indeed, were it so, the only admissible proof of such knowledge and belief would be the writ or oath of the party against whom the plea is maintained. A proof of facts and circumstances, inferring knowledge and belief, never could have been competently admitted. Yet, in the course of a century and a half, such proofs have been admitted over and over again, and been sanctioned as legal, both in the Commissary Court and the House of Lords.

"In order, however, the better to explain the rounds of my opinion on this part of the subject, it is necessary to point out what in such cases it has been held requisite to establish, as inferring knowledge and belief on the part of the individual against whom the plea has been preferred.

June 22, 1832.
Taylor v. Binne.

"(1.) In the first place, wherever the condonation pleaded has been subsequent to raising the action of divorce, it has been uniformly admitted that the belief was to be inferred, and no farther enquiry on that point was necessary. By raising the action, the party, *ipso facto*, has declared his previous knowledge, and indeed, by taking the oath of calumny, in which he has deponed to his belief of the defender's guilt, farther proof as against him would be absurd. To make out the plea in such cases, all that is required is to instruct that the alleged guilt was forgiven.

"(2.) But in those cases where the previous knowledge of the guilt, and the condonation are alleged to have taken place antecedent to raising the action, it must no doubt be a more delicate question to determine what circumstances are sufficient to establish the necessary degree of knowledge and belief, and various views have been entertained upon the subject; but as far as I can gather from carefully considering the cases which have been determined, the rule has been to require evidence of facts and circumstances sufficient to establish, not what others might have thought of the guilt of the adultery which was alleged to have been pardoned, but what the party, against whom the plea of condonation was used, must or ought of himself to have believed regarding it. It has not been a rule of practice to infer belief on the arbitrary principle of assuming that another must have believed, because the judge himself would, under such circumstances, have believed the guilt, but to consider whether, under the circumstances established, any man in his sane mind could have entertained a doubt of that guilt. In short, the rule adopted in this class of questions has been similar to that which regulates several in other branches of the law of Scotland. For instance, put the case that an individual defends himself against a charge of murder, upon the plea of his having perpetrated the act when under bodily fear. There, it is well known, his own statement of that terror will not avail him any more than the mere fact that he actually was under such apprehension when the murder was committed. To succeed in his plea, he must establish that he was under a reasonable dread of personal danger—that he did not labour under a vain terror, or a sudden panic—that he did not act from mere timidity of temper, but that the circumstances in which he was placed would reasonably have created bodily fear in a man of a constant and firm mind. Without establishing this, his justification would go for nothing, the rule being, that the individual feeling is of no consideration, every thing being made to depend on what the party ought to have felt in such a predicament. In like manner, in the present class of cases, I take the rule to be, that the judge, in weighing the import of the evidence as to knowledge and belief, is to look, not to what the individual might actually have believed, but what he ought to have believed, when certain acts and circumstances were brought under his contemplation. And this view of the case seems to me to be confirmed beyond all doubt by the proceedings in the different cases to which I have previously referred. In particular, in the case of Macintosh, it was specially found, 'that after the pursuer separating from the defender, upon her being REPUTED guilty of the facts libelled, he was reconciled,' &c., relevant to found the plea of remissio. In like manner, in the case of Wauchope, in which the remit to proof was to a similar effect; and in the case of Hutchison, where the proof of reconciliation was admitted after it was known to the pursuer

No. 336. (and nothing more was alleged to have been known) that the defender had been seen walking with her supposed paramour, under suspicious circumstances, on the Links of Leith, late at night. Such, also, was the principle on which the case of Sir James Colquhoun and that of Sir W. Cunningham Fairley were ultimately decided.

June 22, 1832.
Taylor v. Bin-

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In short, as it appears to me, the rule is, that after the pursuer has been proved to have seen such conduct, or received such information as ought to have prevented his entertaining a rational ground of doubt that the defender has been in a situation which, according to all common sense and reason, was inconsistent with her innocence and his own honour, and after he has upbraided her with her offence, generally, and still more if he has done so with one individual, and then after proclaiming his belief of her guilt to the world, either by expelling her from his house, or displacing her from her situation at the head of his family, he has yet been reconciled to and cohabited with her, he is held to be barred from insisting in his action of divorce.

" Now, holding the rule of law to have been here correctly stated, it humbly appears to me, that it follows that there is no inconsistency in allowing a proof of the forgiveness of the adultery which is denied; and that from the nature of the proof of knowledge and belief of the guilt which is required, the admission of the plea, and the evidence in support of it as preliminary and prejudicial, is both necessary and expedient.

" When I am called upon, therefore, to apply these views to the present case, where the defence of remissio " is laid so strong as to exclude the libel," I cannot doubt of the propriety of allowing the proof offered by the defender in support of her plea of remissio, to be taken before that of adultery. In the first place, it is offered to be proved that the pursuer accused her publicly of the crime, and that over and over again,—that he accused her of it to her mother,—that he repeatedly charged her paramour with his offence,—that on that account he refused to pay him his wages,—that he then finally dismissed his wife from his house, after publicly upbraiding her with the adultery before his family and servants,—and that, last of all, in an action raised against him by his servant for payment of his wages, he proved his belief of the accusations he had made against his wife and him, by making the guilt of both the ground of his defence. Now, it does seem to me impossible that such a train of facts can be established without arriving at this conclusion, that the pursuer ought to have believed, and must have believed, when all this took place, that his wife was guilty of the crime with which he charged her, and which now forms the statement of facts on which his action proceeds. Indeed, I do not see how any rational person could have such facts established against him, and that at the same time he should be allowed to say, ' they are all true, but I know nothing how the truth lay. I did not believe, nor had I reason to believe, one word of what I was saying during the whole time they occurred. They might be true or false for aught I knew, and I am entitled now to aver I disbelieved all I said; though I took upon me to act in the manner which I did, I have nothing to allege now that I did not allege then.' It seems to me to be utterly inconsistent with justice and with common sense, to allow of such a mode of proceeding; and as it was after these occurrences that the reconciliation is alleged to have taken place, I cannot discover how it is possible, without going in the direct face of the uniform practice to which I have referred, to refuse to allow the proof which is now offered.

" I shall only say, in conclusion, that the present appears to me a question of

very great importance. This Court is only now commencing the administration of a branch of jurisdiction which was formerly exclusively annexed to the Consistorial Court ; and it seems most desirable that, without strong and manifest reason, the course of practice which was followed in the latter, should not be abandoned. One

No. 336.
June 22, 1832.
Taylor v. Bin-

of the greatest objections to questions of divorce being brought originally for adjudication in this Court, was justly rested upon the probable injury which would be done to public morals by the more extensive disclosure which would thereby be given to the details necessarily embodied in all such cases. Now, it must be manifest, that this evil will be greatly increased by not admitting the plea of remissio, as preliminary and prejudicial, and by requiring, in cases of the present description, a proof of the adultery before entertaining and determining that plea by which such disgusting exposure would be altogether avoided.

“ Upon the ground, therefore, of its being more agreeable to principle, of its being consonant to practice, and well founded in general expediency, I am of opinion that the proof offered in this case, in support of the plea of remissio, should be allowed to proceed, before requiring that tendered as to the merits of the cause.”

LORD CRINGLETIE added this opinion.

“ I have perused the opinion of Lord Meadowbank, in which he has most ably and fully disclosed the principles, as well as quoted the authorities, which govern this case ; and, entirely concurring with his Lordship, it is only necessary to add, that I think that the principle contended for by the defender is clearly made out in every case quoted by the pursuer himself, viz. that where the facts alleged by the husband against his wife, on which the action is founded, become known to him, and, after such knowledge, he cohabits and sleeps with her, his conduct amounts to a remissio injuriae, to a discharge of the action. The facts, of course, necessary for the wife to allege are, that her delinquency, whether true or alleged, was known to, or believed by her husband, in spite of which he cohabited with her ; and if she aver this pointedly, the proof of the fact is prejudicial to the action ; because, if proved, it amounts to a discharge.

“ In the case of Sir William Cunningham Fairly, carried by appeal to the House of Lords, Lord Eldon observed, ‘ On a plea of remissio injuriae, before you can permit the party to go on to prove there was adultery committed, you ought to have some evidence pregnant with proof, tending to conviction, that he actually did believe that she had been guilty of adultery, before you can say that the subsequent declarations and subsequent conduct amount to that defence.’

“ Now in this case, as one of relevancy, we must take the averments of the defender as truths, and consider whether they amount to conviction, that the pursuer did actually believe that the defender had been guilty of adultery. She says that he accused her publicly ; that he accused her to her mother, and to her brother ; that he accused her paramour, to whom he refused to pay his wages, because he had committed adultery with his wife ; and in an action in the Sheriff-court against him for these wages, he put in a defence bottomed on that assertion. I have not ascertained the date of that defence, and incline to believe that it was posterior to the pursuer finally dismissing his wife from his house. But the use which I make of it is to prove that he was equally convinced of the fact when he accused the man before his fellow-servants, and refused to pay his wages, as he afterwards was, when he pleaded it as a defence in a court of justice. After these accusations, in presence of her mother and brother, he publicly charged her with the

No. 336. crime in presence of the servants, and turned her out of the house. She went to her brother's, and was received back on the 31st of May, from which day till the June 22, 1832. 7th of June, they cohabited and slept together as man and wife. The pursuer has Taylor v. Bin- denied this, no doubt, though he admits the defence in the Sheriff-court. But his nia. denial is nothing to the purpose. The question is, are the facts relevant? For if they be, they must be sent to proof. Had he admitted the whole, I cannot have a doubt that the Court would not have sustained his action; and if so, it appears to me that a proof ought to be allowed; and as the facts are few and simple, they can be speedily ascertained.

" Could I view the plea of remissio as one on the merits of the case, I might be of a different opinion; but I cannot view it in that light. It is an objection to the merits being tried. It goes to this, that whether the adultery be true or false, the pursuer has discharged the action. Surely when an action is raised on a claim for accounting for a sum of money, and a discharge is produced, that is not a plea on the merits. It is a bar to the action altogether. It is just this, that whether any sum shall be found due or not to the pursuer on discussing the merits, he has discharged the ground of action. The same appears to me to be the essence of a remissio, where the pursuer is fully aware that a ground of action has accrued to him. Cohabitation is a discharge.

" Observe how closely this presses on the pursuer's argument. He says that you must first establish a crime by proof or confession, before you can plead a pardon of it. I answer, what would be thought if you should maintain that you must first establish a claim on a count and reckoning before you can have a discharge of it? It is an absolute fallacy. I say, that whether any thing is due or not, one can discharge all claim on that account; and in the same way, a man can say to his wife, I have every reason to believe your infidelity; I have so much reason as to have charged you with it to your mother, brother, and before all the servants of the house; but I forgive you, in hopes that we shall hereafter live in harmony. Put the case, that the defender had laid on the table a writing to that purpose, could this action have been sustained in the face of it? My opinion is, that it could not; and as the circumstances offered to be proved appear to me to be tantamount to such a writing, I am for allowing a proof of them.

" In the case of Duncan, quoted by the pursuer, 9th of March 1809, he pleaded, in an advocation to this Court of an action in which the wife denied the adultery: ' The plea of forgiveness cannot be listened to, when, in the same breath, the defender pleads she never was guilty of adultery at all, because a crime must be admitted before it can be forgiven.' This was disregarded, on the ground that the adultery was known to the husband, or, at least, believed by him, notwithstanding which he had cohabited with his wife. Besides, it really appears to me, that refusing to the defender a proof of the remissio, because she denies her guilt, is a very great mistake; for, put the case, that she admitted her guilt, no decree could follow upon her admission, without a proof that it was true. This arises out of the fear of collusion; but it is law. The commissioners never proceeded to divorce on admission of guilt alone. Why, then, desire an admission, when it is of no importance to the cause? Yet the want of this admission is the sole ground of refusing a proof of the remissio.

" I conclude with this observation, that if the facts alleged by the defender had been admitted by the pursuer, his action could not have been entertained; and, of

course, that being partly denied, they ought to be allowed to be proved before his No. 336. action can proceed."

The cause was then resumed, along with these opinions, by the Judges of the First Division.

June 22, 1832.
Taylor v. Bin-

LORD BALGRAY.—The views on either side are so fully stated by the consulted Judges, that I shall only say I adhere to my first opinion, which coincides with that of Lord Meadowbank.

LORDS PRESIDENT and GILLIES intimated that they concurred with Lord Balgray.

LORD CRAIGIE.—I am for altering this interlocutor, and I think not only that there is no inconvenience, but that there may be great advantage in allowing the pursuer a proof of his libel, without delaying him till the allegation of remissio be disposed of. During the discussion of that subsidiary question, the proof of the adultery might be lost, and the husband deprived of his remedy. It is true, that remissio injuria is a bar to the action of divorce for any act of adultery remitted; but, viewing it as a discharge or acquittance by the husband, it must be dealt with as any general discharge of obligations, and therefore it cannot be extended so as to include acts of the wife, which were not known to the husband at the time of granting the discharge. And even if remissio were proved, yet, if the adulteries libelled can be proved, I doubt whether the remissio would prevent the husband from obtaining a separation a mensa et thoro, so as to deprive this woman of those rights, as a wife and a mother, of which she would be so unworthy. I think the pursuer should not be prevented from proceeding forthwith to prove his libel.

THE COURT pronounced this interlocutor :—“ The Lords having advised the reclaiming notes, with the cases for the parties, and the answers by the consulted Judges, to the question proposed by this Division, they recall the interlocutor reclaimed against, and remit the reclaiming note for the pursuer to Lord Fullarton, in place of Lord Newton, deceased, with instructions to his Lordship to allow both parties a proof of their respective averments, and to each a conjunct probation; with power to his Lordship to dispose of the reclaiming note for the defender, as to his Lordship shall seem proper.”

Pursuer's Authorities.—Watson, July 15, 1681 (330. and 3. Supp. 470); Lockhart, Dec. 7, 1799 (App. No. 1. Adultery); Duncan, March 9, 1809 (F. C.); Aitken, Feb. 6, 1810 (F. C.); Bell's Prince. 397, &c.; Durant, 1 Haggard, 733; Chattel, 3 Phillimore, 508; Ford., Nov. 13, 1821 (ante, I. 296, and 2 Shaw's App. Cases, 445); 1 Bankt. 5. 129 and 130; 1 Ersk. 6. 45.

Defender's Authorities.—1 St. 17. 14; Hume, July 2, 1630 (12067); 1 Bankt. 5. 129; Steedman, Jan. 20, 1744 (7339); Lockhart, Dec. 7, 1799 (App. No. 1. Adultery); M'Crie, Feb. 6, 1810 (F. C.); Hutcheson v. Hutcheson (not reported); Durant, 1 Haggard, 751; Macdonald v. Macdonald (not reported); Walker, 2 Phillimore, 153; Lady Kirkwall, 2 Haggard, 277.

No. 387.

June 22, 1832.
National Bank
v. Heath.NATIONAL BANK, Pursuers.—*Shene—Penny.*
MRS HEATH, Defender.—*Robertson—A. M'Neill.*

Proof—Process.—In an action for recovery of stolen property from two parties alleged to be accomplices with a third who had been convicted and executed, the Court granted diligence for recovery of all letters written to the party convicted with reference to the robbery, without requiring any specification of the dates, or the parties by whom they were written.

June 22, 1832. A PARCEL of National Bank notes having been carried off from the banking-office of Messrs Watsons of Glasgow, when broken into by ^{2d Division.} William Heath, who was afterwards convicted of the crime and executed, the National Bank raised an action against Heath's widow, and also one Mrs Turnley, whom they alleged to have been participant in the robbery, concluding to have them ordained to restore the notes stolen, or their value. Both defenders at first objected to the jurisdiction of the Court, but Mrs Heath afterwards abandoned her defence on this head, and pressed to have the cause sent to trial. With a view to this, the bank moved the Lord Ordinary for a diligence to recover, inter alia, "all letters dated between 1st November 1830, and 6th October 1831, addressed to William Heath in his own name, or under the feigned names of Mr Lee, Mr Wilmot, or Mr Heathcote, in so far as the same relate to the robbery of Messrs Watsons' Bank, or to the notes or money stolen therefrom."

This motion was objected to by Mrs Heath, on the ground that it was too vague and general, and that the bank were bound to describe the letters called for more particularly, and to specify the dates and the parties by whom they were written. Lord Fullerton having reported the motion verbally for instructions—

LORD JUSTICE-CLERK.—I have no difficulty here. The summons charges all these parties as accomplices in breaking into the bank, and stealing the notes, and what is contended for here is, that the bank should specify the writers and dates of the letters written on this subject. This, in the circumstances, it would be absurd to require. It is quite a legitimate demand which is made for all letters written to Heath with reference to the transaction, and I am clear there is no objection to granting the diligence in the terms craved under the special circumstances of the case.

The other Judges concurring,

THE COURT instructed the Lord Ordinary to grant the diligence as craved.

GOLDIE and PONTOX, W.S.—

—Agents.

J. and W. CREIGHTONS, Complainers.—*More.*
W. DEANS, Respondent.

No. 338.

June 22, 1832.
Creightons v. Deans.

Process—Protestation.—Observed that the Court cannot interfere to stay extract of a protestation for not insisting till an enrolling day should arrive, where the delay has not been occasioned by any act of the defender.

CREIGHTONS raised and called an action against Deans, who put up a protestation for not insisting. They neglected to enrol on Saturday, the 16th, and as they could not thereafter enrol till the 23d, (before which time the period for extracting would have arrived,) they presented, on Wednesday the 20th, a bill to the Lord Ordinary, stating that they had lodged the summons with the enrolling clerk, and praying for an interdict against the officers of Court issuing an extract of the protestation till after the 23d, so as to enable them to enrol on that day. The Lord Ordinary having refused this bill as incompetent, Creightons presented a note, praying for interim interdict till this day, to enable them to reclaim. As acceding to this would have answered Creightons' purpose equally well with granting the prayer of the bill, Lord Moncreiff reported the matter to the Court, and referred their Lordships to a case in this Division where an interdict against extracting protestation had been granted, the delay on the part of the pursuer there, however, having been occasioned by proceedings of the defenders.*

The Court, after calling the counsel for the respondent, who stated that no notice of this proceeding (which was not directed against his client) had been given, intimated an opinion that they could not interfere, but delayed till the end of the roll, that notice might be given to the respondent. When the case was again taken up, the respondent agreed that the interdict should be granted.

* The case alluded to was Craigie v. Commissioners of Police of Perth, July 23, 1832. The pursuer there had applied for the benefit of the poor's-roll, which he was prevented for some time from obtaining by proceedings on the part of some of the defenders themselves, who in the mean time put up protestation. The Court in these circumstances, (the delay being occasioned by the defenders themselves,) granted interdict.

No. 339.

MRS A. V. S. T. ANDERSON, Pursuer.—*Shene—Buchanan.*June 22, 1832.Anderson v.
Anderson.JOHN ANDERSON, Defender.—*D. F. Hope—Henderson—G. G. Bell.*

Service.—1. Service as heir-male in general of tailzie and provision, effectual to establish the general character of heir-male. 2. An ancestor resigned his lands for new infestment to himself in liferent, and his son A, and the heirs-male of his body, whom failing, any other son to be procreated, and the heirs-male of his body, under the fetters of an entail; reserving full power to sell, alter, &c.; his son A predeceased him, leaving a son, B, who served heir-male of tailzie to A, and thereon executed the procuratory in the entail; thereafter, the heirs-male of the body of A failed, and a party alleging himself to be heir-male of the body of a younger son of the entainer served himself heir-male of tailzie and provision to the entainer himself, question whether this was a competent mode of making up titles under the entail.

June 22, 1832.2d DIVISION.
Ld. Moncreiff.

T.

IN 1714, Michael Anderson (1st) of Tushielaw executed an entail of that estate, under reservation of his own liferent, in favour of his son Michael (2d) and the heirs-male of his body; whom failing, the heirs-male to be procreate of his own body; whom failing, the heirs-female of his son's body, &c. This entail was in form of a disposition and procuratory of resignation, whereby the entainer resigned the lands for new infestment to be granted to himself in liferent, and to the above-mentioned heirs, under the conditions, &c. therein specified, reserving to himself full power to sell, alter the order of succession, contract debt, burden the lands, and, generally, to exercise all acts of property as freely as before the making thereof, and dispensing with delivery. Michael (2d) predeceased his father, the entainer, leaving a son, Michael (3d.) No infestment had been taken on the entail; and upon the death of the entainer, Michael 3d served himself heir-male of tailzie and provision in general to his father Michael 2d, and then, in 1741, resigned upon the unexecuted procuratory, and obtained a charter of resignation in terms of the entail, except that the destination to the heirs-male to be procreated of the entainer's body was omitted. On this charter Michael 3d was infest, and at his death he was succeeded by his son Patrick, who was served in special heir-male of tailzie and provision to him, both under the entail and the charter, and died in 1786, leaving no issue male. The estate was then taken up by Mrs Barbara Anderson, a daughter of Michael 3d, who was succeeded by her son, John Kirkton Anderson, who, dying in 1817, was succeeded by the pursuer, Mrs Anderson, his great-grand-niece, and great-great-granddaughter of Mrs Barbara Anderson, daughter of Michael 3d.

In 1824, Andrew Anderson, alleging himself to be great-grandson and heir-male of the body of James Anderson, said to have been a younger son of the entainer, and so to be now heir-male of the entainer's body, on the failure of the heirs-male of Michael 2d, purchased a brief from Chancery for having himself served “propinquior et legitimus haeres masculus

in generali tallie et provisionis dict. quond. Michael Anderson ejus abavi No. 339.
de dict. terris," &c. Under this brief, Andrew Anderson was served heir-
male in general of tailzie and provision of Michael 1st, set forth in the June 22, 1832.
retour as his great-great-grandfather; and in 1826 he raised a summons Anderson v.
of reduction of Mrs Anderson's titles to the estate, on the ground, that Anderson.
under the entail, the heirs-female of Michael 2d were only called on failure
of the other heirs-male of the body of the entainer, and that he, as the
nearest heir-male of the entainer's body, was entitled to the estate on the
failure of the heirs-male of the body of Michael 2d, the entainer's eldest
son. Andrew Anderson having died, his son John obtained himself served
nearest heir-male of tailzie and provision to him, and sisted himself as pur-
suer of the action raised by his father. Thereupon Mrs Anderson raised
the present action for setting aside the services of the defender to his father,
and of his father as heir-male in general of tailzie and provision to the
entailer. Besides various grounds of reduction, founded on alleged irreg-
ularities in the procedure and deficiency in the proof, Mrs Anderson
contended, that the service of Andrew Anderson to the entainer was inept,
in respect the latter had been divested of the fee by the tailzie in favour
of the disponees therein contained, so that he had no right under the en-
tail which could be carried by a service.

The questions raised by this plea were very fully discussed before the
Lord Ordinary, who stated his reasons thereon in the subjoined note,*

* " NOTE.—There are two questions in this case; 1st, Whether the services of Andrew and John Andersons were competent in law, and are sufficient to afford a title to insist in the reduction of the titles of the pursuer, Mrs Gaskain Anderson, or are both inept?—and 2d, Whether, if these services are not inept, but good, in point of form, to the effect pleaded, they are reducible on the merits of them?

" 1. The case, on the first point, is this:—Michael Anderson (1st) dispone by entail to Michael (2d), his eldest son, and the heirs-male of his body; whom failing, to any other heirs-male to be procreated of the entainer's body; whom failing, to the heirs-female of the body of Michael (2d): Michael 2d predeceases the entainer, leaving a son Michael (3d): Michael 3d serves heir-male of tailzie and provision in general to Michael 2d: Michael 3d then executes the procuratory in the entail, and, in 1741, obtains a charter of resignation, in terms of the entail, except that the des- tination to other heirs-male to be procreated of the entainer's body is omitted, and he is infest: He is succeeded by a son, Patrick, who is served in special as heir- male of tailzie and provision to him, both under the charter, and under the entail: Patrick dies in 1786, leaving no issue-male: The estate is then claimed by an heir- female of the body of Michael the 3d: She is served heir of tailzie and provision to Patrick, infest, and in possession: Her son succeeds her, and makes up titles; and the present pursuer makes up titles to him also as heir of tailzie and provision, under the destination to heirs-female.

" The defender's father, Andrew, on the statement that the entainer (Michael 1st) had a second son, James, and that he is heir-male of his body, expedes a general service, as heir-male of tailzie and provision to Michael the 1st; and then brought a reduction of the whole titles by which the pursuer holds the estates in question, beginning with the charter of resignation obtained by Michael 3d. Andrew having

No. 389. but his Lordship in his interlocutor merely pronounced this finding:—

June 22, 1832. “ Finds that the services called for to be reduced, if not liable to solid

*Anderson v.
Anderson.*

died, the defender, John Anderson, expedite a general service to him, proceeding on his previous service, and in the same character, and now insists in the reduction of the titles of the pursuer. The present pursuer demands reduction of both these services.

“ The important question is, whether the general service of Andrew Anderson, as heir-male of tailzie and provision to Michael 1st, the entailer, is valid, to the effect of being used as a title, (tentative,) for insisting in the reduction of Mrs Gaskain Anderson's titles? The propinquity is denied; but the retour of the service describes the entailer as ‘ abavus Andræ Anderson,’ &c.

“ Since the judgment in the case Colquhoun v. Colquhoun, July 8, 1831, in which the Lord Ordinary concurred, there can be no doubt that the service of Andrew Anderson to Michael the entailer, would, in any circumstances, have been entirely useless as a service for carrying any right. The service being as heir of tailzie and provision, and there being no right given to, or vested in Michael the 1st, by the only deed of provision founded on, the Lord Ordinary conceives it to be manifestly impossible, that any man could be heir of provision to the entailer, under a deed which put no fee or right in that person. But the question in the present case is of a different nature.

“ The defender does not say that he can carry any right whatever by means of the service under reduction. He only maintains, that by means of these services, he is entitled to establish in himself the character of heir-male of the body of the entailer, and thereby heir of tailzie and provision under the entail, upon the failure of the heirs-male of the body of Michael the 2d. And he says that, on the supposition that he really possesses this character, in fact and in law, there is no other way in which he could legally prove it: and, further, that a service of this kind was held to be good in the case of Gordon of Carleton, February 8, 1748.

“ It is clear, that the defender could not serve to Michael the 3d, or to Patrick Anderson, because he insists for reduction of all their titles; and necessarily must do so, in order to get rid of the Crown charter and subsequent titles, which exclude the material destination. According to the opinion of a majority of the Judges, in the case of Colquhoun, the service of Michael the 3d to Michael the 2d, the institute, who predeceased the entailer, was inept as a title to carry right to the estate; though it might be sufficient for proving his character as heir-male of the body of Michael 2d; and, thereby, conditional institute in the entail. But it is plain that the defender could not serve to Michael 2d; both because such a service would be inept, under the doctrine held in Colquhoun, and because, according to the judgment of the House of Lords, in Ramsay against Cochrane, the character of heir of tailzie and provision to him, in so far as it existed, has already been taken up by other parties. It is therefore undoubtedly true, that unless some service to the entailer be competent, the defender has no way of proving his title to maintain his reduction, except by declarator. The Lord Ordinary is of opinion, that in such a case, declarator would be competent. But he is aware, that, on this point, doubts have been entertained by others.

“ Although, however, the point is attended with much difficulty, the Lord Ordinary is inclined to think, that the service of Andrew Anderson was competent, and is sufficient to the purpose for which it is used. It was anxiously maintained by the defender's counsel, that it was indispensably necessary for him to be served heir of tailzie and provision, in order to give him the title to reduce, by connecting him with the entail. If this were so, the Lord Ordinary would have much more doubt than

objections on the proceedings held, and the proof led in them, would be sufficient, in point of form, to establish in the defender the character of

No. 339.

June 22, 1832.
Anderson v.
Anderson.

he has as to the sufficiency of the service; because he holds it to be impossible that Andrew could be, in the proper sense, heir of tailzie and provision to the entaller, to whom nothing was provided by that deed. But the Lord Ordinary is not of opinion, that it was necessary that the defender should prove his connexion with the deed by such a service. In the case of Carleton certainly, a service to the entaller as heir of tailzie and provision, was held to be competent and sufficient; but the Lord Ordinary conceives, that it was only so held as a legal mode of proving the failure of the prior heirs,—Nathaniel Gordon, the person served, being called nominatim, and having no occasion to prove his character, but being entitled, on the failure of the prior destination, to take in his own right as conditional institute. It appears to the Lord Ordinary, that this point was made out in the case of Seaforth, though the decision did not depend on it; and the last interlocutor of the Court was qualified so as to leave it open. The decision, however, in the case of Carleton, though it does not prove the necessity of such a service, is an authority to show the competency of it for proving the title of the party. The defender seemed to think, that the case of Cassillis established the necessity of a service as heir of provision. But it appears to the Lord Ordinary, that this is a misapprehension. The question in the case of Cassillis was, whether Earl David was so vested in the estate as to have power to make the material deed; and to that purpose it was held that a service, as heir of provision, was indispensable. But the defender professes that his father's service could carry no right whatever; and the only question is, whether it is sufficient to establish a tentative title in him, to enable him to obtain a right to the estate by other means?

“ The Lord Ordinary therefore thinks that the defender required no service as heir of tailzie and provision; and that the question whether such a service was competent as a title, connecting him with the entail, is not material. What the defender has to do is to show, by some legal form, that he is now the heir-male of the body of Michael the entaller. If he has that character, he must be entitled to insist in the reduction of the titles called for. But nothing stands in his way to prevent him from establishing it by service, because no other party has yet been served heir-male of Michael Anderson the 1st. Perhaps, under the authority of the case of Carleton, a service, simply as heir of tailzie and provision, might have been held sufficient for the purpose, however inept as a title; though there is this difference, that in that case, Nathaniel was called nominatim. But in the present case the service is somewhat different. Andrew Anderson is served heir-male of the entaller, as well as heir of tailzie and provision; and to this there can be no objection of incompetency. If he was the heir-male, he had an undoubted right to be so served in general. But it is farther to be observed, and the Lord Ordinary thinks it of decisive importance, that it appears on the face of the retour, that he is not only the nearest heir-male existing, but an heir-male directly descended of the entaller's body. For the retour bears, that Michael the entaller was ‘abavus,’ great-great-grandfather of Andrew Anderson.

“ As this retour therefore does, by itself, completely prove that Andrew was the heir-male of the body of the entaller, independent of any question as to the aptness of the service as heir of tailzie and provision, the Lord Ordinary is strongly inclined to think that it ought to be sustained as a sufficient title, in point of form, for carrying on the reduction at the defender's instance, unless it shall be held to be invalid, on its merits, in other respects.

“ A question has been agitated on the terms of the clause of destination which is

No. 339. heir-male of the body of Michael Anderson of Tushielaw, described as

June 22, 1832.

Michael Anderson the first, and to give him a title to pursue for the recon-

Anderson v.

Anderson.

to Michael, the entainer's eldest son, and the heirs-male of his body, whom failing, to any other heirs-male to be procreated of the entainer's body; the pursuer maintaining, that as James, the second son, is stated to have been existing at the date of the entail, neither he nor his descendants are within the destination. But unless it be with reference to the service as heir of provision as a proper title, it does not appear to the Lord Ordinary that it is necessary to decide this point in this process. It more properly forms part of the defence in the other action. At present the Lord Ordinary will only say, that he is not convinced by the argument for showing, that if there was a second son James, either he or his descendants were excluded by the entail.

" 2. Supposing the services not to be reducible, on the ground of incompetency or ineptness, the question remains,—whether they can be supported on their own merits ?

" The pursuer objects to the service of Andrew, that all the evidence was taken on commission, and not before the jury, without any proof that this was necessary; and that a very important register, in which the birth of James Anderson is said to have been recorded in a very particular manner, was not exhibited to the jury. The Lord Ordinary, adverting to the long established practice in such ex parte trials, does not think that these objections are sufficient grounds for at once reducing the service; but he thinks that the objections are of great importance, and that, at least in a case relating to a remote pedigree, of which the jury could have no personal knowledge, they deprive the verdict of all authority as a verdict, and render it even more imperative than in other cases, for the Court to judge of the sufficiency of the evidence for themselves.

" Upon the evidence, as it stands, the Lord Ordinary is very decidedly of opinion, that it is insufficient to prove the facts necessary to warrant the verdict. The fundamental fact is, perhaps, *prima facie* established by the extract sworn to by the Session-clerk. But the Lord Ordinary cannot be satisfied even of this, without seeing the record itself; because it is admitted that the entry is very awkwardly placed, where it ought not naturally to have been; and he also thinks, that if the fact be so, there is great probability that other written evidence ought to exist.

" But supposing this primary fact to be proved, there is no written evidence to show that James Anderson, said to be the great-grandfather of Andrew, was the same person with James, the son of Michael, the entainer, or had any connexion with the family of Tushielaw. Some of the records are said to be destroyed, but there are some existing, which do not appear to have been examined; and there are no family letters, or other writings, mentioned or referred to. This whole matter is made to rest on vague hearsays of persons, who, by their own account of the matter, are raising up to themselves, as well as the defender, the character of heirs of entail. The Lord Ordinary must confess, that he can place very little reliance on such evidence, standing by itself. He does not think that it is incompetent; but it appears to him to be very far from sufficient to prove the essential facts of the case.

" The defender says, however, that he is ready to support the verdict by additional proof. The Lord Ordinary is of opinion that he is entitled to do this, according to the practice of the Court in such cases. But, observing that in a branch of the case Ramsay v. Cochrane, December 17th, 1824, the Court appears to have been divided on the subject, if taken independent of the specialty which occurred in that case, and being in doubt as to the form proper to be adopted, if proof shall be held competent, seeing that the record in this reduction has been closed, and that the Court

very or establishment of all rights legally descendible to heirs called by that character or description ;" and, quoad ultra, made avizandum to the Court.

Mrs Anderson having reclaimed, the parties again entered fully into the points discussed in the note of the Lord Ordinary;* the Court, how-

June 22, 1832.
Anderson v.
Anderson.

are now reviewing the verdict of a Jury, on the brieve of judgment,—he thinks it the most expedient course to lay the case before the Court, without pronouncing any judgment on this branch of it."

* The Dean of Faculty, in the course of his argument for the defender, referring to the case of Gordon of Carleton, and to the circumstance that the view taken of it by the consulted judges in Colquhoun v. Colquhoun, was different from that adopted by the Court in Glen v. Peacock (ante IV. 742), stated, that it clearly appeared from a marking of Lord Drummore's, on the Session papers in that case, in his (the Dean's) possession, and also from the papers in subsequent questions between the same parties, that the fee of the estate was held to have been still in the entainer, and that the service of Nathaniel Gordon to the entainer was held to be effectual *for the purpose of carrying the right to it*, and not as merely affording evidence of the fact that the entainer and John Gordon, the conditional institute, had died without issue. In support of this view, the Dean quoted the marking alluded to, and certain passages from the subsequent papers, which, by his kindness, the reporters are enabled to give.

Lord Drummore's note is in these terms :—" In this case the Lords thought the case the same as if the disposition had been to himself, and failing him by his decease to his heirs-male. The fee in both cases was absolutely in the disposer, and the decision was unanimous."

The most important passage in the pleadings in the subsequent case, occurred in a paper for the creditors, which narrated the previous procedure as follows :—" Thus matters stood, when Alexander Gordon, now of Carleton, the grandson of Nathaniel, by his son Alexander, thought proper to compear for his interest, with a view to evict this estate from the whole creditors, and to frustrate the effect of the above-mentioned process of ranking and sale, which he had hitherto allowed to go on for so many years at so great an expense. And, in the first place, he objected, that Nathaniel and Alexander Gordons, his own grandfather and father, had not established the proper titles to this estate ; and therefore, that the debts contracted by them could not be made a charge upon the same, for that the aforesaid deed of entail was not of the nature and form of a settlement of succession to James Gordon, the maker of the entail, but a direct disposition of the estate to John Gordon, a younger son of Earlston's, failing heirs-male of the tailzie's body ; that the aforesaid John Gordon was not heir of tailzie, but a conditional disponee ; and therefore, that upon his predeceasing the tailzie without issue, Nathaniel ought to have established his title by service to John Gordon, the conditional disponee, whereas he had erroneously served himself heir of tailzie and provision to James Gordon, the maker of the entail ; which defect in the title of Nathaniel behoved to vitiate the disposition by him to his son Alexander, in Alexander's contract of marriage.

" But from the whole tenor of this inaccurate deed, it evidently appeared that no more was thereby intended but a settlement of succession, as the estate was first limited to the issue-male to be procreated of the tailzier's own body, and failing these, to John Gordon, the son of Earlston, whom failing, to Nathaniel, whereby John must have taken by service, in order to have it cognosced that the issue-male of the tailzier's body had failed ; and as the issue-male of the tailzier's who were first called, if any such had existed, must have been served heirs to their father, the maker

No. 339. ever, considering that all questions as to the effect of the service, fell more properly to be determined in judging of it as a title to pursue reduction of Mrs Anderson's titles in the other action, waved giving any opinion thereon, and being satisfied that a service as heir-male of the entailor, to whom no service in that character had ever been expedie, was competent, and that to that extent the service was apt in point of form, adhered to the finding in the Lord Ordinary's interlocutor, and remitted to his Lordship to proceed accordingly.

June 22, 1832.
Anderson v.
Anderson.

Blantyre.

W. GARDNER, W.S.—W.M. MARTIN, S.S.C.—Agents.

No. 340. LADY BLANTYRE and Others, Petitioners.—*Murray.*

Process—Tutor and Curator—1672, c. 2.—Husband and Wife.—1. Where there were no relations on the mother's side in Scotland, and a petition was presented by tutors, craving the Court to find that they complied with the statute 1672, c. 2, if they made up inventories with the consent of two of the next of kin residing in England, or failing the concurrence of these parties, if a summons was raised against them citing them to concur, and therefore craving authority to cite—the Court found it unnecessary to cite the next of kin resident in England. 2. One of the pupil's next of kin on the mother's side being the wife of a tutor, not cited to concur in making up inventory, though no other cognates were in Scotland.

June 23, 1832. LADY BLANTYRE and others, the tutors-nominate of the children of the late Lord Blantyre, presented a petition, narrating the act 1672, c. 2, and stating their desire to make up inventories. They set forth that the pupils had no cognate in Scotland, except the Hon. Mrs C. H. Rodney, or Stuart, who was wife of one of the tutors, and incapable of acting separately from him; and that two of the nearest cognates, Mrs Frances Eden, and Lady George Lennox, resided in England.

They therefore prayed the Court "to find and declare that the petitioners will sufficiently comply with the requisites of the foresaid statute, in the matter of making up inventories of their pupils' means and estates, if they shall make up inventories thereof, with advice and consent of two of their pupils nearest of kin on the father's side, who are majors, and within Scotland; and of the said Mrs Frances Eden and Lady George Lennox, and their husbands, for their interests; and in case these par-

of the entail, who could not be divested of the fee in favours of issue-male who never existed; and as John Gordon, the son of Earlston, was substitute to the issue-male of the tailzier's body, your Lordships were unanimously of opinion, that upon the tailzier's death without issue-male, John Gordon, the son of Earlston, then also dead without issue, whereby the succession opened to Nathaniel, he was rightly served heir of tailzie and provision to the maker of the entail, and therefore did repel that objection to Nathaniel and Alexander Gordon's title to this estate." Various other passages established that such, by the admission of all parties, had been the view taken by the Court.

1st DIVISION.

D.

ties, or any of them, shall not concur with the petitioners in making up No. 340. inventories, as said is, to find and declare that it will be sufficient compliance with the requisites of the said statute in the said matter, if the petitioners shall raise a summons, at their instance, before any competent judge, against two of their said pupils nearest of kin on the father's side, who are majors, and within Scotland; and against the said Mrs Frances Eden and Lady George Lennox, and their husbands, for their interests, for citing them to concur with the petitioners in making up the said inventories in manner appointed by the foresaid act; and to authorize the petitioners accordingly to cite the said Mrs Frances Eden and Lady George Lennox, and the said Thomas Eden and Lord George Lennox, their husbands, for their interests, as defenders, along with the pupils next of kin on the father's side, in the action to be raised by the petitioners, as aforesaid, for making up the said inventories; and thereafter to proceed and insist in the said action, in the same manner, in all respects, as if the said Mrs Frances Eden and Lady George Lennox, and their said husbands, were resident within Scotland."

June 23, 1832.
Blantyre.

LORD PRESIDENT.—I apprehend we cannot grant the prayer of this petition, and authorize the consent or the citation of parties resident beyond the kingdom, in making up inventories under the act 1672, c. 2. That act refers specially to the consent or citation of the next of kin, who are majors, and within the kingdom for the time. But, from the necessity of the case, as there are no next of kin on the mother's side qualified to act, and within the country, I conceive we ought to find that it was unnecessary either to obtain their consent or to cite them, and that the inventories will be quite regularly made up notwithstanding. I would therefore propose to refuse this petition, and add a finding that the citation or consent referred to, is unnecessary in the circumstances.

The other Judges assented.*

THE COURT then, “in respect that the Hon. Mrs Stuart is married to one of the petitioners, and that it is stated that there are no other relations on the mother's side residing in Scotland, find it unnecessary to cite the next of kin on the mother's side resident in England, in the circumstances of this case,” &c.

JOHN DUNDAS, W. S.—Agent.

* See Shields, Feb. 2, 1832 (ante, p. 282); Hobbs and others; also De Maria's children, June 29, 1831 (ante IX. 841.)

No. 341.

— M'LEOD, Objector.—*Boswell.*
— SMITH, Respondent.—*Robertson.*

June 23, 1832.
M'Leod v.
Smith.

Expenses—Process—1 William IV. c. 69, § 16.—Where a witness who had been adduced at a Jury trial, objected to the auditor's report at taxing his account, and his objections were repelled; held, not necessary to subject him in expenses, as there was no imperative rule to that effect in the Jury Court, prior to 1 William IV. c. 69.

June 23, 1832. By 1 William IV. c. 69, § 16, it is enacted, “that all rules and regulations in observance in the Jury Court at the time of the union of Jury trial in civil causes, with the administration of justice in the Court of Session; established and enforced by Act of Sederunt, shall continue and be observed as rules and regulations applicable to the Court of Session after such union, until the same shall be altered by Act of Sederunt.”

M'Leod was adduced as a witness at a Jury trial by Smith, the pursuer of the action. His claim of expenses against Smith was taxed by the auditor, and he took objections to the report, which the Court repelled. Smith then moved the Court for the expense of discussing these objections, alleging that it was imperative, by the Act of Sederunt, to award expenses in such a case. M'Leod objected that this rule did not apply to Jury trials, as the rule of the Jury Court was different, and was still in force as to such cases in the Court of Session.

The LORD PRESIDENT enquired at the Jury clerk what had been the practice in the Jury Court, and then intimated that it was the rule of that Court to award expenses only when frivolous objections had been taken. His Lordship observed, that by 1 William IV. c. 69, § 16, that rule remained in force in a case like the present, until it should be altered by Act of Sederunt; and that, in this instance, he was inclined to award no expenses against the objector.

The other Judges concurred, and M'Leod was not subjected in expenses, though his objections were repelled.

D. CLYNE, S.S.C.—C. SPENCE, S.S.C.—Agents.

M'CARTNEY, (for the Commercial Bank,) Pursuer.—Sol.-Gen. Cockburn No. 342.
—*More.*

MAGISTRATES OF EDINBURGH, Defenders.—Keay—L'Amy.

June 23, 1832.
M'Cartney v.
Magistrates of
Edinburgh.

Proof—Contract.—In a building contract, instalments having been agreed to be paid on a certificate by the architect and superintendent of works, that work to the value had been executed; and a question having arisen at a distance of time as to whether an instalment had been due at a particular date; and the architect and superintendent having declared that they had no materials for determining whether they would then have been justified in granting a certificate, a proof allowed in their presence to satisfy them on this head.

IN 1826, John Dickson, builder in Edinburgh, contracted with the June 23, 1832. Magistrates for building the New High School for £16,590, payable by instalments of £1000 each, as the work should reach certain specified stages. During the progress of the work, the Magistrates, by minute of council dated 21st February 1827, agreed to a modification of the contract, to the effect that the instalments should be payable on certificates being obtained from the architect and the city superintendent of works, "that work to the extent is executed." Several instalments were paid on such certificates being granted, and, in December 1827, Dickson having authorized the City Chamberlain to pay the next instalment which might be due to the Commercial Bank, the chamberlain wrote to the bank, intimating that he had been so authorized; and on this the bank (as they had done in regard to former instalments) made advances to Dickson. When another instalment was demanded, however, the architect and superintendent declined giving the certificate, on the ground that the work remaining to be executed exceeded in value the balance of the price unpaid. Dickson subsequently became bankrupt, and it ultimately required a much larger sum than the contract price to complete the building. The Commercial Bank, however, alleged, that at the date of the bankruptcy, work had been done and materials furnished since payment of the preceding instalment, equal to the next instalment of £1000, and the pursuer M'Cartney, manager of the bank, raised an action against the Magistrates for payment.

In this action the Lord Ordinary pronounced certain findings on the merits of the pleas maintained, but these the Court recalled as premature, till a certificate should be obtained from the architect and superintendent, in terms of the minute of council of the 21st of February 1827. These parties being called on for a certificate, declined to give it on the ground that Dickson had not made such progress as would have warranted their doing so; but on being examined, they stated that they had now no materials from which to ascertain whether such progress had been made or not. The Magistrates on this contended, that, as the required certificate

2^d DIVISION.
Ld. Fullerton.
T.

No. 342. could not be obtained, they were entitled to absolvitor; while M'Cartney,
 June 23, 1832.
 —on the contrary, maintained, that the certificate being refused solely from
 M'Cartney v. want of materials to enable the referees, at this distance of time, to ascer-
 Magistrates of tain whether sufficient progress had been made or not, he was entitled to
 Edinburgh. — a proof, in order to satisfy them that such progress had actually been
 Murray, &c. v. made, and that they would have been justified in granting the cer-
 Miller, &c. tificate.

THE COURT allowed a proof to be taken in presence of the archi-
 tect and superintendent for this purpose.

J. A. CAMPBELL, W.S.—M'RITCHIE, BAYLEYS, and HENDERSON, W.S.—Agents.

No. 343. MUNGO MURRAY and CHARLES HAY (Murray's Trustees), Advocators
 —D. F. Hope—Keay.

JAMES MILLER and JOHN BAXTER (Ducat's Trustees), Respondents.—
 Gordon.

Cautioner—Belief.—Two parties signed a bond to a bank for a tenant's behoof, one of them being his landlord, and missives of lease were at the same time exchanged between the landlord and the tenant, under which a claim for meliorations was allowed at the end of the lease; the landlord's missive referred to the security provided in his favour in the tenant's missive, and the tenant's missive authorized the landlord to retain any sum which might be paid by him under the bond, against the claim for meliorations, and provided, "that the obligation for these meliorations shall not take place until the landlord is fully relieved" of such sum;—held, that on the tenant's failure, the co-cautioner could not compel the landlord to communicate a share of the value of the meliorations made by the tenant.

June 26, 1832. THE late Mr Murray of Lintrose was the landlord of David Ducat.

1st DIVISION. In 1816, when missives of lease were exchanged between them, a bond
 Lt. Corehouse. of caution for a bank account of £300 was signed in favour of Ducat, by

B. Mr Murray and a Mr Baxter. This was referred to in the missives of lease. Murray agreed to allow his tenant a claim for meliorations at the expiry of the lease, "but in case I shall have to pay any sum, or sustain any loss or damage in consequence of my having subscribed a bond of credit to the extent of £300 sterling for you to the Perth Banking Company, I am to be entitled to payment and relief, as expressed in the counter-missive granted by you of the 12th of April 1816, and annexed to these presents, before I, my heirs and successors, shall be liable or bound to pay any part of the sums of money before-mentioned."

Ducat's missive of acceptance, of the same date, contained this clause. "in respect you have been so good as to subscribe a bond, along with John Baxter at Corston, for me, of a credit upon a cash-account with the Perth Banking Company, to the extent of £300 sterling, I bind and

oblige myself, and my heirs and successors, to free and relieve you and No. 843.
 your heirs of and from payment of the said sum of £300 sterling, or any June 26, 1832.
 part thereof, and at any time, when required by you, to retire and deliver Murray, &c. v.
 up to you the aforesaid bond you have subscribed on my account, regularly discharged, or otherwise to pay the said sum to you, that you, your
 heirs and successors, may operate your own relief; and for your further
 security, from whatever sum I, my heirs and successors, shall be entitled
 to receive of meliorations or otherwise, in consequence of the aforesaid
 obligation at the end of the said new lease, I agree you shall retain to
 the extent of the sum or sums of money you may have to pay on my
 account to the said Perth Banking Company; and that the obligation
 for these meliorations shall not take place until you are fully relieved of
 any sum or sums of money you may have to pay on my account, in con-
 sequence of your having subscribed the aforesaid bond with me to the said
 Perth Banking Company."

Under a reference, at the end of Ducat's lease, the amount of meliorations which he could have claimed from his landlord, had he himself paid his bond to the bank, was £219. But before the end of the lease, that bond, with interest, amounting in all to £418, had been paid by the landlord and Baxter. Ducat, in the mean time, had executed a trust-deed; and Baxter, in consequence of the advance made by him to the bank, desired Ducat's trustees to retain in their hands, for his behoof, the last term's rent falling due to Mr Murray at Martinmas 1828, at least to the amount of one half of the meliorations laid out on the land. This being done, and Murray having also executed a trust-deed, an action was raised by his trustees against Ducat's trustees, for payment of the arrears of rent, and afterwards a multiplepoinding was brought by the same parties before the Sheriff of Perthshire, in order to ascertain the rights of parties to the sum expended in meliorations. The two processes were conjoined.

Pleaded by Baxter and Ducat's Trustees—

Where there are two co-cautioners, and one of them has acquired a security in relief of his obligation, he is bound to communicate the benefit of it to the other. Murray obtained a real security by the expenditure of the meliorations on his property, and reaped the full benefit of it. One half of this must be accounted for to Baxter, and, to that extent, Murray's trustees were not entitled to demand Ducat's rent, which Baxter had authorized them to retain for his claim against Murray.

Pleaded by Murray's Trustees—

The security stipulated by Murray was a part of the original transaction, and appeared on the face of the missives of lease. Without it, Murray would not have signed the bond, and if Baxter signed, without security, sibi imputet. It was only under the missives of lease that any claim for meliorations could arise; and Baxter could not claim on these meliorations, without reference to the condition, in gremio of the missives,

No. 343. that the landlord was to be relieved of the bank bond before any meliorations became exigible.

June 26, 1832.
Murray, &c. v. Miller, &c.

The Sheriff found "that the sum in medio consists of £219, 10s. 1d., with interest from and after the term of Martinmas 1828: Found the raisers of the multiplepoinding liable only in once and single payment, and that they are entitled to deduction of £1, 15s. 9d., as the expense of bringing that action into Court: Preferred the claimant John Baxter to one-half of the balance, towards his relief of the cautionary obligation come under by him and the late Mr Murray of Lintrose, for David Ducat, to the Perth Banking Company: Found the trustee of Mr Murray entitled to retention of the other half towards relief of his said cautionary obligation: Found the trustees of David Ducat liable to the trustees of Mr Murray in the arrear of rent, and interest thereof, sued for in the action at the instance of the trustees on the estate of Lintrose; and deerned accordingly, and for the expense of extract against the party failing to pay before extract, but for no other expenses."

Murray's trustees having brought an advocation, the Lord Ordinary "advocated the cause; and, in the multiplepoinding, altered the interlocutors of the Sheriff, repelled the claim of John Baxter, and preferred the trustees of Mr Murray to the fund in medio; and in the ordinary action found the trustees of Mr Ducat liable to the trustees of Mr Murray in the arrears of rent and interest, and for the expense of extract, and deerned; but found no other expenses due." *

* * Note.—When cautioners are bound conjunctly and severally, it is an equitable and expedient rule, that, if one of them shall afterwards acquire a security over the estate of the principal debtor, he must communicate the benefit of it to the rest. The principal debtor is bound to act fairly by them all, and every motive should be taken away which might induce him to grant, or any of them to elicit, a preference. If such a competition were allowed, the debtor would be harassed, his interests prejudiced, and the most artful and urgent of the cautioners would get free at the expense of the rest. But at the time when the cautionary obligation is entered into, there is no reason why a cautioner should not stipulate the condition under which he consents to interpose; and if this is done openly and fairly, the condition will be effectual. In the present instance, at the date of the bond of caution, and as pars ejusdem negotii, Mr Murray agreed to allow the principal debtor Ducat, who was his tenant, meliorations to a certain extent, provided he was relieved of the bond. The missives of lease, in which this stipulation is contained, are dated the 12th of April 1816, and the bond of caution the day following. Baxter, the co-cautioner, must have known of this condition, because a tenant is not entitled to meliorations unless he has an obligation to that effect in his lease; and if Baxter, the co-cautioner, trusted to them as part of the tenant's estate, he must at the same time have been aware of the condition under which they were allowed. In truth, they formed no part of the tenant's estate, until Mr Murray was relieved of the bond; before that was done, the tenant was meliorating at his own risk. This is not the case, therefore, of a co-cautioner acquiring a security over the debtor's property.

Ducat's trustees reclaimed.

No. 343.

LORD PRESIDENT.—I concur with the Lord Ordinary. There is a manifest distinction between the case of a cautioner who refuses to sign a bond at all, until he be possessed of some security, and the cautioner who merely acquires a security at a period subsequent to that at which he and his co-cautioner have signed the bond. The security in the present case was stipulated by Mr Murray as a condition of his undertaking the obligation, and he was entitled openly to make such a condition, for the purpose of protecting himself in the event of the principal obligant's failure. Suppose that a party declines to sign a bond of caution, unless the principal obligant puts plate, cattle, or any thing else into his hands, by way of security, and that this is openly done, and eventually the principal obligant fails—the co-cautioners cannot insist on having a share of the proceeds of the plate, &c., communicated to them for their relief, so long as the party holding them is not indemnified. Besides this, I have much doubt of the claim of Baxter on another ground. I doubt if the meliorations are at all exigible against Mr Murray the landlord, in terms of the missive under which they are claimed. Ducat's missive bears that "the obligation for these meliorations shall not take place until you (Murray) are fully relieved of any sum of money you may have to pay on my account, in consequence of your having subscribed the aforesaid bond," &c. Murray is not relieved of the sums paid to the bank; how then can the obligation for meliorations take place against him? Independently of this view, however, I have no hesitation in adhering to the interlocutor under review.

LORD BALGRAY.—I am for adhering, and I rest on what is specially founded on by the Lord Ordinary. The claim for meliorations can only arise under the missives of lease, and these missives contain, in gremio, the qualification, that the meliorations shall not be exigible against Murray, until he is relieved of the bank-bond. The foundation of the claim of Ducat's trustees is therefore removed by the very document on which alone they are obliged to rest in making their claim. It was part of the original transaction, and was openly stipulated, that Murray should possess a security of this special tenor, before he undertook the cautionary obligation; and now that the precise event has occurred, in the view of which such separate security was taken, he cannot be called on to surrender one half of it to a party, who, being less vigilant or prudent, chose to sign without any security. The general rule of law, that, after co-cautioners are already bound, the security acquired by one of them accrues to the others, does not apply to this case.

LORD CRAIGIE was understood to concur in the interlocutor, but to dissent from the note of the Lord Ordinary, as limiting too strictly the right of any individual co-cautioner, to secure himself by dint of using greater vigilance than his co-cautioners.

LORD GILLIES.—I am more prepared to assent to the law so far as generally stated in the Lord Ordinary's note, than as applied in his interlocutor. When

June 26, 1832.
Murray, &c. v
Miller, &c.

subsequent to the date of his obligation, or even secretly stipulating for one before he consents to be bound; therefore it does not fall under the general rule established by the precedents to which the respondents refer, but forms the exception which, ~~is~~ ^{not} hitherto sanctioned by decisions, has been contemplated by the best authorities on the subject.—I BELL, 349."

No. 343. Ducat's bank-bond was signed by the two cautioners, they stood on a very unequal footing. Mr Murray had an interest that his tenant should gain the command of capital, so as to stock and cultivate his farm beneficially, and expend meliorations upon it. Baxter had no such interest; but Murray farther stipulated for a security against the risk he incurred as cautioner, by inserting a condition in the missives of lease that the meliorations should not become due until he was relieved of the bank-bond. Nothing therefore could be more grossly unequal than the footing on which these two co-cautioners signed the bond. It is true, that if Baxter was cognizant of all this, he must stand by the consequence of having undertaken such a risk. But where is the evidence of his knowledge? He may have been wholly ignorant of the existence of any clause relative to meliorations. He may have believed that there was none such; that the accommodation granted to Ducat had no reference whatever to meliorations, and that Mr Murray, his co-cautioner, stood precisely in the same position with himself, in point of risk, in signing the bond. But I hold that Baxter had a right to be informed of every thing which it was material for him to know, relative to the condition of Ducat and his co-cautioner, before signing the bond. Had Baxter been informed of the security stipulated for by Murray, quomodo constat that he would ever have signed the bond? As I do not see it proved that Baxter knew, what in all justice and equity he ought to have been made acquainted with, I am not prepared at present to adhere to the Lord Ordinary's interlocutor.

THE COURT adhered.

Advocators' Authority.—2. Bell, 349.

Respondents' Authorities.—2. Bell, 348, et seq., and authorities there referred to.

A. STOAK, W. S.—TOP and ANDERSON, W. S.—Agents.

No. 344.

GYE and COMPANY, Pursuers.—D. F. Hope—Maitland.
S. J. HALLAM, Defender.—Sol.-Gen. Cockburn.

Process—Jury Trial.—New trial granted in respect of surprise as to the evidence led at the former trial.

June 26, 1832.

2d DIVISION.
Jury Court.

R.

THE defender, Hallam, from the month of August 1827, had been manager of a tea establishment in Edinburgh, belonging to the pursuers, Gye and Company, merchants in London. On the 30th of September 1829, an alteration was made in the establishment, whereby the situation of manager was suppressed, and Hallam was retained as cash-keeper, and on the 30th November thereafter he was dismissed altogether. Gye and Company subsequently raised an action against him for recovery of a balance alleged to be due by him, and in their condescendence, besides an admitted general deficiency of about £94, for which, on grounds unnecessary to be stated, Hallam maintained he was not responsible, they specified four particular items, amounting in all to only £4, 16s. 8d., as errors in the books. This issue was sent to a jury—“Whether the de-

fender is indebted and resting owing to the pursuers in the sum of £120, No. 344. or any part thereof, as the value of stock not accounted for by him, or of monies received by him on account of the pursuers, and not accounted for by him?" Besides the plea as to Hallam's responsibility for the admitted general deficiency, Gye and Company led evidence by an accountant who had examined the books, which were very voluminous, consisting of transactions from August 1827 to November 1829, to the amount of £45,542, to prove that there were certain specific errors of goods that ought to have been added to the stock, but which were not so added, amounting, up to 30th September 1829, to £84, 19s. 3d., none of these having been condescended on, or alluded to by Gye and Company in their condescendence. The jury returned a verdict for the pursuers "to the extent of £84, 19s. 3d., being the amount of errors or omissions up to 30th September 1829."*

Hallam now moved for a new trial on the ground of surprise, and he pleaded that Gye and Company, having condescended on certain alleged errors, (besides the general deficiency, as to which they could not obtain a verdict,) were not justified in resting at the trial on other specific errors totally different, at least without notice being given; and that although the whole books were no doubt put in as evidence, whereby there was actually produced the materials for explaining these alleged errors, and showing that the accountant was mistaken, yet these were so voluminous, and regarded so many transactions, that it was impossible to do this on the instant, without notice as to the particular items to be founded on as erroneous or omitted. He further endeavoured to satisfy the Court, from the books, that the accountant was mistaken.

The Court considering there were sufficient grounds on the head of surprise for setting aside the verdict, granted a new trial.

CAMPBELL and MACK, W.S.—T. and J. DARLING, W.S.—Agents.

ARCHIBALD GIBSON (WILSON and SON'S TRUSTEE).—D. F. HOPE— No. 345.

Hunter.

HENRY STEPHENSON and Others.—*Shene—Rutherford.*
Competing.

Bankrupt—Sequestration—Heritable Creditor.—Circumstances not sufficient to render an heritable creditor liable for the general expenses of a sequestration, or for charges incurred through the acts of the trustee for behoof of the personal creditors.

THE late John Wilson, senior, was a partner of the Company of Wilson and Sons, which carried on extensive coal and iron works at Wilsonton, in the county of Lanark, and he was feudally vested in a great part of

June 26, 1832.
2d DIVISION.
Ld. Fullerton.
F.

No. 345. the heritable property in which the operations of the Company were carried on. In the year 1807, the Company having borrowed £20,000 from Stephenson, Batson, Remington, and Smith, bankers in London, Mr Wilson granted in security thereof an heritable bond over his properties above mentioned, to the late John Stephenson, in trust for Stephenson and Company. At this time there was only one other heritable security over the property; its amount was £10,000, while the property was estimated to be worth nearly £60,000, and subsequent securities were taken over it to the extent in all of £53,000. In 1808, the affairs of the Wilsonton Company fell into great embarrassment, and a trust-disposition in favour of certain voluntary trustees was executed by Mr John Wilson, senior, and the other partners, of all their property, including the estates vested in Mr Wilson's own person, and over which Stephenson's security extended. The trustees entered into the possession and management of the works and estates of the Company, but Stephenson was no party to the trust. After some time it was found that great additional loss had been sustained under the management of the trustees, and in 1812, a sequestration of the Company estates was applied for and obtained. John Wilson, senior, had died some time prior to this, so that his individual estate was not included in the sequestration; but at a subsequent period, the voluntary trustees (who had been infest under the trust-deed in the heritable property standing in his name) were ordained, by a judgment of the Court, to denude thereof in favour of the statutory trustee on the Company estates, and for behoof of the Company creditors. On the sequestration being awarded, Mr Bristow Fraser, writer in Edinburgh, became a candidate for the office of trustee, and with the view of availing himself of the vote of Stephenson, who was his client, he transmitted to London, where that gentleman resided, an affidavit to be taken, and mandate to be signed, by him, as an heritable creditor of the Company, having previously got a mandate and affidavit from him as creditor of John Wilson, senior, with the view of being used in a multiplepoinding then depending before the Court. No explanation was given as to the effect or object of this affidavit and mandate, except so far as it was to be used for the election of Fraser, who wrote to Stephenson, of date June 27, 1812, that his claiming under the sequestration would not impair, but confirm, his preference under his heritable security. In consequence of this application, Stephenson made affidavit before a master in Chancery, that the Company of Wilson and Sons were indebted to him in the sum of £20,000, conform to the heritable bond and infestment thereon, and he signed, along with Stephenson and Company, the mandate in favour of Fraser, authorizing him to attend all meetings of Wilson and Son's creditors, "to vote in the election of an interim factor or trustee on their estates, and in all other matters that may come before the said meetings." In consequence of this mandate, Fraser used their vote in his own favour, and was elected trustee, but no further appearance was ever made for Stephen-

June 26, 1832.
Gibson v. Ste-
phenson, &c.

son, or the company, under the sequestration, and in particular, no claim was made for them as personal creditors, (their heritable security being deemed fully equal to their debt,) and when finally an application was made for discharge of the bankrupts, their names were specially excluded from the number of creditors in calculating whether the requisite concurrence had been obtained.

In the course of the sequestration the heritable property was sold. The first security was entirely discharged out of the prices, and a large proportion of that held by Stephenson ; but there still remained a balance due, which was claimed out of the price of the last parcel of the property which had been disposed of. In the meantime, however, considerable expenses were incurred by the trustee in carrying on the works for some time after the sequestration, and in the ordinary management of the sequestered estate ; and further, the trustee was found liable for the feudities and rents of certain properties of which he had entered into possession,¹ but over none of which Stephenson's security extended. Gibson, who had been elected trustee on the death of Fraser, alleging that the general trust funds were altogether inadequate to pay the expenses, &c. of the sequestration, and those incurred under the voluntary trust-deed, demanded that these should be defrayed in the first place out of the fund in question. To try this point a multiplepoinding was raised in name of the purchaser, and claims were lodged for Gibson, and for Henry Stephenson, grandson and heir of John, (in whose name the security was originally taken,) along with the assignees of Stephenson and Company, for whose behoof it had been granted.

For Gibson it was contended, that Stephenson having claimed in the sequestration, was liable, as any personal creditor so claiming, for the expenses thereof, and for charges arising from the acts of the trustee and general body of creditors—that this had been decided in the case of Goodwin v. Brown,² which was not affected by the subsequent cases holding heritable creditors not responsible, because in these, the creditors had made no claim, but rested solely on their rights as heritable creditors.

On the other hand, Stephenson, &c., besides contending that John Stephenson was only a creditor of John Wilson, senior, and not of the Company, and that the affidavit was invalid and ineffectual, as taken before a master in Chancery, who was not included among the judges mentioned in the statute, pleaded—that at all events Stephenson had never claimed in the sequestration to the effect of drawing any thing out of the general estate ; that he had rested solely on his heritable security, which was perfectly equal to the amount of the debt incurred thereby, and that he had taken no part in the proceedings of the creditors ; and

¹ Kirkland and Sharpe v. Gibson, May 17, 1831, ante, IX. 596.

² Feb. 1, 1815, (F. C.)

No 345. therefore, that under the decisions in the cases of *Crawfurd v. Currie*,¹
 June 26, 1832.
Gibson v. Stephenson, &c. and *M'Lane v. Robertson and Kennedy*,² he was not responsible further
 than for such expenses in the way of selling the estates, &c., as he must
 otherwise have borne.

The Lord Ordinary pronounced the following interlocutor, adding the
 subjoined note :*—“ Repels the claim of the trustee on the sequestrated

¹ March 8, 1817, (F. C.)

² Nov. 29, 1825, (Ante IV. 232.)

* “ The lands of Cleugh were, *ex facie* of the titles, vested in John Wilson, senior, a partner of the house of Wilson and Sons, and the heritable security in favour of Mr Stephenson, was granted by John Wilson, senior. The sequestration of Wilson and Sons took place after the death of John Wilson, senior, and, of course, was not granted against him as an individual: But, in the first place, John Wilson, senior, had included the lands of Cleugh in the voluntary trust-deed, by which the whole subjects belonging to the Company were conveyed, in security of various debts due by the Company; and, secondly, on the sequestration of Wilson and Sons, the voluntary trustees were, as the Lord Ordinary understands, held to be bound to dedude, not only of the lands originally vested, *ex facie* of the titles, in Wilson and Sons, but of these lands of Cleugh, which were accordingly made over by the voluntary trustees, to the trustee on the sequestrated estate.

“ The inference is, that though apparently vested in John Wilson, senior, they were held to be, and treated by the Court as, forming part of the Company property. Agreeably to this view, Mr Stephenson, the heritable creditor, made affidavit, and claimed in the sequestration; and the lands of Cleugh were ultimately exposed to sale, and sold by the trustee on the sequestrated estate. In these circumstances, the present multiplepointing has been brought by the purchaser, and the fund in medio, being the half of the price, the only balance now remaining unpaid, is claimed by the trustee, to answer, in the first place, the balances said to be due of the expenses of the voluntary trust and sequestration; and, secondly, the claims of Messrs Kirkland and Sharpe, for certain rents and feu-duties, which have lately been sustained by a decision of the Court against the trustee on the estate of Wilson and Sons.

“ In regard to one of the pleas maintained by Mr Stephenson's representatives, namely, the attempted disclaimation of his character as a claimant in the sequestration, founded on the alleged informality of his affidavit, the Lord Ordinary does not think it can now be received. In so far as any liability could legally attach to an heritable creditor, from his appearance in a sequestration, it seems clear, that after his claim had been recognised, and acted upon by all concerned, such liability could not be evaded by the party himself starting objections to the formality of his own affidavit. The Lord Ordinary thinks then, that Mr Stephenson must be viewed in the light of an heritable creditor, claiming in the sequestration. But, even in that view, it appears to him, that the demand of the trustee cannot be sustained. In the first place, as to the expense of the voluntary trust, there appears to be no ground whatever for charging any part of it against the heritable creditor, who neither acceded to, nor took benefit from, that arrangement: Secondly, the trustee's demand is equally unfounded, in so far as it rests on the judgment in favour of Kirkland and Sharpe. Whatever may have been the opinion, at one time, entertained of the liability of heritable creditors for the expenses of the sequestration, founded on certain clauses of the bankrupt statute, there does not appear to be any authority, either in principle or in practice, for holding that an heritable creditor, by appearing and claiming in a sequestration, rendered himself liable, not only for the expenses of the sequestration, but for separate pecuniary obligations, come under by the trustee and

estate of Wilson and Sons : finds that Henry Stephenson, Esq., and the assignees of Stephenson and Remington, are entitled to receive the balance of the price of the lands of Cleugh, and others, purchased by the raiser of the multiplepoinding, subject only to the deduction admitted in their claim, namely, of the necessary expenses of selling and realizing these subjects : therefore, ranks and prefers them to the fund in medio, under said deduction, as afterwards to be ascertained ; and decerns in the preference, and for payment, against the raiser of the multiplepoinding accordingly ; finds no expenses due in the present process ; and appoints the case to be enrolled, in order that the precise amount of the above deduction may be ascertained."

Gibson reclaimed, but the Court adhered, with certain variations, unimportant in a general point of view, with reference to alleged specialties as to the sale of the properties.

LORD JUSTICE-CLERK.—Undoubtedly a fair share of the expense of selling all the subjects over which the security extends must be allowed ; but, as to the general question, it appears to me, from the whole proceedings, that there was no claim or act by Stephenson, &c., with any other view than to protect their interest as heritable creditors, notwithstanding the attempt to lead them on by Fraser, who, in his letter of June 27, 1812, tells them that the affidavit and mandate will merely confirm their heritable security. Then the sequestration having been followed up for behoof of the personal creditors, they must abide the consequences ; but as Stephenson, &c., never intended to claim as personal creditors, I think the interlocutor impregnable, making, however, an explanation as to the extent of the expenses of the sales.

The other Judges concurred.

JOHN WIGHT, W.S.—PEARSON, WILKIE, and ROBERTSON, W.S.—Agents.

the estate, in relation to subjects not covered by his security, and in which he, in character of heritable creditor, had no concern. There is, perhaps, more difficulty in regard to the expenses of the sequestration, on which point the trustee founds mainly on the decision in Goodwin against Brown. But upon this case, it may be remarked, in the first place, that the question was raised in an action brought by the trustee against a personal creditor, for a share of the expenses ; so that the rights of the heritable creditor, who was no party in the action, were left to be maintained by the trustee, in support of the demand against the personal creditor ; and secondly, it will be found, on looking into the Session papers, that this case, though often referred to as fixing a general principle, was, in truth, from its circumstances, not merely special, but an extreme case against the heritable creditor. The heritable creditor had concurred in the application for the sequestration,—had been one of the commissioners,—and was therefore cognizant of the whole proceedings which occasioned the expense, and drew nearly the whole free amount of the estate, the personal effects being a mere trifie, never affording to the personal creditors any probability of a dividend. In these circumstances, the Lord Ordinary conceives himself justified in adopting the rule, in itself more consonant to the generally recognised rights of the heritable creditor, and which appears to have been sanctioned in the latter cases on this point, viz. of holding the heritable creditor only bound for the necessary expenses of the sale, of which he takes the benefit."

No. 346. MRS BARBARA MITCHELL and SPOUSE, Pursuers.—*Greenshields—Macallan.*

June 27, 1832.
Mitchell, &c.
v. Rankine, &c.

MRS E. RANKINE and SPOUSE, Defenders.—*M'Neil—Stark.*

Sloan v. Cuthbertson. *Possession.*—Effect given to the rule, *in pari casu melior est conditio possidentis.*

June 27, 1832. This was a special case. Mutual actions of reduction and declarator were raised by parties, neither of whom possessed a good title to the subject in dispute, and the Court applied the rule—*in pari casu melior est conditio possidentis.*

J. NAIRN, S.S.C.—D. GRAY, S.S.C.—Agents.

No. 347. JOHN SLOAN, Suspender.—*D. F. Hope—Cowan.*
JOHN CUTHBERTSON, Charger.—*Shene—Wilson.*

Possession—Spuilzie.—Where a party had been in peaceful possession of garden ground from Martinmas 1827, and had dressed the fruit-trees, and planted and cultivated the potatoes, and a charge was given to him on a judgment of an inferior court, as guilty of a spuilzie in removing fruit and potatoes from the ground, in October 1828,—letters suspended simpliciter, and charger found liable in expenses.

June 27, 1832. In 1827, John Cuthbertson took a house and some ground from his brother George Cuthbertson, under a verbal lease for three years. John Cuthbertson bought the property from George Cuthbertson in the same year, through the intervention of one Richard, the missive bearing that the property “was now possessed by John Cuthbertson,” &c.; “John Cuthbertson having a tack for two years after Whitsunday 1828.” In November 1827, John Cuthbertson addressed a missive to his brother, stating that the subject of his lease was a house, except certain rooms, and “garden ground I have as far back as the bleaching-green,” &c. The upper portion of the garden lay beyond the bleaching-green.

In spring 1828, Sloan laboured that part of the garden, sowed it, planted potatoes in it, dressed its fruit-trees, &c. He also divided it by a palisade from the lower portion, and connected it with an adjoining garden of his own, by taking down part of the hedge between them. He gathered the fruit as it grew ripe, and raised the potatoes without interruption. But in October 1828, John Cuthbertson presented a petition to the Baileys of Kilmaurs, stating, that Sloan or his accomplices, “without any warrant of law, and without the petitioner’s consent, did enter the said yard or garden ground, and spuilzied and carried off fruit growing upon fruit-trees, and potatoes growing in said garden ground,” &c. He craved restitution of these articles, or payment of their value, as ascertained by his oath in item, &c. Sloan answered, that he was proprietor of the

ground in question, and was lawfully entitled to occupy the upper portion of the garden, as Cuthbertson's possession was restricted by his missive to the lower portion; that he had peaceably sowed and cultivated the garden, and gathered the crop, and that there was no ground whatever for an action of spuilezie. The Bailies found, that Sloan had "no title to take possession of the garden ground in question, which forms part of the premises taken by John Cuthbertson from George Cuthbertson, the lease of which is not yet expired," and they found Sloan liable in £3 of damages, and £4, 19s. of expenses, for which Cuthbertson gave a charge. Sloan presented a bill of suspension, and this Court "remitte^d to the Lord Ordinary on the Bills, with instructions to his Lordship to remit the cause to the Magistrates of Kilmaurs, to recal their judgments complained of by the said John Sloan, and to allow the parties a conjunct probation of the averments regarding possession, made by them respectively in the revised condescendence and answers, and thereafter to pronounce such judgment in the case as to them shall seem just; with power also to the Magistrates to determine the whole questions of expenses incurred both in this Court and in the Inferior Court."

Under this remit a proof was led by each party, and the agent for each lodged a note or minute, concluding probation. Mutual minutes were then put in, arguing the import of the proof. It was stated by Sloan, that the two Bailies of Kilmaurs took opposite views of the case, and that each of them signed an interlocutor giving effect to his own opinion. The case lay over for some time, and in January 1831, this interlocutor was pronounced: "The Bailies having considered the reclaiming petitions for both parties, with the answers thereto, in the meantime recal both the interlocutors complained of; and in respect the parole proof is contradictory and unsatisfactory, and does not sufficiently show the state of possession, as required by the remit from the Supreme Court, therefore, before answer, allow both parties a farther proof of possession, and assign for the proof, and grant diligence against witnesses."

Farther proof was then adduced by John Cuthbertson of the state of possession in 1827, and also in 1829, and 1830; and the Bailies, in March 18, 1831, found that Cuthbertson was entitled to the possession of the whole garden in 1828, and that Sloan's possession of the upper portion of it had not been bona fide or peaceable; therefore they again found Sloan liable in £3 of damages, and £4, 19s. of expenses, and all subsequent expenses in both courts. Sloan presented a bill of suspension, which Lord Craigie refused with expenses. A second bill was presented to Lord Cringletie, who, on ordering answers, issued the subjoined note.*

* "NOTE.—As a similar bill has been advised with answers, and refused by Lord Craigie, the present Lord Ordinary thinks it proper to express his reasons for doubting the propriety of that refusal, that the respondent may obviate them if he can.

"First, then, it is admitted that the complainant did purchase the property giving rise to this question, through the intervention of one Richard; and the only right

No. 347.
June 27, 1832.
Sloan v. Cuthbertson.

No. 347. Sloan's bill being passed, the Lord Ordinary found, "that the petition of June 27, 1832. Sloan v. Cuthbertson. the respondent to the Magistrates of Kilmarnock sets forth that the suspender or others his accomplices, without any warrant of law, and without the respondent's consent, entered the piece of garden-ground in dispute, and spuylized and carried off fruit growing upon the fruit-trees, and potatoes

which the respondent has, or pretends to it, is a verbal lease for three years after Whitsunday 1827, from his brother, George Cuthbertson. The missive of sale to John Richard is dated 9th July 1827, at which time the respondent is mentioned to have a lease of the subject sold for two years after Whitsunday 1828; but on 13th November 1827, four months after the sale, the respondent gave to his brother, from whom he held the lease, a letter restricting his possession to the under part of the garden, or the part next to his house, and between it and the bleaching-green. This missive George Cuthbertson gave to the complainer, who, of course, appears to have considered himself, as purchaser of the whole, to be entitled to enter to possession of the part thus abandoned. Accordingly, as soon as the season for cultivation arrived, he is distinctly proved to have separated it from the bleaching-green by a paling, and to have laboured the ground, and planted potatoes on it. He is also distinctly proved to have hoed them in the summer, to have pulled and used the gooseberries, the fallen fruit from the trees on the walls, and pulled the fruit when ripe in October 1828, and all this without interruption; this was done under the eyes of the respondent every day of the year 1828.

"In October, after all this, the petition to the Magistrates was offered, complaining of the complainer's conduct; and, from the statement in that paper, no one could think otherwise than that the respondent had been in possession, cultivated the ground, sown the potatoes, and pruned and dressed the fruit-trees and bushes; notwithstanding which the complainer had thrust himself into possession, and resped the crops by spuylzie: and the petition prayes the Magistrates to ordain him to restore the whole fruits and articles so carried off, or to pay the value thereof, to be ascertained by his the respondent's oath in item; further, to find the complainer liable for damages and expenses, &c. As judgment was given against the complainer by the Magistrates without any proof, application was made by the complainer to this Court, and the First Division remitted to the Magistrates to recal their interlocutor, and allow a proof of possession. This shows that their Lordships considered, that if the complainer had quietly possessed the property, laboured and planted it, and that under the eye of the respondent, this, when combined with his declaratory letter to his brother restricting his possession to the under part of the garden, amounted to an abandonment of his verbal lease to the upper part, and justified the complainer to act as he had done. The present Lord Ordinary confesses that his opinion is consentient to that of the First Division; and as he has perused the proof, he has no sort of doubt that it establishes quiet possession by the complainer, and that the respondent has totally failed to show a single interruption. A part of the paling is said to have been pulled down soon after it was put up; but how this happened it is not said, and by whom; and it was repaired, and remained during the year 1828. In the year 1829, the respondent was allowed to possess, and then one witness says that the paling was pulled down by the respondent. A process of ejection is mentioned, but it is not produced. The Lord Ordinary would have wished to see it, to know the terms of the summons and its date. Stress is laid on it by the Magistrates in their interlocutor, but it is said by the complainer to have been an action for obtaining caution by the respondent for his rent, and, on failure, to find caution that he should be decerned to remove. If this was its nature, it does not seem to affect the present question."

growing in the said garden ground, and that he had kept the same ever since, and refused to restore them, and it concludes, as in an action of spuizie, that the articles should be restored, or the value thereof paid, as ascertained by the oath of the respondent, with damages and expenses: found, that it is clearly established by the proof adduced, that at the time this spuizie is alleged to have been committed, in October 1828, the suspender, was in peaceful possession of the ground in question, and had been so from the preceding term of Martinmas, that he had dug about, and pruned the fruit-trees from which he had gathered the fruit, and had planted and cultivated the crop of potatoes which he had raised when mature; therefore, suspended the letters simpliciter, and found the charger liable in the expenses incurred in this and in the inferior court," &c.*

June 27, 1832.
Sloan v. Cuthbertson.

Dougalls v.
M'Cartney.

Afterwards, his Lordship made avizandum with the process, in order to dispose of the expense of the first bill of suspension; that expense was awarded against Cuthbertson. Cuthbertson reclaimed; but the Court adhered.

G. McCLELLAND, W.S.—W. MERCER, W.S.—Agents.

HENRY and ROBERT DOUGALL, Pursuers.—D. F. Hope—Spiers.
ALEXANDER M'CARTNEY, Defender.—More.

No. 348.

Presumption—Right in Security.—Parties having bought a debt on a sequestered estate, and given a bill therefor, and written a letter to the trustee, agreeing that the first dividend should be paid to the original creditor towards payment of the bill; and having got up the bill before any dividend fell due on payment of a sum much within the amount of the bill, but not having recalled the letter to the trustee, the presumption held to be that this dividend formed part of the consideration for getting up the bill, and was a security still available to the original creditor.

THE estates of John Zuill, distiller at Blairgorts, in Stirlingshire, having been sequestrated, the Commercial Banking Company claimed to be ranked as creditors, to the extent of about £1700, and they further incarcerated Zuill. The pursuers, Henry and Robert Dougalls, who were Zuill's brothers-in-law, being anxious to procure his liberation, agreed to purchase from the Bank their claim, at the price of £508, 15s. 7d., for which they, of date March 16, 1827, granted their bill to Cunningham, the Bank's superintendent of branches, payable by ten several instalments. Cunningham, on the other hand, granted them a letter in these terms:—“ Stirling, 16th March, 1827. Gentlemen, as you have purchased from me the debt due by your brother-in-law, John Zuill, distiller at Blairgorts, to the agency here for the Commercial Bank, and have, of this date,

2^d Division.
Ld. Fullerton.
T.

* “ NOTE.—The proof allowed by the Magistrates proprio motu, after the parties had closed their probation of the state of possession in 1827, before the suspender's entry, and in 1829 and 1830, after this action was in dependence, is equally irrelevant and improper.”

No. 348. granted me your joint acceptance for the price and interest thereon, amounting together to £508, 15s. 7d. sterling, payable by ten different instalments, I hereby oblige myself to withdraw the Bank's ranking on John Zuill's estate, and to allow you to rank therefor, and to receive the whole benefit to be derived therefrom; it being expressly understood between us, that notwithstanding of the prolonged date of the instalments on the bill, that I am to be paid the amount of the first instalment of John Zuill's composition, and for which credit will be given on the back of said bill, as well as interest thereon, in so far as the same may prove a beforehand payment."

Of the same date, Dougalls wrote to the trustee on Zuill's estate, authorizing him to pay the first instalment of Zuill's dividend or composition to Cunningham, in their presence. No dividend was at this time declared; and in the meanwhile, Dougalls made certain payments to account of the bill; to the extent, as they averred, of £122, or, as the Bank alleged, of £55; and, on the 30th November 1827, they entered into a new transaction with Cunningham, whereby they paid him £100, and got up the bill of £508 previously granted by them, but no written evidence was preserved of the exact purport of this proceeding; and although the bill was got up from Cunningham, the letter from Dougalls to the trustee above mentioned was allowed to remain in his hands. Thereafter a dividend of one shilling in the pound became payable out of Zuill's estate, being the only dividend realized therefrom. The amount referring to the claim of the Commercial Bank was £87, 15s. 4d., and of this sum the Bank obtained payment from the trustee.

Dougalls thereupon raised an action on Cunningham's letter, against M'Cartney, manager of the Bank, for repetition of this amount, on the ground; that the Bank's interest in this debt had been transferred to them; and that, although it had been agreed that the first dividend was to be paid to the Bank, towards extinction of the bill, yet the bill having been given up by a subsequent arrangement, and so extinguished, there was no longer room for the Bank to claim this dividend. In defence, the Bank pleaded, that the letter to the trustee not having been got up, and the sum paid by Dougalls having been far within the amount of the bill, the legal presumption was, that the first dividend was still to be paid to the Bank as part of the consideration, in respect of which the bill was given up.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:—"Finds, that by an agreement of the 16th of March 1827, be-

* "NOTE.—Upon enquiry, at the debate, the Lord Ordinary was informed, in the first place, that the parties had no further proof to offer; and, 2dly, that the letter to Mr M'Intosh the trustee, mentioned in the summons, had not been withdrawn on the occasion of the settlement of the 30th of November 1827, and was still in his hands. In these circumstances, the case must be determined on legal presumptions; and, considering that the bill was given up for a sum which, even when added to

tween Mr John Cunningham, as agent for the Commercial Bank, and No. 348. the pursuers, the pursuers purchased from the Commercial Bank a debt due by the sequestered estate of John Zuill, their brother-in-law, to the said Bank: finds, that on the one hand, the pursuers, of that date, granted their bill for £508, 15s. 7d., payable by ten different instalments; and on the other, Mr Cunningham, by missive of the same date, bound himself to withdraw the Bank's ranking on Zuill's estate, and to allow the pursuers to rank therefor, and receive the whole benefit: finds, that the missive also contained the provision, that notwithstanding the prolonged date of the instalments of the bill, the Bank was 'to be paid the amount of the first instalment of John Zuill's composition, and for which credit will be given on the back of said bill, as well as for interest thereon, in so far as the same may prove a forehand payment:' finds it set forth in the summons, that, of the same date, the pursuers wrote to William Mac-Intosh, the trustee on Zuill's sequestered estate, authorizing him to pay the first instalment of the said John Zuill's composition to the said John Cunningham, the agent for the Bank: finds, that by a subsequent transaction of the 30th November 1827, between the pursuers and the Bank, the latter or their agent gave up the bill to the pursuers, upon receiving a sum of £100, in addition to the instalments previously paid; but finds, that while the bill was thus given up, the letter authorizing Mr M'Intosh the trustee to pay the first instalment on John Zuill's dividend to the pursuer, was not withdrawn; finds, that according to the legal presumptions applicable to these circumstances, the defenders cannot be held, by the giving up of the bill for a sum confessedly far below its amount, to have abandoned their claim to draw the first dividend or composition on Zuill's estate, and therefore assuizes the defenders from the conclusions of the libel, and decerns."

Dougalls reclaimed, but the Court adhered.

LORD GLENLEE.—I see no reason to alter. These people's title to draw any dividend at all, depends on the letter of the 26th March; but there it is expressly provided, that the Bank is to have the benefit of the first dividend. The Bank do not object to this; but the pursuers want something more, and contend, that this right to the first dividend was given up by the Bank by the subsequent transaction. There is no minute of what passed, but only the bill was delivered up. It is not discharged, however. If it had, we might have thought it had been intended to abandon their claim to the dividend; but from their merely giving up the bill, I

the first instalment or composition on Zuill's estate, fell far short of its amount, the Lord Ordinary does not think that the Bank, by giving up the bill while the letter authorizing the drawing of the first dividend remained uncancelled, can be held to have abandoned their right to that dividend. He rather considers the fair presumption to be, that the prospective right of drawing that first dividend truly formed part of the consideration for which the bill was given up."

June 27, 1832.
Dougalls v.
Macartney.

No. 348. cannot infer that they intended to give up their other security. Suppose the Bank had had another bill, would their giving up this without a discharge infer a departure from the separate security? I have no conception of that, and I think the interlocutor right.

June 27, 1832.
Dugall v.
Macartney.

LORD MEADOWBANK.—I am a good deal puzzled, and do not exactly see the justice of the grounds on which the Lord Ordinary proceeds. The pursuers were under no obligation to pay Zuill's debts, but he being in jail, they offer to give a bill payable by instalments; and as an additional security to the Bank, there is put into the letter, in which the Bank withdrew their ranking, a stipulation that they were to be paid the first dividend, for which credit was to be given on the back of the bill. This was not reserving the ranking by the Bank, but a stipulation in security of the bill. Subsequent to this, it is averred that the transaction was intimated to the trustee. Then, what is said to have taken place? Payments were made to the extent of £220; and it is farther alleged, that under the belief that the transaction was illegal, a new contract takes place. It is not necessary that it should be made out to have been illegal; but it is averred that the new arrangement proceeded on the belief of its illegality. Then can we suppose, that after these parties pay £220, and get up the bill, if the Bank were still to rank on the estate, they would not have required a document providing that the pursuers were not to rank? If we sanction the interlocutor, we will make the pursuers pay £220, besides £87 from the estate, they being parties originally under no obligation whatever; and, under the averments made, I am unwilling to shut them out.

LORD CRINGLETIE.—I take a different view, and agree with Lord Glenlee. In not exacting the whole £500, the Bank have dealt very favourably with these parties, and have met with a very bad return. The only difficulty is just whether it was understood that the dividend was still to be drawn, notwithstanding delivery of the bill; and when the letter to the trustee is retained, I cannot doubt but that it was still so understood.

LORD JUSTICE-CLERK.—If production of the letter said in the summons to have been written to the trustee, is wished for, I have no objections; but if it be in the terms stated, looking at the whole transaction, I am satisfied the interlocutor is right; and it is of no consequence how much had been paid on the bill. They never interposed the trustee to pay the first dividend to the Bank. The letter was not recalled, and the dividend has been paid, and the fair presumption is that deduced by the Lord Ordinary.

TOD AND WRIGHT, W.S.—J. A. CAMPBELL, W.S.—Agents.

EDINBURGH OIL GAS-LIGHT COMPANY, Pursuers.—Keay—Maitland— No. 349.

H. Bruce.

DAVID CLYNE, Defender.—Boswell.

Et e contra.

June 28, 1832.
Edin. Oil Gas-
Light Co. v.
Clyne.

Arbitration—Process.—Homologation.—1. Two counter actions being judicially referred, and the referee having decided the claims raised under each summons, and having inserted a reservation of other claims—held that the Court should interpose its authority to the award, and plea repelled that the reference was not exhausted. 2. Circumstances in which the objection was repelled, that a party had not consented to a judicial reference.

In January 1827, the Edinburgh Oil Gas-Light Company raised an action against David Clyne, S.S.C., to recover the fifth and sixth calls upon 52 shares of the company stock, held by him. They concluded for payment “of £130 sterling, payable on January 10, 1826 (with interest), and of the further sum of £130 sterling, payable on February 13, 1826,” with interest.

June 28, 1832.
1st DIVISION.

Clyne pleaded in defence, *inter alia*, that the calls were not for the necessary purposes authorized by the statute, but were occasioned by unwarrantable speculations on the part of the pursuers. The following issue for trial was adjusted in June 1831. “Whether the defender is indebted and resting owing to the pursuers in the sum of £130 sterling, or any part thereof, with interest thereon from the 10th day of January 1826, and the sum of £130 sterling, or any part thereof, with interest thereon from the 13th day of February 1826, as the instalments or instalment on the shares of the said Company, held by the defender as aforesaid?”

In the meantime, (October 1829,) Clyne raised an action against the Oil Gas Company, setting forth that he held fifty-two shares in the concern, corresponding to a capital stock of £1250, as on 21st April 1824; that he had paid instalments, &c. on his stock, amounting, with interest, as on 15th October 1829, to £1019; that the market price of his stock as on 21st February 1825, with interest to 15th October 1829, was £1183; that the company was established for the manufacture of oil gas, and was debarred by the statute constituting it from making coal gas: that meetings of the company, or of committees of their body, had adopted various unwarrantable and irregular proceedings, and had ultimately made an agreement with the Edinburgh Coal Gas Company, to surrender their whole property to that company, and to dissolve the Oil Gas Company, on condition of the Coal Gas Company admitting the Oil Gas Company as proprietors of 1000 shares of the Coal Gas Company’s stock, chiefly to be distributed among the oil gas shareholders, in proportion to their shares in the Oil Gas Company, and the oil gas shareholders to be subject

No. 349. to the regulations of the Coal Gas Company; that the pursuer had never assented to these proceedings, and therefore the Oil Gas Company and their directors were bound to repay to him the sums advanced by him, and also to refund the loss he had suffered by the unwarrantable abandonment of the original company, and the amalgamation with a new one. He concluded for payment of £1183, with interest from October 15, 1829.

June 28, 1832.
Edin. Oil Gas-
Light Co. v.
Clyne.

The Oil Gas Company pleaded in defence, inter alia, that their whole proceedings were proper and warrantable; that these proceedings had been homologated by Clyne; that they had been beneficial to him; and that, at all events, he could only claim repetition of the sums paid by him to the Oil Gas Company.

In this cause the following issue was prepared for trial: "Whether the defenders wrongfully violated the provisions of the aforesaid statute, and thereby became indebted to, and are resting owing to the pursuer in the sum of £1183, 10s. 5½d., or any part thereof, with interest thereon, as the value of the shares of stock held by the pursuer, as foresaid? Or,

"Whether the pursuer homologated or acquiesced in all or any of the said actings of the defenders?"

Both causes came on for trial on 19th December 1831, and, after the counsel for Mr Clyne had opened his case, the following agreement was subscribed by the counsel for both parties. "The parties agree to refer the two actions to Mr John Boyd Greenshields, with full powers to determine all questions between the parties, and to determine the question of expenses, and they request the Court to interpose their authority to this minute of judicial reference.

"Failing Mr Greenshields, the parties agree to refer to any referee to be named by the Lord President."

On the same day the Lord President made a remit to Mr Greenshields, who, however, declined to accept. Clyne wrote, on the same day, to the clerk of the Jury Court, stating that he had just returned from the Jury Court, and was ignorant of the tenor of the minute which had been proposed or agreed to; that the proposal was quite unexpected by him, and therefore he took the first opportunity of stating, that if it "contains any thing prejudicial to the ordinary remedies of law, and particularly to the right of appeal to the House of Lords, it is what I cannot assent to." He wrote in the same terms to the opposite agent. On 22d December, he moved the Court to remit both causes to the Lord Ordinary, and the Oil Gas Company at the same time moved the Court to name a new referee. The Lord President then, "in virtue of the power given to him by the within judicial minute, and in respect Mr Greenshields has declined to accept, names Mr Duncan M'Neill, advocate, as judicial referee in these cases: And the Lords of new remit to the said Duncan M'Neill, as judicial referee, to consider the cases, and to report; and continue both cases till such report is made, and refuse both motions for Mr Clyne."

Mr M'Neill accepted the reference, and on 25th May 1832, pronounced No. 349.
 an award, on the narrative, inter alia, of " my having frequently met with
 the agent for the Edinburgh Oil Gas-Light Company, on behalf of the
 said company, and with the said David Clyne for himself, and having
 seen and considered the said two causes, and the mutual claims and alle-
 giances and pleas in writing, and the books and documents produced,
 and having heard and considered the parole proof adduced by both parties
 for several days before me; and having thereafter, on the 27th day of
 February 1832, heard the counsel for both parties at great length on the
 proof and documents, and whole merits of both causes, and having there-
 after, on the 19th of March 1832, issued full notes of my views thereanent;
 and having thereafter on the 11th of May 1832, at the desire of the parties,
 again heard the counsel for both parties fully, and being well and ripely
 advised in the whole matters, and having God and a good conscience
 before my eyes, I do give and pronounce my final decision, determina-
 tion, and award as follows : Primo, I find that in the action at the instance
 of the Edinburgh Oil Gas-Light Company against Mr Clyne, the pur-
 suers are entitled to decree for £130 sterling, with legal interest thereof
 from the 10th of January 1826, and for the further sum of £130 sterling,
 with the legal interest thereof from the 13th of February 1826, being the
 two calls or instalments concluded for in the summons at the instance of
 said company against Mr Clyne, and amounting, the said two calls
 or instalments, with interest, to £289, 16s. 10*½*d., at Whitsunday 1828.
 Secundo, I find that in the action at the instance of Mr Clyne, against
 the Edinburgh Oil Gas-Light Company, he is entitled to decree for
 £780 sterling, with the legal interest thereof from the term of Whitsun-
 day 1828, but that the said company is entitled to deduct therefrom the
 aforesaid sum of £289, 16s. 10*½*d. found due to them as at Whitsunday
 1828, leaving a balance due by the said company to Mr Clyne, at Whit-
 sunday 1828, of £490, 3s. 1*½*d., which sum, with the legal interest thereof
 from Whitsunday 1828, till paid, Mr Clyne is entitled to recover from the
 said company, upon his surrendering the fifty-two shares of the Edinburgh
 Oil Gas-Light Company stock held by him, or transferring the same in
 favour of the said company, or of any person or persons they may direct, for
 their behoof. Tertio, I find that the Edinburgh Oil Gas-Light Company
 are entitled to reservation of any claim they may have against Mr Clyne for
 any calls or instalments subsequent to 13th February 1826, paid by other
 partners of the company, but not paid by Mr Clyne, and that Mr Clyne
 is entitled to have his defences against any such claim reserved, and that
 the said company are not entitled to withhold or delay payment in the
 meantime of the said balance of £490, 3s. 1*½*d. and interest, or any part
 thereof, on account of any such alleged claim for subsequent instalments.
 Quarto, I find that neither party is entitled to expenses against the other
 party, but that both parties are conjunctly and severally liable to the clerk
 to the reference for his expenses and trouble, which I tax at £21 sterling,

June 28, 1832.
 Edin. Oil Gas-
 Light Co. v.
 Clyne.

No. 349. with relief to either party paying the same against the other party to the extent of one-half," &c.

June 28, 1832.

Edin. Oil Gas.
Light Co. v.
Clyne.

The Oil Gas Company applied to the Court to interpose their authority to the award. Clyne opposed the motion, contending, 1. That he had never been a party to the reference, and only recognised Mr M'Neill as a commissioner leading a proof, on the import of which Courts of law were to decide; and, 2. That the award was *ex facie* irregular, as it did not exhaust the reference, but reserved to the Oil Gas Company any claims against him for instalments subsequent to February 13, 1826. The company answered, 1. That the judicial reference was regularly entered into; the jury had been discharged on the faith of it; and both parties had pleaded before the judicial referee; and, 2. That the award did exhaust the reference, as the claims which it had reserved, did not fall within the conclusions of either of the actions referred.

LORD PRESIDENT.—It was only the two actions remitted to the referee, and the issues in them, which the referee could decide. He has given judgment on the claims made by each party respectively in these actions, and reserved *quoad ultra*. His reservation, therefore, applies only to matters not falling under the reference, and gives no ground for maintaining that his award does not exhaust the reference. I think the Court ought to interpose their authority to the award.

LORD BALGRAY.—I do not think there is any room for doubt in this case. There are just two questions that arise. First, was this a regular reference, binding on the parties? Second, is the award *ultra vires* of the referee, or *ex facie* irregular? I think it clear that the reference is binding. I perceive on the record of the Court a judicial reference agreed to, and a remit made, so that Mr M'Neill, from the moment of acceptance, was bound to decide the matters referred. In doing so, what course should he have pursued? He must have taken up the summons of each of the parties, so as to learn the claims made by each party against the other, and ascertain what were the demands upon which he was to decide. After examining these, and the tenor of the issues, the referee proceeds to explicate the facts, and decide the two causes. He unites in himself the powers which would otherwise have been exercised by the judge and the jury before whom the actions came. I think he decides the whole claims falling under the actions referred. His reservation applies to other claims only, which claims, indeed, would have reserved themselves at any rate, but he inserts a special reservation as to them, for the purpose of keeping the respective claims and defences of both parties entire. I have no hesitation in these circumstances in interposing the authority of the Court.

LORD CRAIGIE was understood to express a doubt as to the propriety of interposing the authority of the Court, on account of the reservation, which appeared to be contrary to the object of the reference.

Keay, for the Oil Gas Company.—The reservation was thought a necessary precaution, to prevent it from being afterwards argued that the claims to which it refers, had fallen under the reference.

THE COURT then interposed their authority, and remitted to the auditor to tax the expenses of the reference.

THOMAS FREEN and Others, Pursuers and Suspenders.—*Penney.*
ALEXANDER BEVERIDGE, Defender and Respondent.—*Christison.*

No. 350.

June 28, 1832.
Freen, &c. v.
Beveridge.

Trust—Parent and Child.—A father, in reference to the antenuptial contract of his daughter, having disposed his estate to three trustees without naming a quorum, or conferring any power of devolution to be held for behoof of his daughter and husband in liserent, and their children in fee; and two of the trustees, without the consent of the other (who had never acted, but declined to renounce till satisfied on a particular point), having disposed, with consent of the spouses for themselves and children, a part of the trust-estate to a trustee, for behoof of the creditors of the father,—held, that this trust-deed was incompetent, that the spouses were not barred from insisting in a reduction of it, and that their consent could not affect the interests of the children.

THE late Mr John Scott was proprietor of Halbeath colliery and salt-work, over which the Bank of Scotland held an heritable security for a cash bond. In May 1827, his daughter, Miss Sarah Hamer Scott, was married to Mr John Clarkson. In an antenuptial contract or agreement, written in England, to which these three persons were parties, Scott disposed and conveyed the Halbeath colliery, and other property real and personal in Scotland and England, to “ Robert Taylor of Blackness, Andrew Roxburgh of Inverkeithing, and Thomas Freen of London, their heirs and assignees.” The deed narrated, that Scott held the colliery, “ subject to the balance of account due from him to the Bank of Scotland, now computed to be £6000, or thereabout.” The conveyance was in trust “ to the use of the said John Scott until the said intended marriage; and immediately thereupon, upon trust to permit the said collieries and salt-works to be carried on as at present, and subject to the payment and indemnity to the Bank of Scotland, and their agent, of and against all sum and sums of money to which the said John Scott is liable, whether due or in course of currency, the same being secured by infestment, &c.; and also to the sum remaining due to Mr Martin’s executors, &c., and to permit and suffer the said Sarah H. Scott to receive the rents, issues, profits, benefits, and proceeds arising therefrom to her own separate use, during her natural life, independent of the said John Clarkson,” &c. After her decease, the trustees were “ to stand possessed of all the said trust premises” (subject to such charge thereon as she might make on certain conditions), “ in trust, for the benefit of the said John Clarkson for his life; and after his decease, to sell and dispose of the said trust property, and to invest the net proceeds in government funds in their own names, for the use of the children of the said marriage,” &c. Power was given to the trustees, “ with consent of the lady,” by any writing subscribed before two credible witnesses, to let the trust-premises; and power was given to them “ to sell all the premises before conveyed,” at her request, attested as above mentioned, if she was still in life. It was also declared,

June 28, 1832.
1st DIVISION.
Ld. Moncreiff.
B.

No. 350. "that if either of the said trustees, or any future trustee, should die, or be desirous of being discharged from, or decline, or become incapable to act in the trusts hereby in him reposed as aforesaid, it shall be lawful to and for the said Sarah Hamer Scott, by and with the consent of the said John Scott, and, if he should be dead, of the remaining trustees, by any writing signed before two credible witnesses, from time to time to nominate and substitute any other person to be a trustee in the stead and place of the trustees so dying," &c. The trustees were entitled "to pay each other all costs, charges, damages, and expenses which they may sustain in the execution of the trust;" but were to act gratuitously.

June 28, 1832.
Freen, &c. v.
Beveridge.

In August 1827, this agreement was followed by a separate trust-disposition of the Halbeath colliery and salt-work, by Scott, in favour of " Robert Taylor, Andrew Roxburgh, and Thomas Freen, and the survivor or survivors of them, their heirs and assignees;" under which they were infest. There was no provision as to any part of their number being a quorum.

In August 1828, at which time the debts of the Halbeath colliery were said to amount to £25,000, a trust-conveyance of the colliery and salt-work was executed, which purported that the granters were, " Robert Taylor, Andrew Roxburgh, and Thomas Freen, trustees under articles of agreement between John Scott, John Clarkson, and Sarah Hamer Scott, dated May 1827; and also as trustees under a disposition by John Scott, in August 1827, in virtue of which disposition we were duly infest, &c., with the special advice and consent of Sarah H. Scott or Clarkson, and J. Clarkson, her husband; and we, the said Sarah H. Scott and J. Clarkson, for ourselves, and for all right, title, or interest which we have in the premises," &c. The deed proceeded on the narrative, that the Halbeath colliery and the three trustees were indebted in various sums to a large extent; and that for the more ready payment of the debts, and to prevent the cost of separate diligence, the trustees had been requested by Mrs S. H. Scott and her husband, and they felt it "to be necessary, to grant the trust-right and disposition underwritten." Therefore the trustees, with consent of Mrs H. Scott and her husband, for themselves, and in name of their children, and for their whole interest, disponed the Halbeath colliery and salt-work, their outstanding debts, &c. in favour of Alexander Beveridge, as trustee for the creditors of the Halbeath company, "and to any other trustee whom the creditors of the said company may appoint," &c. Power was given to Beveridge to sell the whole subjects conveyed, on certain notice being given in the newspapers; to name such factors as he saw fit, ("with such powers, and liable to such diligence as he shall think proper," and "to give such salaries to such factors or agents, &c. as he shall think proper"), and to carry on the working of the coal as far as he might see proper, under the condition that a majority of the creditors in value might stop or limit his working. The proceeds realized were to be applied, "after suitable gratifications to the said trustee," in pay-

ment of the creditors of the Halbeath company ; and the residue of the trust-estate, if any, was to be re-disposed to Taylor, Roxburgh, and Freen, or to those having right. It was provided, that Beveridge, " or any other trustee named by the creditors, shall be nowise obliged to do diligence other than as he shall think fit, nor shall he be liable for omissions, but for his own actual intromissions only." The trustees for the creditors were not to be liable in solidum, but each for his own intromissions only, and were to be no farther liable for their factors than that they should be habit and repute responsible.

At the date of this deed, John Scott was alive, but he died in about a month afterwards. There was no evidence of his having known of it ; but, in April 1828, he had written a letter to Beveridge's brother, containing these words, " As to a trust, I am sure my daughter and her husband can have no wish but to act without deviating, right or left, from whatever line the Bank may draw." Beveridge's brother was the Bank of Scotland's agent, who was personally liable to the Bank for a large part of the debt due by the Halbeath company to the Bank. The creditors of the Halbeath company did not sign any accession to the trust. The deed was signed by Taylor and Roxburgh, two of the trustees. When Freen was asked to sign, he wrote the following letter to a Mr Platt, the agent of Beveridge : " Having never acted as a trustee in Mrs Clarkson's marriage-settlement, I cannot subscribe to a deed which fixes upon me the consequences of the acts of others, and makes me assume liabilities I know nothing of. I do not doubt the arrangement is a very prudent one, and, as one of Mrs C.'s trustees, shall throw no impediment in the way of it. I am advised to disclaim and renounce the trusts, by a short deed of disclaimer and renunciation, which will have the effect of giving legal validity to the acts of the other trustees without me. I am informed by Mrs C., that a promise of the lease of the salt-works was made to her, if she consented to this arrangement. I think this promise should be fulfilled, and I should like to know that it was fulfilled before I sign any thing. Upon hearing from you, I will prepare a disclaimer," &c. Platt afterwards wrote to Freen to sign a renunciation of the trust, as he " declined signing the trust-deed," to Beveridge, but Freen did not comply with the request. At a subsequent period, he signed a deed along with the other two trustees, disposing of part of the trust-property situated in England.

Beveridge entered on the management of the estate, and, after some time, advertised a sale of it, to take place on the 9th of March 1830. A bill of suspension and interdict of the sale was then presented in the name of Freen, and Mr and Mrs Clarkson, and Mr Clarkson as administrator-in-law for his children. The bill was passed, and a reduction of the trust-deed, in favour of Beveridge, being brought by the same parties, was conjoined with the suspension.

Pleaded by Clarksons and Freen—

1. Freen was a trustee, and he, singly, had a title to pursue ; Mr and

June 28, 1832.
Freen, &c. v.
Beveridge.

No. 350. Mrs Clarkson could also pursue for the interest of their children. But farther, as they had only consented to the new trust-deed to Beveridge, June 28, 1832.
Freen, &c. v. on the faith that Freen was to sign it, they might pursue for their own Beveridge. interest also. If the deed was funditus null, no acting under it by Beveridge could save it from reduction.

2. The new trust-deed being the devolution of Scott's trust to a third party, was ultra vires of Scott's trustees.

3. The deed, being an alienation of chief part of the trust-estate, required the concurrence of all the three trustees, and was invalid as the act of two only.

4. The deed, conferring greater powers and privileges on Beveridge than were possessed by the grantors of the deed themselves, was on that account reducible.

Pleaded by Beveridge—

1. Freen was barred from pursuing, both because his letter to Platt had waved all objection to the deed, and because he had never acted as trustee. Mr and Mrs Clarkson were barred from challenging the deed, as they were parties granting it. Besides, Beveridge had acted under it for nearly two years, and it was now too late to challenge it.

2. The new trust-deed was merely meant to provide for the interim administration of the Halbeath concern, with a view to its being speedily sold, and to prevent the trust-creditors from pursuing separate diligence. It was an act of beneficial and necessary administration, and as the free proceeds, if any, were to be paid to Scott's trustees for the purposes of the trust, there was no devolution of that trust, which, on the contrary, still subsisted.

3. Even had Freen been an acting trustee, the new trust-deed was valid, being executed by a majority of the trustees.

4. The deed was truly intended as the best means of giving effect to the trust-deed of Scott, and was, in substance, conformable to it. Large powers of letting or selling were expressly given to Scott's trustees, and, in particular, provision was made for the eventual appointment of an entirely new set of trustees. Besides this, it arose from the nature of the trust-estate, a large colliery, that very ample powers of borrowing, &c., were necessarily implied. It was within these powers to take the best mode of winding up the concern, when necessary, and the voluntary trust-deed to Beveridge was therefore within their powers, express or implied.

The Lord Ordinary found, "that by the original deed of agreement, disposition, and assignation, executed by the deceased John Scott, in contemplation of the marriage of his daughter, Sarah Hamer Scott, the various subjects, real and personal, therein enumerated, partly situated in Scotland, and partly in England, were effectually conveyed to and vested in the pursuer, Thomas Freen, Robert Taylor, and Andrew Roxburgh, upon trust, for certain defined purposes, and with certain specified

powers for carrying those purposes into effect; and that there was there- No. 360.
 by provided and reserved, for behoof severally of the said Sarah Hamer June 28, 1832.
 Scott, and of the children of the intended marriage, certain legal rights Freen, &c. v.
 and interests of life-rent and fee respectively, in the whole funds and sub- Beveridge.
 jects under trust, according to the particular terms of the said provision :
 That the said deed of agreement and disposition confers no powers on the
 trustees so appointed, all or any of them, to devolve the said trust, gene-
 rally, on other parties, or to convey all or any of the subjects so vested in
 them to any other person or persons, upon trust, whether for the same
 purposes with those expressed in the said deed, or for other purposes :
 That the trust constituted by the said deed, being a trust in the persons
 of the three trustees above named jointly, and the powers of sale thereby
 conferred being given to the trustees generally, under the conditions, and
 with the qualifications therein expressed, and there being no provision
 that such powers might be executed by a majority, as a quorum of the
 said trustees, it would not have been competent for any two of the trus-
 tees, without the concurrence of the third, to perform such an act of
 alienation of the trust property : That it was not established that the pur-
 suer, Thomas Freen, did ever, by deed, or in any other competent form,
 renounce his character as trustee under the said deed : That the trust-dis-
 position now under reduction is a deed whereby the three trustees above-
 named, with the advice and consent of the said Sarah Hamer Scott and
 John Clarkson, her husband, for themselves, and on behalf of their chil-
 dren, alienated and disposed to the defender, Alexander Beveridge, as
 trustee for certain creditors of the Halbeath Company, 'and to any other
 trustee whom the creditors of the said company may appoint,' the col-
 lieries and coal-mines in the lands of Halbeath, &c., and all the subjects
 therewith connected, under various conditions and provisions, as therein
 expressed : But that the said trust-disposition does not purport to be, and
 does not, by any words, general or special, comprehend a conveyance of
 any of the subjects or funds situated in England, which were included in
 the aforesaid deed of agreement and disposition by which the original
 trust was constituted, or any appointment of trustees in regard to that pro-
 perty : That the said trust-disposition in favour of the defender, being a
 deed signed by Robert Taylor and Andrew Roxburgh, and by the said
 Sarah Hamer Scott or Clarkson, and John Clarkson, as consenting there-
 to, whereby the said parties attempted to constitute a new trust over a
 large part of the subjects contained in the deed of agreement, was not
 a deed which it was within the powers of the said two trustees, with such
 consent, to execute : That the pursuer, Thomas Freen, as one of the ori-
 ginal trustees, neither having renounced his character of trustee, nor con-
 curred in the execution of the deed under reduction, has a sufficient title
 and interest to maintain the present action, in defence and furtherance of
 all the provisions of the original trust ; and that the children of the mar-

No. 350. June 28, 1832.
Freen, &c. v. Beveridge.

riage of the said Sarah Hamer Scott and John Clarkson, have also a sufficient title and interest, not prejudiced by any consent given by their parents, to insist for reduction of the said deed; and in respect that the said deed bears to be granted by Thomas Freen, and that it was never signed by him, and farther, in respect of the other grounds of reduction set forth in the summons, found, that the said Sarah Hamer Scott and John Clarkson are not barred, by their consent given, from concurring with the said Thomas Freen in this action: Therefore, repelled the objection to the title of the several pursuers; and in the reduction, reduced, decerned, and declared, in terms of the reductive conclusions of the summons; in the suspension, declared the interdict perpetual, and decerned: And appointed parties to be farther heard on the conclusions of the summons, for count, and reckoning, and payment."*

* " Note.—The Lord Ordinary thinks this a very clear case. He does not enter into the question, as to the effect of the circumstances stated, to render it necessary or expedient that some different management should have been adopted for the management of the Halbeath colliery, and its dependencies, as a material part of the original trust-estate, or into the question as to the views and conduct of the defender, or Mr William Beveridge, in asking or taking the trust-deed under reduction. Whatever necessity there might be, and whatever might be the proper remedy, he is of opinion that this trust-disposition was funditus incompetent. It is impossible to bring it within the powers of sale given by the original trust, for there is no price stipulated; and it is a mere trust in all its form and substance. But the defender endeavours to bring it within the provision for the appointment of new trustees, where any or all of the trustees named have died, or are desirous of being relieved of it. But this is manifestly untenable: For, 1st, The power to appoint new trustees in that case, is not given to the existing trustees, but expressly to Mrs Clarkson, with a certain consent, according to circumstances. But, by the deed under reduction, she is made a mere consenter to the acts of the trustees; 2d, The power is to Mrs Clarkson, with consent of John Scott, if alive, 'by any writing signed in the presence of, and attested by two or more credible witnesses.' There is no such writing in process, and the general letter referred to by the defender, cannot be admitted as at all equivalent to the formal consent required; yet it is admitted on the record, that John Scott was alive at the date of the deed: 3d, The deed is not a nomination of new trustees in place of trustees dead, or wishing to be relieved. On the contrary, the original trust still subsists. The property conveyed to Mr Beveridge is only a part of the subjects of that trust: And therefore, even if the attempt had been made, it would have been incompetent for the trustees to denude of the trust pro parte. But, 4th, the deed in question does not profess to be, and is not in fact, a deed in the exercise of such a power, or a conveyance proceeding on a previous nomination by Mrs Clarkson. If this had been the nature of it, it would have taken a very different form. It is, on the contrary, avowedly a trust for creditors, with various powers and provisions, which are not warranted by the original deed; and the essential character of it is different, in so far as the trustee is to be paid for his trouble, while the original trustees were bound to act gratuitously; and there is power given to the creditors to name any other trustee. The Lord Ordinary therefore thinks that the trustees had no power to execute such a deed, under any circumstances. But he is farther of opinion, that even though such an act were

Beveridge reclaimed.

No. 350.

LORD PRESIDENT.—There was no trust-deed in favour of Beveridge effectually executed. No quorum of trustees was appointed. Freen is one of the trustees, yet does not sign the deed at all. It is therefore invalid; and even if he had signed, it would have been ultra vires of Scott's trustees, being just a devolution of their trust.

LORD GILLIES.—The case is a very clear one, and we must adhere. Whatever may have been the motives which prompted the execution of the deed in favour of Beveridge, or however expedient such a deed might be, we must reduce it, because the authors of the deed had no power to grant it. It would often be highly expedient for a man to perform many acts which are wholly out of his power, but such expediency cannot validate them.

The other Judges concurred.

THE COURT adhered, reserving all questions of expenses.

Pursuers' Authority.—3 Erak. 3. 34.

Defender's Authorities.—Watts, Dec. 22, 1692 (14700); Lord Drummore, Feb. 24, 1742 (14703); Children of Fisher, Aug. 2, 1758 (16361); Stuart, Jan. 28, 1829 (*ante*, VII. 330); 1 Erak. 7. 30; 1 St. 6. 14; Campbell, June 26, 1752 (7440); Hospital of Largo, July 15, 1608 (14722); Macintyre, June 12, 1824 (*ante*, III. 126); 1 Erak. 7. 15.

D. SMITH, W.S.—W. RENNY, W.S.—Agents.

within any of the powers of the trust, it could not be regarded as an act of ordinary administration, being, in fact, an alienation, *per aversionem*, of the principal part of the trust-estate; and, therefore, that it would have required the concurrence of the whole trustees. It does appear, indeed, that Mr Freen had not hitherto acted as trustee; that he contemplated renouncing the trust, and had declared his intention to do so. But the last words of the letter founded on expressly stated, that he required to be satisfied on a particular point, before he would sign any thing. It is no matter what foundation there might be for Mrs Clarkson's statement about the salt-works. Right or wrong, Mr Freen expressly refused to sign any writing of renunciation, until he should be satisfied with regard to it; and the very statement implies, that, up to that time, he was acknowledged as a trustee. He never did execute such a writing; he subsequently acted as trustee on the English property; and the deed under reduction, though bearing to be granted by him, is not signed by him. The Lord Ordinary, therefore, thinks that the deed is reducible separately, as not granted by all the trustees. But though he gives judgment on this point also, he thinks the case clear on the other ground."

No. 851. SIR ARCHIBALD CAMPBELL, Pursuer.—*D. F. Hope—Tait.*

June 28, 1832. HON. MRS ANN D. HAMILTON or WESTENRA, and HUSBAND, Defendants.
Campbell, v. —
Westenra, &c. —*Forsyth—Ivory.*

Superior and Vassal—Entry of Singular Successors.—1. Where a vassal had feued out his property in different parcels, with untaxed entries, for feu-duties merely equalling that paid by himself to the superior, and grassums, which, with the duties, were a fair consideration for the property at the time—Held, that on the entry of a singular successor, the superior was only entitled to a year's feu-duty, and a year's interest of the grassums, and not to a year's actual rent of the lands. 2. Question reserved as to the case of a composition for entry falling due to the vassal from his subvassals during the year when the entry of the former was required.

June 28, 1832. SIR ARCHIBALD CAMPBELL of Succoth is superior of certain lands in the neighbourhood of Paisley, in which Mrs Westenra is his immediate 2d Division. vassal, for payment of a feu-duty of £16 Scots, and 22 bolls of victual, the Ld. Fullerton. entry of singular successors not being taxed. The dominium utile of these lands formerly belonged to the Dukes of Hamilton, and in 1765, the then Duke subfeued them in small parcels at feu-duties not exceeding in all the feu-duty payable to the superior, but for prices or grassums, which, with the feu-duties, were admitted to have been a fair consideration for the lands at the time. The entries of singular successors in these subfeus were not taxed; the sub-vassals were taken bound to enter within a year; and subinfeudation was prohibited. Mrs Westenra having acquired right to the lands, by singular titles in the form of a conveyance, from the trustees of Douglas Duke of Hamilton, Sir Archibald Campbell demanded as the composition on her entry a year's rent of the property, including the rent of a number of houses which had been built thereon. This Mrs Westenra refused, but offered, besides a year's subfeud-duties, the interest at five per cent of the prices or grassums originally paid for the feus; and, on obtaining an entry, she paid this sum, upon an understanding, however, that she should still be liable for any further composition which Sir Archibald might be found entitled to. Sir Archibald thereafter raised a process of declarator, to have it found and declared that he was entitled to a year's rent as at the time of entry.

The Lord Ordinary reported the cause on cases.

Pleaded for Sir Archibald—

It is no doubt settled by the case of Cockburn Ross, that where the feu-duties stipulated for are a fair return for the lands at the time, the superior can draw no more from the vassal than this fair return. But the question which here arises was specially reserved in that case, and is not affected by it. This question is, whether, where the vassal has subfeued the lands for a nominal or illusory duty, taking himself a price or grassum, the superior is not entitled to a year's actual rent of the subjects as at the

date of entry. The statutes reserve to the superior "a year's rent No. 351. as the lands are set for the time." Now, when the feu-duty has been a fair return at the time it was stipulated for, it is the same as if the lands had been let for an extremely long lease; the feu-duties are truly the "year's rent as the lands are set for the time." But when the feu-duty is illusory, it cannot be permitted that the superior's right should be thus evaded, and such feu-duty can never be held a year's rent in the sense of the statute. Then if so, the superior must be entitled to a year's actual rent of the land, and his claim to this cannot be precluded by an offer of the interest of the grassums or price, because that in no respect can be considered a year's rent in terms of the statute, and there is no authority or principle for substituting it in stead thereof. Besides, in the present case, the subvassal's entries are not taxed, and as there is no subinfeudation allowed by them, Mrs Westenra is in use to receive as compositions for the entry of singular successors in the subfeus, a full year's rent as the subjects are set or are worth, and so, at all events, the superior is entitled to the average yearly value to her, in addition to the year's interest of the price.

June 28, 1832.
Campbell v.
Westenra, &c.

Pledged for Mrs Westenra—

The principle of the case of Cockburn Ross rules the present against the defender. It was there decided, that when a vassal in a bona fide exercise of his powers feus out his property for a fair consideration as at the time, the superior cannot demand more than the yearly return so bargained for by his vassal. In the case of Ross, the whole consideration was the feu-duty. Here it was partly feu-duty, partly grassum, but this is merely a difference in the shape of the return, and does not make the transaction less fair, or in any way a fraud on the superior, although he may be entitled to have the actual consideration reduced to a yearly return, so as that he may not be deprived of his just claims. This, however, is done by the interest on the grassums already paid, and he is clearly entitled to demand nothing more.

LORD CRINGLETIE.—The principle which must rule the present case, appears to me to have been decided in that of Cockburn Ross. The facts are not the same, but the principle is settled in the words of the rubric of the report in the Faculty Collection, that "when a vassal subfeus his possession for its full adequate value at the time, it is only a mere subfeu-duty, not a year's rent, which he is bound to pay to the superior as a composition for an entry as a singular successor." This was afterwards affirmed by the House of Lords. Now, the difference between that and the present case, is, that the entries in Cockburn Ross's case were both taxed; here they are not taxed; and the subfeu-duty is only 10s. more than that payable to Sir Archibald Campbell, but a considerable grassum was paid. It is admitted that the feu-duty with the grassum, amounted to an adequate consideration, and 5 per cent is offered as interest. If the sub-entries, by singular successors, had been taxed, that would have been following out the principle of Ross.

No. 351. But as the entry was not taxed, it is clear a smaller price would be given than if taxed, and Mrs Westenra has received year's rents at the entries of singular successors in her subfeus. I think, therefore, a value should be put on the average of these entries, and if that is done, I think it would be in conformity to the principle of the case of Ross, to allow Sir Archibald Campbell that, and not a year's rental.

LORD MEADOWBANK.—There would have been a great deal in Lord Cringletie's view, had Sir Archibald Campbell not admitted that the duty and grassum alone were a full and adequate value at the time.

LORD JUSTICE-CLERK.—The principle on which the parties have made their interim arrangement, is in conformity to the opinion of the late Lord Meadowbank, at one of the stages of Cockburn Ross's case, not mentioned in the report, and I think it the fair principle. In Cockburn Ross's case the entries were taxed at double feu-duty, and in a second reclaiming petition for the superiors, we were craved to find them entitled not merely to a year's feu-duty, but to "one year's average value of the whole profits derived by the pursuer from his casualties, or in any way whatever." But the Court refused the petition without answers, and the whole judgment was affirmed, and so it was decided that no more was exigible than the annual feu-duty. Till I adverted to that, I was inclined to think we might have taken an average, as Lord Cringletie proposed; but as that judgment stands, I do not think we can allow such estimation to be made. If we could have known what she drew at that very time, an argument might have been raised under Lord Meadowbank's interlocutor, that the superior was to have that year's whole profits. But no such special case is set forth, and I do not think we can go into the question of common average.

LORD GLENLEE.—I certainly understood that this was an open question, notwithstanding the decision in the case of Ross; but, on the other hand, that while the mid-superior would not be allowed to defraud the overlord, yet if what he does is bona fide a fair transaction at the time, the rule is that we are not to take into view matters of entries, because, though these being untaxed diminished the price given, yet they were incidental profits, and nothing fraudulent is alleged. If it had been the fact that one of these casualties had occurred during the very year of the entry, the superior would have had a great deal to say, for, if he had got a decree of non-entry, he would have drawn it.

LORD CRINGLETIE.—My view was founded on the words of the act, that, in determining the rent, the subjects were set for the casualties from a consideration, but there is certainly nothing of that stated in the record.

The Dean of Faculty enquired if the profession were to understand it to be still open, whether a superior might not claim casualties falling due the year of the entry.

THE COURT intimated, that they did not consider themselves as deciding that point, and they found that Sir Archibald was only entitled to a year's sub-feu-duty, and interest of the grassums, and assoltized.

TARLIS AND YOUNG, W.S.—P. ADAM, S.S.C.—Agents.

ALEXANDER BROWN and Co., Advocators.—*Shene—Innes.*
 ROBERT URE (SCOTT'S TRUSTEE), Respondent.—*D. F. Hope—Monteith.*

No. 352.

June 28, 1832.
 Brown, &c. v.
 Ure.

Agent and Principal.—The agent of a foreign merchant having obtained consignments to him from a merchant in this country, on making advances on the goods consigned, and these having been sold, so that the foreign merchant could have remitted the full price, but not having remitted till the exchange fell so low that the proceeds did not cover the agent's advances—held, that the agent was not entitled to recover the difference from the consigning merchant made.

ALEXANDER BROWN and Co., merchants in Glasgow, were, in 1825, June 28, 1832. applied to by John Scott there, for consignments to his brother William Scott, who was settled at Rio Janeiro, John Scott agreeing to make advances by bills to the extent of one-half of the invoice amount of the goods consigned. Brown and Co., in consequence, consigned goods to William Scott; and John Scott granted bills, which were repeatedly renewed, owing to a temporary inability to retire them, but they were ultimately retired by him to the extent, as he alleged, of £657. In the meantime, the goods consigned had been sold at Rio by William Scott, at prices which, deducting charges, left of free proceeds 4458 milreas, equal, at the then rate of exchange, to upwards of £700. Instead of then remitting the proceeds according to his instructions, William Scott retained them for two or three years, and then remitted them, but the exchange had in the meantime fallen so much that they realized little more than £400. This remittance was received by John Scott, who imputed it pro tanto in extinction of his advances to Brown and Co. His estate having been sequestrated under the bankrupt act, the respondent Ure was elected trustee. For the balance of the advances, alleged to be about £250, Ure raised an action before the Sheriff of Lanarkshire against Brown and Co. In this action, Ure gave in a condescendence, averring, that John Scott acted as agent for his brother, and had agreed to make advances conformably to the practice of trade, but that these advances were made from his own funds, and at his own risk. Brown and Co., on the other hand, averred that John Scott was a partner of his brother, and participated in his commission; and, at all events, that, according to the practice of trade, no claim lay on the part of an agent for advances, such as were made here, when the proceeds of the goods, on being sold, were sufficient to cover them; and that the claim for reimbursement lay, in that case, against the consignee, and not against the consigner. To this averment of practice, Ure answered,—“Totally denied; and the pursuer avers, on the contrary, that the practice is the very opposite of what is here alleged. At any rate, the practice has nothing to do with the present case, which is one standing upon its own circumstances, and is proved by the writings in process.”

2d Division.
 Lt. Mackenzie.
 F.

No. 352. The Sheriff at first allowed "the pursuer a proof prout de jure of the character in which John Scott acted throughout the transaction in question, whether he was a partner or guarantee for William Scott, or simply an agent, the reimbursement of whose advances upon the consigned goods was not to depend upon the sale of the goods, or remittances by the consignee;" but on a reclaiming petition for Ure, he recalled his interlocutor, and pronounced as follows: "Finds it instructed by the writings in process, that John Scott, the pursuer's constituent, acted merely as agent for William Scott in the transaction in question: finds, that John Scott is not accountable for any mora on the part of William Scott, in remitting the proceeds of the sales of the goods consigned, repels the defences, and decerns against the defenders for £656, 7s. 1d., with interest from the 21st January 1830, deducting a remittance of £409, 1s. 11d."

Brown and Co. brought an advocation, in which the record in the Inferior Court was agreed to be held as the record in the cause, with additional pleas in law merely. In these, Brown and Co. pleaded, that, according to mercantile practice, an agreement by an agent to make advances, in consideration of consignments to his correspondent abroad, is not to be held as a transaction purely between the agent and the consigner, but as made on account of the consignee, and, consequently, that the agent is not entitled to claim reimbursement from the consigner, under circumstances in which the consignee could not have done so; and that as the proceeds of the goods drawn by the consignee were sufficient to have covered the whole advances, if timely remitted, and only proved insufficient by the consignee's negligence, his agent could not have recourse on the consigner for the difference between his advances and the amount of the remittances to him from the consignee.

On the other hand, Ure pleaded, that according to mercantile usage, such agents as John Scott (who were said to be vulgarly known by the name of "drummers") were entitled to reimbursement from the consigners of the goods, without reference to the returns by the consignee.

The Lord Ordinary advocated, and assailed Brown and Co., with expenses, adding the subjoined note.*

Ure reclaimed, and craved an issue on the question of mercantile usage.

* "NOTE.—It being admitted that John Scott was agent for William Scott, and that he (John) having procured a consignment of goods as to his constituent, did, acting as such agent, make an advance equal to a part of the estimated value of the goods, to the consigners, by accepting bills to them as for value, the Lord Ordinary thinks himself bound to presume that the advance was made for the consignee, in consideration of the consignment in the usual way; and sees no competent offer of proof, or even averment, made by the respondent, sufficient to establish that there was a special contract to the effect that, notwithstanding all these circumstances, the bills should be held to be accepted merely as a loan granted by the agent tanquam quilibet, and repayable absolutely, without regard to the consignment or its proceeds at all."

Skene, for Brown and Co.—John Scott granted bills to Brown and Co., No. 352. and no proof can be allowed to affect the question of how far they were for value, other than by writ or oath.

June 28, 1832.
Brown, &c. v.
Ure.

LORD JUSTICE-CLERK.—The Sheriff allowed a proof as to the character in which this man acted. Now, this would have opened the question of practice, and yet Findlay & Co. Ure reclaimed against his interlocutor, and he cannot ask us now for what he declined before.

LORD MEADOWBANK.—It is clear he has admitted himself out of Court before the Sheriff, and we cannot let him in again here.

LORD CRINGLETIE.—What occurred to me was this. Suppose the advances had been made by William Scott himself, it is clear Brown and Co. must have repaid the difference between the advances and the proceeds, if his conduct had been unobjectionable. But then the goods were sold for more than the advances, and would have satisfied them, if they had been duly remitted. In these circumstances, William Scott could not have demanded the difference, and his agent is in the same situation.

THE COURT adhered.

DALLAS and INNES, W.S.—W. A. G and R. ELLIS, W.S.—Agents.

JOHN FLEMING, Advocator.—*D. F. Hope—Brown.*

No. 353.

JAMES FINDLAY and Co., Respondents.—*Rutherford—Russell.*

Agent and Principal—Compensation—Reputed Ownership.—Circumstances held sufficient to certiorate a purchaser that the seller was acting as agent merely, although the name of the principal was not mentioned, so as to exclude a plea of compensation on a debt due to the purchaser by the agent.

WATSON and LENNOX were commission-agents in Glasgow, whose chief business consisted in selling the goods of others on commission, although occasionally, to make up parcels, they purchased and sold goods on their own account; this, however, being (as one of the parties deponed) “rather an exception to their business than constituting a separate business.” In their character of agents they had been in the course of frequently transacting with the advocator Fleming, a merchant in Glasgow, to whom, in the beginning of October 1828, they sold certain parcels of cotton yarn; a small portion of this had been purchased by themselves, while the remainder belonged partly to the respondents, James Findlay and Co., (who had consigned them to Watson and Lennox for sale, under a del credere commission,) and partly to a house in Manchester. No mention was made by Watson and Lennox to Fleming, of the parties to whom the yarn belonged, nor did it appear that it had been specially stated that it was not their own property; but the invoice sent with it was in the ordinary printed form used by Watson and Lennox, which was headed thus:—“ Bought of Watson and Lennox, agents, 8, Ingram Street;” and under this were stated the several parcels sold, without any

2d DIVISION.
Fullerton.
R.

No. 353. distinction. Shortly after the yarns were delivered to Fleming, Watson and Lennox became bankrupt, without having obtained any settlement from him on account of that sale, but being considerably in his debt on other transactions.

June 29, 1892.
Fleming v.
Findlay & Co.

Findlay and Co. having demanded from Fleming payment of the yarns which belonged to them, he refused, on the ground that he had not dealt with Watson and Lennox as agents in regard to this sale, and was entitled to set off his claim on them against the price of the yarns. Findlay and Co. thereupon raised an action before the Magistrates of Glasgow, in which a proof was allowed, and the facts as above detailed established.

Pleaded by Fleming—

Where an agent transacts as if he were principal, the party contracting with him is entitled to the benefit of every plea of compensation he would have had were he truly the principal, and it is not sufficient to deprive him of this that he be aware of the agent's general profession. It is necessary that his character of agent in reference to the particular transaction should be known.¹ Now, here there was nothing to certify Fleming, that, in regard to the sale in question, Watson and Lennox were acting as agents. The invoice could not have this effect, because it only set forth their general profession as agents, and the same form of invoice was used whether the goods belonged to themselves or to others, and indeed the invoice of this very sale contained goods belonging to themselves. Then no special notice of their character was given, and under these circumstances Fleming was entitled to deal with them as principals, and is now entitled to set off his claim on them against the price. Further, as Watson and Lennox guaranteed the sales to Findlay and Co., the latter looked solely to them, and are not entitled to come against purchasers who have a larger claim against the agents.

Pleaded by Findlay and Co.—

Under all the circumstances of the case, Fleming was fully certified that he was dealing with Watson and Lennox in their character of agents. That was their notorious mercantile character, and any sales occasionally made on their own account were exceptions from their general course of dealing. Fleming had repeatedly transacted with them in their character of agents, and in no other; and when under these circumstances he purchased the yarn in question, and received an invoice in which they were specially designated "agents," he was not entitled to assume that they were acting on their own account, but must have known that they were acting in their ordinary character of agents, and at all events he was put on his enquiry. Then, as to the name of the principal not having been communicated, that makes no difference; provided the character of agency

¹ Lord Ellenborough in *More v. Clementson*, 2 Campb. 22.

be known, it is of no consequence whether it be known or not who is the particular individual for whose behoof the agent acts,¹ and it is settled that the circumstance of the sale being made under a *del credere* commission, No. 353. cannot affect any question with third parties.²

June 29, 1832.
Fleming v.
Findlay & Co.

The Magistrates pronounced this interlocutor:—" Finds, that under the invoice transmitted along with the cotton goods in question to the defender, and which bore the said goods to be bought of Watson and Lennox, agents, the defender was not entitled to consider Watson and Lennox as principals, and as the proprietors of the said goods, with a view to a plea of compensation against them, to the detriment of the real owners; and finds, that although Watson and Lennox appear, from the evidence adduced, to have occasionally dealt as principals in similar goods, and to have used in such cases invoices, containing their ordinary designation of agents, the said intimation in the invoice of the goods in question having been bought by them in the character of agents, was sufficient to put the defender on his guard in this respect, and is sufficient in law to throw on the defender the burden of proving, that, notwithstanding the said notice to the contrary, the said goods were really the property of Watson and Lennox; but finds it not proved that the said goods were sold by the pursuers to Watson and Lennox as vendees, or delivered to them in any other capacity than as consignees, or agents for sale: farther, finds that the circumstance of Watson and Lennox having acted under a *del credere* commission from the pursuers, does not affect the rights of the pursuers as principals, or give the defender, who was no party to that contract, any right to which he was not otherwise entitled as a purchaser from agents for sale; therefore, upon the whole, repels the defender's plea of compensation, decerns against the defender in terms of the libel, remits to the auditor to tax the pursuer's expenses," &c.

Fleming thereupon brought an advocation, in which the Lord Ordinary pronounced this interlocutor: " Finds it proved that the goods, of which the price forms the subject of the present action, were held by Messrs Watson and Lennox, not as purchasers from, but as the commission-agents of the respondents: finds that these goods were sold to the defender by Messrs Watson and Lennox; and that in the invoice of said goods, Messrs Watson and Lennox were expressly designed as agents: finds that this was a sufficient intimation to the advocator of the character in which Messrs Watson and Lennox dealt; and therefore remits the case simpliciter to the Magistrates of Glasgow, and decerns."

Fleming reclaimed—

LORD JUSTICE-CLERK.—Looking at the whole proof, I am satisfied, apart from

¹ Paley, 250-1; Maans v. Henderson, 1. East. 335.

² Morris v. Cleasby (4 Maule v. Selwyn, 566.)

No. 353. any abstract principles, that there is enough to warrant the simpliciter remit, though I am inclined to go rather on the findings in the Inferior Court interlocutor, than in that of the Lord Ordinary. I subscribe to every word in the former, as justified by the facts, and sound in law. The Lord Ordinary has adopted the judgment, as he remits simpliciter, but I would rather leave out the rationes of his Lordship's interlocutor; for though I agree in part, I think the other more satisfactory.

Gordon, &c. v. June 29, 1832. **LORD GLENLEE** concurred.

LORD CRINGLETIE.—I was a good deal puzzled; but, on the whole, I incline to agree with your Lordship.

LORD MEADOWBANK.—Had it not been for the whole course of transactions between Fleming, and Watson and Lennox, certiorating him that they were agents, I would have held an opinion different from that of the Magistrates, for I could not have considered their designation of "agents" in the invoice as alone sufficient. But I am satisfied, from the whole course of transactions, that he must have known he was dealing with them as agents.

THE COURT accordingly "found it unnecessary to decide on the preliminary findings in the interlocutor of the Lord Ordinary complained of, but adhered to the finding, remitting the case simpliciter," &c.

W. A. G. and R. ELLIS, W.S.—GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—Agents.

No. 354. JOHN GORDON and Others, Petitioners.—*D. F. Hope—Marshall.*
JOHN GUNN, Respondent.—*Gordon.*

Curator Bonis.—1. Under a petition for the recal of the appointment of a curator bonis, on the allegation that it had been made without personal intimation to the party who was to be put under curatary, that his condition had never rendered it necessary, and that at least he had since reconvalesced, the Court remitted to the Sheriff "to enquire concerning the condition of intellect, and state of faculties of the party, and his abilities to manage and conduct his own affairs, and with power to examine medical men and witnesses on the subject, and to report." 2. Parties being at issue, whether the curator had made an adequate allowance out of the rents of the estate, for the support of the family of the party under curatary, the Court remitted to the Sheriff to fix the allowance.

June 30, 1832. **GORDON** of Swiney, and several of his family, petitioned for the recal of the appointment of Gunn as curator bonis to Gordon, alleging that the appointment had been irregularly made, the medical certificate not having stated that Gordon was insane, and no personal intimation of the petition having been made, nor any other than a general intimation for eight days on the walls, and in the minute-book. The petitioners stated that, at all events, Gordon had reconvalesced, and was able to manage his affairs; and they produced two medical certificates in support of the petition.

1st DIVISION. Gunn answered, that his appointment had been perfectly regular, on the production of a sufficient medical certificate, and with the concurrence of the friends of Gordon. He contended, that intimation on the walls, and in the minute-book, was enough, without personal intimation to

Gordon, as appeared from the case of Bryce.¹ He denied the reconversion. No. 354.

Parties were at issue, whether the allowance made by the curator out of the rents of the estate, for the support of Mr Gordon's family, was adequate. June 30, 1832. Gordon, &c. v. Gunn.

The Court pronounced this interlocutor: "Remit to James Trail, Esq. Sheriff of Caithness, to enquire concerning the condition of intellect, and state of faculties of the petitioner, Mr John Gordon of Swiney, and his abilities to manage and conduct his own affairs, and with power to examine medical men and witnesses on the subject, and to report; and farther, remit to Mr Trail to fix the annual allowance that ought to be made for the maintenance of the family of Mr Gordon out of the rents of his estates." Mortimer v. Anderson. Cullen v. Ewing.

A. SNODY, S.S.C.—DONALDSON and CAMPBELL, W.S.—Agents.

ALEXANDER MORTIMER, Suspender.—Skene.
JAMES ANDERSON, Charger.—D. F. Hope—Russell.

No. 355.

Bill of Exchange.—Circumstances in which the charger on a bill for £487, alleging an actual advance by himself of only £200—bill of suspension passed on caution for £200.

BILL of suspension of a charge by Anderson, on a bill for £487, drawn June 30, 1832. by Mackie upon Mortimer, and indorsed by Mackie to Anderson. Anderson had only advanced £200 on account of the bill, and the only question raised by him was, as to the nature and amount of the caution which he was entitled to require. He contended that he might incur responsibility to his author, Mackie, unless he insisted for full caution. 1st Division. Bill-Chamber. Ld. Moncreiff.

LORD GILLIES.—I think if caution be found to the extent of £200, being the whole advance alleged by Anderson to have been made by him, the bill ought to be passed. He incurs no responsibility thereby to Mackie, because he does not consent to the limitation of the caution. Such limitation is the act of the Court alone, and I think it justified by the circumstances of the case.

The other Judges concurred, and the bill was passed on caution to the extent of £200.

J. HUNTER, W.S.—ROBERTSON and BENNETT, W.S.—Agents.

MRS CULLEN OR M'KENZIE, Pursuer.—Robertson—Wilson.
WILLIAM EWING, Defender.—Cunninghame.

No. 356.

Reparation—Proof.—Bill of exceptions refused against the directions given by the Lord President (ante, p. 501), in charging the jury.

No. 356. **SEQUEL** of the case reported ante, p. 497, which see. Ewing was heard in support of a bill of exceptions to the direction given by the **1st Division.** Lord President in charging the jury. He contended, 1. That the judicial slander was privileged; and, 2. That there was no evidence of the extrajudicial slanders which should have been allowed to go to a jury.

Cullen v. Ewing. The Court, including the Lord Chief Commissioner, unanimously approved of the directions as given by the Lord President,¹ and refused the bill of exceptions without calling on the counsel for the pursuer. Their Lordships applied the verdict, and found Ewing liable in expenses.

W. DALEMPLE, S.S.C.—WOTHERSPOON and MACK, W.S.—Agents.

No. 357.

ALEXANDER GEIKIE, Pursuer.—*Cunninghame.*
HIS CREDITORS, Defenders.—*Penney.*

Cessio Bonorum.—Circumstances in which the benefit of cessio was refused to a party who had been 18 months in jail.

June 30, 1832. GEIKIE having been incarcerated for debt in November 1830, brought **2d Division.** a process of cessio bonorum, and in order to account for a sum of £300, T. he stated that he had been robbed to that amount at the Edinburgh Hallow Fair preceding his imprisonment. Of this statement, however, he was unable to bring any sort of evidence, and it did not appear that he had at the time mentioned such a circumstance to any one, lodged a complaint, or made any attempt to discover the alleged robbers. The Court giving no credit to his statement, had previously refused him the benefit of cessio, and they now again refused it *hoc statu*, although he had been 18 months in jail.

GREIG and MORTON, W.S.—ANDERSON and TOD, W.S.—Agents.

No. 358.

ARCHIBALD RICHARDSON, Petitioner.—*W. Bell.*
JAMES WYLD and Co., Respondents.—*Rutherford.*

Process.—A petition for rectification of an interlocutor refused as incompetent.

June 30, 1832. PETITION for rectification of the interlocutor in the case mentioned **2d Division.** ante, p. 538, alleged to have been written out in some measure differently T. from what was intended to be decided, refused as incompetent.

P. COUPER, W.S.—J. R. STODART, W.S.—Agents.

¹ See ante, p. 501.

W. R. RAMSAY, Pursuer.—*Maitland.*

No. 359.

SIR WILLIAM A. CUNINGHAME'S TRUSTEES, Defenders.—*Rutherford.*June 30, 1832.
Ramsay v.

Warrandice.—Land having been evicted as glebe, found, under a clause of war-
randice, that the party warranting was liable for the value both of the land and of
the trees thereon.

Laidlaw, v.
Laidlaw, &c.

AFTER the judgment mentioned ante, VIII. 399, finding Sir William June 30, 1832.
Cuninghame liable in warrandice for the glebe of Gogar, sold to the late 2d Division.
Ramsay of Barnton, and evicted from the pursuer, his son, a remit was
made to valuators to report on the value. They having reported that the
land was worth so much, and the trees so much, the defenders objected
that they were not liable for the value of the trees, because neither
the minister nor presbytery could dispose of them. But to this plea
it was answered, that the whole glebe was conveyed as a feu with war-
randice; that the seller had as little right to convey the land as the trees,
but having conveyed the whole, and warranted the conveyance, his repre-
sentatives must be liable for the value of the whole.

The Court awarded the whole value reported, including that of the
trees.

Tod and ROMANES, W.S.—Tod and HILL, W.S.—Agents.

MRS MARGARET REYNOLDSON or LAIDLAW, Pursuer.—*R. Bell.*

No. 360.

THOMAS LAIDLAW, Defender.—*Miller.*MRS OLIVER and HUSBAND, Defenders.—*W. Forbes.*

Aliment—Parent and Child.—Question, whether a married daughter and her hus-
band are equally liable with a son, to aliment their widowed mother, neither son nor
daughter having derived any estate from their deceased father.

MRS MARGARET REYNOLDSON, or Laidlaw, widow of a shopkeeper in July 3, 1832.
Galashiels, raised an action of aliment against her son, Thomas Laidlaw,
shopkeeper in Melrose, concluding for £25 per annum. He stated his
willingness to contribute an equal share of his mother's aliment, at the
rate of £18, as being suitable to the condition of the parties, but contend-
ed that the pursuer's daughter, Mrs Oliver, the wife of a grocer in Edin-
burgh, was jointly liable along with himself in the natural obligation of
supporting their common parent. It was admitted that the son had de-
rived no benefit from his father's succession. In these circumstances he
pleaded as a preliminary defence, that the action should be sisted, till
Mrs Oliver and her husband were called as parties; and he farther con-
tended on the merits, that he should be only found liable jointly along
with these parties.

When the action was called, the Lord President observed, that Mrs

No. 360. Oliver and her husband ought to be made parties; whereupon appearance was made for them, and they were sisted as parties. They then pleaded in defence, that Mrs Oliver had derived no succession from her father, and possessed no means of her own when married: she had acquired none since, as the marriage vested all moveable effects in her husband; and her husband was not liable to aliment his mother-in-law, as he had obtained no effects along with his wife; at least, he was not liable so long as any son of hers was able to aliment her.

LORD PRESIDENT.—I am not aware that there is any authority directly in point. But it would rather appear, that the obligation to aliment, being founded on the law of nature, should attach to all children equally, who are able to perform that obligation. But if Mrs Oliver would have been liable, had she remained single, I do not see how her marriage should extinguish her liability, or how her husband should be free from it. If a man marries a widow who has a child by a former marriage, she is liable to aliment that child; and how can it be maintained that her second husband is free from that liability? Suppose that the pursuer had no son and no other child but Mrs Oliver, could it be maintained that she and her husband were not liable to aliment her mother? And if so, how can the existence of a son of the pursuer's do more than divide the liability which would otherwise have attached to her? But although I throw out these observations, I am not prepared to decide the case, and I cannot but suggest that it is extremely fit for extrajudicial arrangement between the parties themselves.

LORD GILLIES.—I incline to take a similar view with that now expressed. The daughter of the pursuer says she has no means of her own, and every thing is her husband's; but what then is the import of the term, "goods in communion?" A share of the moveables is hers. If this be a debt arising from a natural obligation—if it be a debt against her—I conceive that her husband incurs the same liability as for the other debts of his wife, and that this does not depend upon the amount of effects which she possessed at the time of entering into the marriage.

THE COURT then superseded the case, in the hope that an arrangement might be made among the parties, and afterwards the following concerted interlocutor was pronounced: "Having advised this cause, with the minute given in for Mr and Mrs Oliver, allow them to sist themselves as parties to this cause, and hold them as so sisted accordingly; and having heard parties, &c., on the respective liabilities of the defenders, and also on the amount of aliment to which the pursuer is entitled; of consent of parties, find the pursuer entitled to an aliment of £18 per annum, and that at two terms in the year, Whitsunday and Martinmas, beginning the first term's payment at Whitsunday 1832, for the half-year immediately preceding; find the defender, Alexander Laidlaw, liable in payment of £10 of the above yearly aliment, and the other defenders, Jeasie Laidlaw or Oliver, and William Oliver her husband, liable in the remaining £8; farther, find the pursuer entitled to the expense incurred by her in this action, modify the same to the sum of £10 sterling, in payment of which, find the said defenders liable in equal proportions, and decern."

LIEUTENANT-GENERAL MATTHEW SHARPE, Pursuer.—Keay—Jameson. No. 361.
 CHARLES KIRKPATRICK SHARPE, Defender.—Shene—Marshall.
 SIR ALEXANDER M. MACKENZIE, Defender.—D. F. Hope—
H. J. Robertson.

July 3, 1832.
 Sharpe v.
 Sharpe, &c.

Entail—Clause.—1. Terms of an ungrammatical irritant clause in a deed of entail, which were held to constitute a valid and sufficient irritant clause; and observed that, “to supply an omission in a deed, by conjectures however plausible, or deductions however clear, with regard to the intention of the maker,” is at variance with the principles of construction applied to entails; but that “to restore the syntax of the deed, defective in consequence of a clerical error, by means of a reference to the context itself,” is consistent with principle and authority. 2. Question whether the want of a sufficient irritant clause in an entail, under which an heir who was not *alioqui successurus* has made up his titles, leaves such heir at liberty to dispose the entailed estate gratuitously, or to apply the price arising from the sale of it, without being subject to any claim at the instance of the substitute heirs.

In 1768, Matthew Sharpe executed a deed of entail of the estate of July 3, 1832. Hoddom, which was duly recorded in the register of entails. The irritant clause was in these terms:—“And upon every contravention which may happen, by and through any of my said heirs failing to perform all and each of the said conditions and provisions, and acting contrary to any or all of the restrictions and limitations before written, it is hereby expressly provided and declared, that not only my said lands and estate shall not be burdened with, or liable to the debts and deeds, crimes, and acts, contracted, granted, done or committed, contrary to these conditions and provisions, or restrictions and limitations, or to the true intent and meaning of these presents, shall be of no force, strength, or effect, and ineffectual and unavailable against the other heirs of taillie, and who, as well as the said estate, shall be noways burdened therewith, but free therefrom, in the same manner as if such debts or deeds had not been contracted or granted, or such deeds, omissions, or commissions, had never been done nor happened.”

1st DIVISION.
 Ld. Corehouse.
 B.

Titles were made up under this entail, by Charles Kirkpatrick Sharpe, who was not *alioqui successurus*; and afterwards by his son, Lieutenant-General Matthew Sharpe, who raised a summons of declarator against Charles Sharpe, Sir A. M. Mackenzie, and the other substitute heirs, to have it found and declared that the deed of entail “does not contain any clause, declaring the deeds granted or the debts contracted by the heirs of entail, in opposition to, or in contravention of, the conditions, restrictions, &c., contained in the deed of entail, to be in themselves null and void;” and consequently, that the pursuer was entitled to sell the lands, burden them with debt, or alienate them gratuitously, in the same manner as a proprietor in fee-simple, and without being liable to account for the price, or the loans thereby raised.

No. 361.

July 3, 1832.
Sharpe v.
Sharpe, &c.

The entailer had left some funds in trust for the purchase of lands, to be entailed in the same terms as the estate of Hoddom. An entail was executed, under the trust, of lands purchased with part of these funds, and part of them remained still unapplied. General Sharpe concluded for declarator, that he had the same right of property in these lands and funds as in the estate of Hoddom.

Defences were separately lodged by Charles Sharpe, and Sir A. M. Mackenzie; they pleaded that the tailzie of 1768 was affected with a sufficient irritant clause, and, being otherwise duly fortified, the pursuer had no power to sell, or burden, &c., either as to Hoddom, or the estate subsequently entailed under the trust, or the trust-funds still remaining.

Cases were ordered.

Pleaded by General Sharpe—

An entail which is defective in either of the prohibitory, irritant, or resolutive clauses, leaves an heir the power of a proprietor in fee-simple, not only in a question with his creditors, but also (since the late case of Ascog) in a question with the substitute heirs.

But the Hoddom entail contains no effectual irritant clause. There is an omission which renders it unintelligible; and there are no fixed words of style, so as to afford a standard for ascertaining what were the words omitted, and it is even uncertain at what part of the clause the omission occurs. The clause is defective, as the debts, &c. are not declared null, to any effect whatever; it merely provides, that "not only my said lands and estate shall not be burdened with, or liable to the debts and deeds, crimes and acts, contracted, granted, done, or committed, contrary to these conditions and provisions, or restrictions and limitations, or to the true intent and meaning of these presents." But unless declared expressly null, at least so far as they may affect the estate, the debts may be made the ground of diligence against it. Nor can the declaration of their nullity, *quoad hoc*, be reared up by implication.

The clause being therefore defective, the entail is ineffectual; and it is quite incompetent, either by inserting words or by implication, to construct an irritant clause. Besides, as there are no fixed words of style applicable to such a clause, the omission in it could be restored by reading it in several ways, without making it a valid irritant clause. Thus it might be read, "not only my said lands and estate shall not be burdened with the debts and deeds, crimes and acts, contracted, &c., contrary to these conditions, &c., or to the true intent and meaning of these presents, but the said acts shall be of no force, strength, or effect," &c., or it might be read, "but the said debts shall be of no force," &c. In either case, the entail would be defective; in the first case, as the irritancy did not strike at sales or debts; in the last, as it did not apply to sales or feudal delinquencies. But as it is incompetent to rear up fetters by implication, the Court, if they could supply any words at all, could not supply more than

were necessary barely to restore the grammar of the sentence, whether such words cured the defect in the entail or not.

Pledged by the defenders—

As the prohibitory clause is effectual, this is enough in a question inter heredes, especially as the pursuer is not *alioqui successurus*, and has no right to it except under the entail.

July 3, 1832.
Sharpe v.

But the irritant clause is valid and sufficient. Before any break in the syntax necessarily occurs, it is provided that “not only my said lands and estate shall not be burdened with, or liable to the debts and deeds, crimes and acts, contracted, &c., contrary to these conditions, &c., or to the true intent and meaning of these presents.” But a declaration that the lands shall not be affectable by the debts, &c., is a good irritancy, as an absolute irritancy of the debts, &c., to all effects is not required, but only to the special effect of their forming any ground for attaching the estate.

The only defect in the rest of the clause is in the grammar, occasioned by a palpable clerical omission, and there cannot be a doubt as to the meaning and intention. It was clearly intended that the clause should be read thus:—“Not only my said lands and estate shall not be burdened with or liable to the debts and deeds, crimes and acts, *of the heirs of tailzie, as before provided, but also all debts, deeds, and acts,* contracted, granted, done, or committed contrary to these conditions, &c., or to the true intent and meaning of these presents, shall be of no force or strength against the other heirs of tailzie, and who, as well as the said estate, shall be no ways burdened therewith, but free therefrom, in the same manner as if such debts or deeds had not been contracted or granted, or such deeds, or omissions, or commissions, had never been done or happened.”*

Upon looking at the entire clause, it will be found, that, towards the end of it, the relative adverbs “therewith” and “therefrom,” and also the relative adjective “such,” which was coupled with “debts, or deeds, or omissions, or commissions,” left no alternative except to hold that they referred back these debts, or deeds, or omissions, or commissions, to a prior part of the clause, into which they could not enter except as the nominative to the words “shall be of no force,” &c., and consequently, as the subject to which the declaration of irritancy was applied. There is no other meaning of which the clause is rationally susceptible.

The Lord Ordinary found “that the tailzies in question are affected

* These words occurred in a corresponding clause in a prior deed of entail, executed in 1765 by the same entaller, but never recorded; it was said to be substantially the same with that of 1768. Sir A. M. Mackenzie pleaded separately, that the irritant clause should be read by inserting, in place of the above, the words “*but they,*” before the words “*shall be of no force, strength,*” &c.

No. 361.
July 3, 1832.
Sharpe v.
Sharpe, &c.

with valid and sufficient irritant and resolutive clauses ; and therefore sustained the defences, assoilzied, &c., but found no expenses due."*

General Sharpe reclaimed on the merits, and the defenders on the point of expenses.

LORD BALGRAY.—I have formed a decided opinion in favour of the interlo-

* " NOTE.—That the omission in the irritant clause in this entail is merely clerical, appears obvious from the structure of the sentence, which is altogether ungrammatical, in consequence of the nominative in the second member being wanting. It is first declared, ' that not only the lands shall not be burdened with, or liable for, the debts and deeds, crimes and acts, contracted, granted, done or committed,' in contravention. Here the syntax is interrupted. Then follows, ' shall be of no force, strength, or effect, and ineffectual and unavailable against the other heirs of tailzie, and who, as well as the said lands, shall be nowise burdened therewith, but free therefrom, in the same manner as if such debts or deeds had not been contracted or granted; or such deeds, omissions, or commissions, had never been done nor happened.' Coupling the effect of the relative adverbs ' therewith' and ' therefrom,' which necessarily refer to the omitted nominative, with the effect of the relative pronoun ' such,' which connects that nominative with the words that follow, it is a plain, if indeed not a necessary inference, that the acts of contravention mentioned at the commencement of the sentence, and repeated at the close, constitute that nominative, and are those which are declared to be ' of no force, strength, or effect.' To supply an omission in a deed by conjectures, however plausible, or deductions however clear, with regard to the intention of the maker, is very different from restoring the syntax of the deed, defective in consequence of a clerical error, by means of a reference to the context itself. The first is at variance with the principles of construction applied to all deeds stricti juris, and with peculiar rigour to entails ; but the second is consistent with those principles, and was admitted by this Court and the House of Lords, in the case of Munro of Foulis, cited by the defenders. In that case, as in this, the irritant clause was ungrammatical, and, without amendment, unintelligible—the syntax being broken by a clerical omission. The entaller appointed the lands to be resigned into the hands of the superior or his commissioners, ' to be made and granted to me; whom failing, to Hugh Munro,' &c. The words, ' for new infestments,' were omitted. It was pleaded by the defenders, in the declarator brought for setting aside the deed, that the clause as it stood was correct, because the lands were resigned into the hands of the superior to be granted. But that plea was obviously untenable, because they were resigned ' to be made and granted,' and although the superior could grant the lands, he could not make them. That, therefore, which was to be made and granted, was something not named or expressed, but which the Court supplied by intendment from the context, namely, ' for new infestments.' It is said, that the omission in the present case might perhaps have been debts and deeds, or debts and crimes, or debts only ; and if such words were inserted, the irritant clause would still be defective ; but the same argument might have been used in the Foulis case. The lands might have been resigned, not for new infestment, but for a lease, a wadset, or some other grant, which would not have constituted an effectual tailzie. But the context in that case, as in this, excluded all such gratuitous suppositions. Construction, by inference, was carried still farther in the Roxburgh case, where the words ' heirs-male' in the destination were read, ' heirs-male of the body,' although the syntax was correct without that interpolation, and the context gave very little assistance in its support."

cutor. Bad grammar is not enough to destroy a clause, if words be left in it from which an appropriate legal meaning can be gathered. The Court is bound to find such a meaning in the clause, if the whole of it, viewed collectively, be susceptible of such meaning. Now, when I look at the clause as it stands, I cannot read it in any other way than by putting in the words contended for by the defendants. It is true that a deed of entail must be interpreted strictly, but still a fair construction must be put upon its terms; and I think we should withhold all fair construction if we did not concur with the Lord Ordinary.

LORD PRESIDENT.—I am of the same opinion. The words “shall be of no force,” &c. must have a nominative, and I cannot discover any other nominative which the context admits of their having, except that which the Lord Ordinary has stated in his note. I therefore approve of his Lordship's interlocutor.

LORD CRAIGIE expressed great doubt of the interlocutor, and wished to have the case more fully considered. An error in grammar might not be enough to vitiate a deed; but when there was the omission of the most essential words requisite for the fencing of a deed of entail, it became a question of great difficulty how far the Court had a power to supply them. It did not appear clear that the words proposed by either of the defendants, or any equivalent words, were the only means of restoring both sense and syntax to the clause; on the contrary, both of these might be restored, and yet the irritant clause might not be thereby made sufficient; and therefore his Lordship doubted of the interlocutor of the Lord Ordinary.

LORD GILLIES.—I am not prepared to say that the question is free from difficulty; but I concur with the Lord President. In forming this opinion, I adopt implicitly the distinction expressed in the Lord Ordinary's note, where his Lordship says, “to supply an omission in a deed by conjectures, however plausible, or deductions, however clear, with regard to the intention of the maker, is very different from restoring the syntax of the deed, defective in consequence of a clerical error, by means of a reference to the context itself.” This is a distinction which is never to be lost sight of, and I regret to think that it does not appear to have been always kept in view in the House of Lords. But it is most dangerous to overlook it in any case; and it is with that distinction fully in my view that I approve of the Lord Ordinary's interlocutor. The syntax of the irritant clause is obviously defective. We are bound to restore the syntax, if we see from the context precisely what is wanting to restore it. And I am satisfied, from an examination of the context, that the nominative, as stated by the Lord Ordinary, can restore the syntax, and that nothing else can do so. I therefore read the clause as if that nominative stood inserted, and there is no longer a question as to the sufficiency of the irritant clause.

THE COURT accordingly adhered on the merits, but, as to expenses, altered and allowed the defenders their expenses.

Pursuer's Authorities.—(2. and 3.) Mitchelson, June 15, 1831 (ante, IX. 741); Dick, Jan. 14, 1812 (F. C.); Elliot, March 10, 1814 (F. C.); Robertson Barclay, May 18, 1821 (1. Sh. Ap. Ca. 24.)

Defenders' Authorities.—(3.) 2 Blackstone, 379; 1 Bridgeman's Index, 435, § 22; Douglas and Co., Nov. 14, 1823 (ante, II. 487, and 1 W. S. 323); Syme, Feb. 27, 1799 (15473); Munro, Feb. 15, 1826 (ante, IV. 467), affirmed July 25, 1828 (3 W. S. 144); Mackenzie, May 23, 1823 (ante, II. 331); Nisbet, June 10, 1823 (ante, II. 381.)

No. 362.

JOHN BAIRD, Objector.—*Cuninghame.*July 3, 1832.
Baird v. Mi-
nister of Pol-
mont, &c.MINISTER OF POLMONT and COMMON AGENT, Respondents.—*Rutherford
—Handyside.*

Prescription—Teind.—Where a final decree of locality was pronounced in 1726, localising an overpayment beyond a decree of valuation of the High Commission in 1636; and the decree of 1726 was reduced in 1764, and the overpayment restricted to the amount in the decree of valuation; and the overpayment was, nevertheless, continuously made by singular successors in the lands down to 1824,—held still competent to the heritor to surrender his valued teind, in terms of the decree 1636.

July 3, 1832. IN 1636, the teinds of the lands of Dorrator, in the parish of Falkirk, were valued by decree of the High Commission, at 19 bolls and 6½ lippies of victual, and £4 Scots. In 1724, the Teind Court separated a portion of the parish of Falkirk, erected it into the parish of Polmont, and, in 1726, modified a stipend to the minister of Polmont, out of teinds which had belonged to the Earl of Linlithgow; of this stipend they imposed 24 bolls on the lands of Dorrator, which were not locally within the parish of Falkirk; but to this process the proprietor of Dorrator was not called as a party. After the attainder of the Earl of Linlithgow, the commissioners of forfeited estates conveyed the lands and teinds to Hamilton of Dechmont, under burden of all stipends, &c., and especially of any new stipend which might be imposed by the Court, as a provision to the minister of the new parish of Polmont.

The lands and teinds of Dorrator were afterwards acquired by James Burns, who, in 1759, disposed to John Chalmers a portion of the lands, and Chalmers “became bound to pay the 24 bolls of oatmeal yearly to the minister of Polmont, or to any other having right thereto, and to free and relieve the lands” remaining with Burns.

In 1764, Burns, designed as “of Dorrator,” raised an action of reduction of the decree of 1726, in which he specially libelled, 1st, that the heritor of Dorrator had been no party to the process in 1726; and, 2d, that the allocated stipend should be restricted to the amount as valued by the decree of the High Court in 1636. Appearance was made for the minister, who pleaded, inter alia, 38 years’ possession of a stipend of 24 bolls out of the lands of Dorrator. The Court reduced as to the excess beyond the valued teind of 19 bolls and 6½ lippies of victual, and £4 Scots money. Notwithstanding this decree, the payment of 24 bolls was continued as before.

Chalmers and his heir granted a number of minor feus out of their part of Dorrator, and, finally, the heir sold to John Baird the whole land acquired from Burns, under burden of the previous feus.

No final locality was ever adjusted since the original one of 1726. In a late process of locality, Baird, after considerable discussion had taken place, founded on the decree of valuation in 1636; and on 17th December 1824, ^{July 3, 1832.} ~~Baird v. Minister of Polmont, &c.~~ gave in a minute, stating, that he was proprietor of part of the lands which were burdened with the stipend of Dorrator; that the teinds were valued at 19 bolls 6½ lippies victual, and £4 Scots; that a proportion of the valued teind should be allocated on the feus from Chalmers, excepting some which had recently been acquired by Baird himself; that the remainder only should be imposed on his lands; and that he surrendered his valued teinds according to that proportion.

The minister and the common agent answered—

That though a decree of the High Commission could not be disregarded by over payments, yet the minister might acquire a right to these over payments by prescription, and had done so in this instance.

The Lord Ordinary “having considered the excerpts from the decree of erection of the parish of Polmont in 1724, and the original decree of modification and locality in 1726, and also the excerpts from the decree of reduction of the said locality in 1764, &c., found, that the whole teinds of the lands of Dorrator, in the parish of Falkirk, were valued by decree of the High Commission in 1636 at 19 bolls and 6½ lippies of victual, and £4 Scots of money, against which decree no objection has been stated: that by decree of modification and locality in 1726, upon the erection of the new parish of Polmont, 24 bolls of meal were allocated on the said lands of Dorrator, these lands not being within the said parish of Polmont; and that it is admitted on the record, that the whole stipend then modified to the minister of Polmont was so modified out of the teinds which had belonged to the Earl of Linlithgow, of which those of Dorrator formed a part, under a reservation by the commissioners on his forfeited estate, in the disposition by them to Alexander Hamilton: that the proprietor of Dorrator was not called as a party to the said process of modification and locality: that in ~~an action of reduction of the said decree of locality was brought by James Burns of Dorrator, on the double ground that the heir of Dorrator had not been called in the process, and that the quantity of victual allocated on these lands exceeded the valued teind according to the valuation 1636, which was expressly libelled on and produced; in which action appearance was made for the minister, but decree of reduction was pronounced on 8th August 1764: that no final decree of locality was ever afterwards pronounced; but that the full quantity of 24 bolls of meal continued to be paid to the minister, until the present objector lodged his condescendence, making a surrender of his valued teinds on the 17th December 1824. But in respect that the decree of locality in 1726, founded on by the minister and common agent, stands finally reduced, by decree of this Court, above sixty years ago, and that the payments since made have been exacted and received from singular successors in the lands, not only contrary to the decree of valuation by~~

No. 362.

July 3, 1832.
Baird v. Minister of Polmont, &c.

the High Commission, but in the face of the standing decree of reduction of the locality, on that precise ground, found, that no legal title to the continuance of such over payments could, by prescription or otherwise, in virtue of such payments, be acquired to the minister of Polmont, or to the heritors of that parish; therefore sustained the surrender made by the objector: found, that in so far as parts of the said lands of Dorrator have been disponed in feu, without relief from the proportion of minister's stipend, and are not now in the objector's possession, a proportion of the valued teind surrendered must now be laid on the lands so held and possessed in feu by other parties: And with these findings remitted to the teind clerk to prepare a rectified scheme of locality, with power to him to call for all writs which he may find necessary for instructing the state of the lands alleged to have been alienated by feu rights, and to report."*

The minister and common agent reclaimed, and pleaded, that, if the benefice had a proper title to found prescription, such as a final decree of locality, then possession for forty years of over payment, would prescribe a right in favour of the minister. In this case, uninterrupted possession of over payment had followed on the final decree of locality in 1726, down to the minute of surrender in 1824, because, although reduction of the decree of 1726 was obtained in 1764, the over payment continued without interruption. In these circumstances, the minister had prescribed a good right to the over payment: and there was even ground to presume that the reduction in 1764 laboured under some essential nullity, since it never was acted upon. Besides, it was taken at the instance of "James Burns of Dorrator," five years after his disposition to Chalmers of part of the lands of Dorrator had burdened Chalmers with the whole 24 bolls, and left Burns no interest to pursue the reduction. It was therefore submitted, that, unless the minister's prescriptive right were to be sustained, the case

* "NOTE.—If there had been no decree of reduction, the case would still have appeared to the Lord Ordinary to be difficult, though the plea for a prescriptive right in the minister would then have been very strong. But the reduction entirely alters the character of the case, and the plea now founded simply on erroneous payments is infinitely weaker than the plea in the case Nenthorn, or indeed in any of the cases, was. In Nenthorn, in which, it is to be observed, the discussion was expressly with the minister, the payments had been made both before, and clearly for 108 years after, the valuation, under final decrees of locality: Yet it was found that they could not prevent the surrender. The case of Eastwood is also much in point. As to the case of Madderty, the Lord Ordinary thinks it a very special case under the interlocutor of the Court. There had been a mere subvaluation, which the Court expressly found had not been acted on: Then there was a locality disregarding it, and a prescriptive possession on it for 110 years: After this a decree of approbation was obtained in 1760, but the Court held that it 'must be limited and qualified by such prescriptive right.' And there was a farther prescriptive possession even after that time. The Lord Ordinary thinks it impossible to extend the principle of such a case to the present.

" If the party reclaims, the excerpts from the decrees should be printed."

should be delayed until further enquiry was made regarding the state of No. 362.
the parties to the decree of reduction.

July 3, 1832.
Baird v. Minister of Polmont, &c.

LORD PRESIDENT.—If Chalmers had an infestation in the lands of Burns, and burdened with these 24 bolls, I am at a loss to discover what title Burns had to insist subsequently in the action of reduction.

Garvie v. Hammermen of Perth.

LORD BALGRAY.—I think the Lord Ordinary's interlocutor right. In order to found a prescriptive right, the minister must have a title of some sort with which he connects his possession. The final decree of locality in 1726, might have sufficed for this, if it had stood for forty years, and possession for that period had co-existed. But the decree does not subsist for forty years. It is cut down in 1764, and after that, it is impossible to refer the subsequent possession to it. Now, I see nothing else to which the minister's possession of over payment can be ascribed, so as to give him any prescriptive right, and therefore I must adhere to the Lord Ordinary's interlocutor.

LORDS CRAIGIE and **GILLIES** concurred; and the **LORD PRESIDENT** was understood also to assent to the views of Lord Balgray.

THE COURT therefore adhered.

Objector's Authority.—Common Agent in locality of Fearn, Nov. 21, 1810 (F.C.)

Respondent's Authorities.—3 Forb. on Tithes, 7. 3; Boswell, July 22, 1668 (10892); Turner, Dec. 21, 1757 (10980); Moray, July 9, 1817 (F.C.)

J. BAIRD, W.S.—H. G. DICKSON, W.S.,—Agents.

GEORGE GARVIE, Advocate.—*D. F. Hope—Mylne.*

No. 363.

HAMMERMEN OF PERTH, Respondents.—*A. M'Neill.*

Burgh—Exclusive Privilege—Local Militiaman.—Circumstances held not to amount to actual service by a local militiaman, within the meaning of 42 Geo. III. c. 68, or 54 Geo. III. c. 19, so as to entitle him to exercise the trade of a blacksmith within the burgh of Perth.

IT is enacted by 52 Geo. III. c. 68, § 179, “that every person having July 3, 1832. served in the local militia when drawn out into actual service, being a married man, may set up and exercise any trade in any town or place within Great Britain, without any let, suit, or molestation,” &c., in the same manner as any mariner or soldier could do by 24 Geo. III. sess. 2. . 6.

1st DIVISION.
Ld. Corehouse.
B.

By § 122 of the same statute, it is enacted, that in the event of actual invasion, or the appearance of an enemy in force upon the coast, or of rebellion or insurrection, it should be lawful for the King, by an order in council, or proclamation, to draw out and embody the local militia, to march them to any part of Great Britain, and to continue them embodied for any period not exceeding six weeks after the enemy should be repelled,

No. 363.

July 3, 1832.
Garvie v.
Hammermen
of Perth.

or the rebellion suppressed. During such service the local militia were to be subject to the mutiny act, and the articles of war.

It is enacted by § 91, that it shall be lawful for the Lord-Lieutenant, Vice-Lieutenant, or Sheriff, to call out the local militia of any county for the suppression of riot or tumult in that or the adjoining county. Any militiaman failing to appear, was to incur the same penalties as for not appearing when the local militia were assembled for training and exercise; they were "to be deemed to be assembled for training and exercise; and all provisions relating to the local militia when assembled for training and exercise, shall apply to the local militia called out upon such service as aforesaid, and all days of such service shall be deemed part of the days of training and exercise under this act." They were not to be kept assembled on such service above twenty-eight days in one year; or if called out on such service after they had fulfilled twenty-eight days, the extra days were to be computed part of next year's period of training.

By 54 Geo. III., c. 19, it is enacted that the King may accept the voluntary offer of any of the local militia to serve out of their counties; that the days of such service should compute, to the individuals serving, as part of their twenty-eight days of annual training and exercise under the other acts relative to the local militia; and that all the rules of these acts as to the local militia "when embodied for service in case of invasion, shall extend to the local militia when serving under any such voluntary offers under this act, out of the counties within which they are enrolled."

George Garvie, a married man, served for eight years in the East Perthshire local militia. He also made an offer to extend his service to any part of Britain, under 54 Geo. III. c. 19; but he was never called to serve beyond the county of Perth. In February 1813, a warrant was issued by the Sheriff in the following terms:—"Whereas it has been represented to us by the officers commanding this district, that it is necessary, for the suppression of riot in the city of Perth and its vicinity, that a portion of the local militia of the county be immediately called out: these are directed to you forthwith to assemble, within the said city of Perth, the battalion under your command, for the suppression of the said riot." This warrant was addressed "to the officers commanding the central eastern battalion of the local militia of the county of Perth." It was indorsed, "James Durham, Major-General, commanding in Perth." The occasion for calling out the militia was alleged to be the insubordination of some regiments, amounting to 4000 men, then in charge of the depot for French prisoners at Perth, who were threatening to open the jail in the city, and also to liberate the French prisoners. Garvie turned out, received arms and ammunition, and alleged that he did duty by mounting guard at the depot, until relieved by the arrival of other troops. The period of this service was two days, and these were considered by Government as part of the annual training and exercise of the corps; so that a corresponding deduction of pay, and of marching allowance in lieu of bread, was made at

the end of the ordinary period of training for that year. Garvie again served three days in Perth, at a time when the militia were drawn out under an order from the Sheriff, on account of a mob in the city at the period when one of the corn-laws was passed.

In 1828, the incorporated Hammermen of Perth applied to the Sheriff to prohibit Garvie, as an unfreeman, from exercising the business of a blacksmith within burgh, and to subject him in damages for past encroachments. They contended that he had never been drawn out into actual service within the sense of the statute ; and that mere training and exercise, or any duty equivalent thereto, was not enough to allow an unfreeman to set up trade.

Garvie pleaded that he had been called into actual service, within the meaning of 52 Geo. III. c. 68, on the two occasions already detailed ; and separately, that his offer to serve in any part of Great Britain under 54 Geo. III. c. 19, entitled him to exercise the trade of a blacksmith, as freely as any mariner or soldier could do, under 24 Geo. III. sess. 2. c. 6.

The Sheriff found, " that the two occasions founded on by the defender, do not bring his case within either of the acts of Parliament founded on, so as to entitle him to set up and exercise his trade within this burgh, independent of the exclusive privileges of the Hammermen Incorporation ; inhibited and discharged him, *ut petitur*, and decerned, with the expense of extract."

Garvie brought an advocation, and was allowed the benefit of the poor's-roll. The Lord Ordinary " remitted the cause simpliciter, but found no expenses due."*

* " **NOTE.**—Under the statute 52d Geo. III., the local militia was liable to be called out in two different ways. By section 122 it was enacted, that in cases of actual invasion, or of the appearance of an enemy in force upon the coast, and in cases of rebellion and insurrection, it should be lawful for his Majesty, by an order in council or proclamation, to draw out and embody the local militia, and to continue them embodied for any period, not exceeding six weeks, after the enemy should have been repelled, or the rebellion or insurrection suppressed. When so embodied, the local militia was declared to be subject to the Mutiny Act, and to the Articles of War. On the other hand, it was enacted by the 91st section, that it should be lawful for the Lord-Lieutenant, Vice-Lieutenant, or Sheriff, to assemble the local militia for the suppression of riot or tumult in the county, or any adjoining county, in which case they were not to be subject to the Mutiny Act or Articles of War. Further, all the days when they were so assembled were to be deemed part of the twenty-eight days of training and exercise under the statute ; and if kept assembled for more than twenty-eight days in one year, the additional time was to be counted part of the days of training and exercise for the succeeding year. Now it is evident that the privilege conferred by section 179 of the act, by which married local militiamen were entitled to set up and exercise any trade, provided they had served when the local militia had been drawn out into actual service, applies to the first, and not to the second case—that is, when they were assembled by an order in council or proclamation of his Majesty, and were placed under the operation of the Mutiny Act, and not

July 3, 1832.
Garvie v.
Hammermen
of Perth.

No. 363. Garvie reclaimed. *

July 3, 1832.
Garvie v.
Hammermen
of Perth.

LORD PRESIDENT.—I felt some difficulty, at one time, in consequence of the indorsement of the Sheriff's warrant by the general officer commanding the district. But I am satisfied that there was not, in this case, any actual service within the meaning of the statute, to entitle Garvie to the privilege he claims.

LORD GILLIES.—I think there is a clear distinction taken by the Lord Ordinary between the actual service which confers the privilege in question, and the other militia service, which is to be imputed to the annual period of training and exercise.

The other Judges concurred.

THE COURT adhered.

Pursuer's Authority.—Shoemakers of Dumbarton, July 3, 1824 (ante, 111. 210.)

Defenders' Authority.—Hammermen of Leith, June 10, 1818 (F.C.)

A. TRAIL, W.S.—J. MARSHALL, S.S.C.—A. DUNCAN, S.S.C.—J. YOUNG, S.S.C.—Agents

when they were called out by the Sheriff, and held to be employed in training and exercise only.

"It appears from the extract from the orderly-book of the eastern battalion of Perthshire local militia, that the two days of duty performed, in February 1813, by the division of the regiment to which the advocator belonged, in consequence of an application to the Sheriff, was considered by Government as part of the annual training and exercise of the corps; and that a corresponding deduction of pay, and of marching allowance in lieu of bread, was made at the end of the ordinary days of training, because the men who were called out had received pay and allowance at the time for these two days."

* The Dean of Faculty, before opening the case for the claimer, called the attention of the Court to the peculiarity of the position in which he was placed by the 13th and 14th provisions of A.S. June 16, 1819, relative to the counsel for the poor. That A.S. limited a poor party's right, so that he could appear by the counsel for the poor only. But it had always been the practice of every Dean of Faculty before and since that A.S., to appear in support of the cause of any poor party when requested to do so by any of the counsel for the poor. In the present case, his own interference was at the request of his junior counsel. Still as it seemed to be an irregularity, and as the subject of such interference on the part of agents had been lately under the observation of the Court,¹ he felt it right to explain the position in which he was placed, so as to learn whether the Court concurred with him in thinking that the A.S. was not meant to abridge any Dean of Faculty of the right he formerly possessed, of affording gratuitous assistance in circumstances like the present.

LORD PRESIDENT.—The provision of the A.S. was meant for the protection of the counsel for the poor. It was never meant to deprive the Dean of Faculty of the power of acting as senior counsel when requested by one of the counsel for the poor to do so. Such an operation of it would be to the prejudice of those parties for whose behoof it was made.

LORD GILLIES.—If the function now claimed by the Dean of Faculty be contrary to the letter of the A.S., I am sure it is most congenial with the spirit of it.

The Court then requested the Dean to proceed.

¹ Barr, Feb. 29, 1832 (ante, p. 408.)

JOHN NICOLSON, Pursuer.—Jameson—W. Bell.
M'ALISTER'S TRUSTEES, Defenders.—M'Neill.

No. 364.

July 3, 1832.

Nicolson v.

M'Alister's

Trustees.

—

Scheniman, &c.

v. Willison's

Trustees.

—

Quinquennial Prescription.—A tenant who had retained rents in his hands to answer an alleged claim for ameliorations, having, several years after he left his farm, brought an action for payment of this claim—held not entitled to object to the counter-claim for rents retained being set off against it, on the ground that the five years prescription of rents had taken place.

SEQUEL of the case mentioned ante, VII. 743, and VIII. 488. The July 3, 1832.
 only point remaining for decision after the judgment there reported, regarded a claim by the pursuer for the value of a house built by him on the farm held by him under M'Alister. This was ascertained to be worth £180, to which he was found entitled, subject to compensation on account of whatever arrear of rent might be due by him for his farm. The rents which had not been paid exceeded this sum, but he pleaded prescription, it being now considerably more than five years since he left the farm. To this plea it was answered, that there was no room for it in the present case, where he had retained the rents in compensation of the claim for improvements on his part.

The Court repelled the plea, found that he had failed to establish that any thing was due to him, and assailed the defenders.

J. M'KENZIE, W.S.—M. N. M'DONALD, W.S.—Agents.

CHARLES SCHENIMAN and Others, Pursuers.—More—J. Paterson.

No. 365.

WILLISON'S TRUSTEES, Defenders.—Boswell—W. Bell.

Trust.—Trustees entitled, before denuding, to a discharge of an annuity, payable out of the trust-fund which had been assigned to a third party, or to retain sufficient funds to answer it.

THE late George Willison, by trust-deed of settlement, conveyed his whole estate to the defenders as trustees, for division among his grandchildren, the pursuers, on the youngest attaining majority, subject to the payment of a liferent annuity to their mother, his daughter. In an action of count and reckoning at the instance of the grandchildren, the Court June 25, 1828) found that they were entitled to receive payment of heir provisions, “providing always that the interest of the liferentrix, heir mother, Mrs Emira Willison Clark or Scheniman be secured or effectually waved.” Part of the annuity payable to Mrs Scheniman had been by her assigned to a Mrs M'Gowan, and the assignation intimated to the trustees. Mrs M'Gowan now refused to allow the annuity to be redeemed, and the trustees insisted on retaining such amount of the prin-

July 3, 1832.

2d DIVISION.

Ld. Medwyn.

T.

No. 365. Capital fund as was necessary to answer it, unless the pursuers should obtain a discharge to them from Mrs M'Gowan. The Lord Ordinary Scheniman, &c. having given effect to the plea of the trustees, the pursuers reclaimed, but v. Willison's Trustees. the Court refused their reclaiming note.

July 3, 1832.
Scott, &c. v.
Anderson.

H. SCHENIMAN, W.S.—H. CANNAN, W.S. Agents.

No. 366. ALEXANDER SCOTT and CURATORS, Suspenders.—D. F. Hope—
J. Anderson.

JOHN ANDERSON, Charger.—Sandford.

Jurisdiction—Sheriff's Small Debt Act—Circumstances which held not sufficient to maintain a previously subsisting domicile to the effect of giving jurisdiction.
2. A decree by the Sheriff under the small debt act, liable to review when the defendant has not been legally subject to his jurisdiction.

July 3, 1832. THE suspender, Scott, was proprietor of some heritable property at Tollcross, in Lanarkshire, where he had been brought up. In May 1829 2d Division. he married, and continued to reside at Tollcross, at first in a house belonging to himself, in which his mother lived, and afterwards in family with his brother-in-law. In August of the same year, he removed to Pollockshole, in the county of Dumbarton, where a furnished room was taken for him at so much per week, by one of his curators under a bond of interdiction, who also arranged with a grocer in the neighbourhood to supply him with groceries. In this room Scott and his wife resided during the winter, occasionally visiting his mother at Tollcross for a day or two at a time. On the 24th April 1830, he, with his wife, and a child which had been born shortly before, went to Tollcross for the purpose of having the child baptized there. They took up their abode in the house belonging to him, occupied by his mother, and remained there till the 24th May, when they returned to Pollockshole, the child having in the meanwhile died. While at Tollcross, Scott was, on the 7th May, personally cited before the Sheriff's Small Debt Court of Lanarkshire, on a summons at the instance of the charger, Anderson, for payment of an alleged debt of £6, 2s. No appearance having been made before the Sheriff, decree in absence passed against him; and a charge having been given, on the 25th May, by leaving a copy at the house in Tollcross, where he had been living with his mother, and the decree having been indorsed by the Sheriff of Dumbartonshire, he was apprehended at Pollockshole, and thereafter incarcerated. Thereupon a bill of suspension and liberation was presented in his name, and in name of his curators under the bond of interdiction, on the ground that having no domicile in Lanarkshire, he was not amenable to the jurisdiction of the Sheriff of that county; that consequently the whole proceedings were invalid, and not authorized by the Sheriff's small debt act, and of course liable to suspen-

sion, notwithstanding the declaration of finality in the act, which only applied to cases where the provisions thereof had been complied with. No. 366.

The Court passed the bill, and the Lord Ordinary having allowed a proof, whereby the facts above detailed as to Scott's domicile were established, pronounced the following interlocutor, adding the subjoined note :*—“ Finds it proved that the suspender was not, at the date of his citation, and of the decree against him, domiciled within the jurisdiction of the Sheriff of Lanarkshire ; and therefore suspends the letters simpliciter, and decerns : Finds the suspender entitled to expenses,” &c.

Anderson reclaime d.

LORD JUSTICE-CLERK.—The weight of the proof is in favour of the interlocutor. A house is taken for him in Dumbartonshire, and a credit arranged for him there, while it was merely as visiting his mother that he went occasionally to Tollcross.

LORD MEADOWBANK.—I had some difficulty on the fact that he went to Tollcross about his child's baptism. Suppose, while at Tollcross for a month, a citation had been left at his lodgings in Pollockhole, which was a mere taken room, the furniture not being his, would that have been sufficient ? It seems to me that his residence there was much of the same kind with that at Tollcross ; that he had no fixed residence any where, and that he might be taken at whichever of the two places he was found, and cited personally, as was done.

LORD CRINGLETIE.—I agree with the Lord Justice-Clerk, but I doubt as to awarding full expenses, the case being doubtful.

LORD GLENLEE concurring—

THE COURT adhered, with this variation, that the expenses should be subject to modification.

J. M'GILL, S.S.C.—A. HAMILTON, W.S.—Agents.

HENRY RAEURN, Pursuer.—*Rutherford—H. J. Robertson.*

No. 367.

JOHN BAIRD, Defender.—*Jameson—Burn Murdoch.*

Sale—Mora—Expenses.—1. Circumstances under which a delay of six months in completing the title to an heritable subject, after selling it, was held not to authorize the purchaser to resile. 2. In corresponding before raising an action, one agent having founded on an opinion of counsel, and having refused to communicate it and the memorial to the opposite agent—held, under the circumstances, that this was a ground for modifying expenses.

* “ The decision of the Court, in passing the bill of suspension, appears to the Lord Ordinary to reduce the point in dispute to the single question, whether the suspender was or was not domiciled within the jurisdiction of the Sheriff of Lanarkshire—and he thinks that the negative is established by the proof.”

No. 367.
July 5, 1832.
1st DIVISION.
Lord Medwyn.
D.

Raeburn v.
Baird.

IN 1785, Walker conveyed an heritable subject, situated near Fountainbridge, to Whyte and Henderson, equally betwixt them, under burden of the payment of Walker's debts, and several legacies. Henderson executed a general conveyance of his pro indiviso half, and of his whole other estate, in favour of Whyte, in trust, for behoof of his grandchildren, after paying debts. He left only one grandchild, and, after his own immediate issue were dead, Whyte gave a charge to the grandchild to enter heir, and thereon led an adjudication in implement of Henderson's general conveyance in his favour. He took the decree of adjudication in favour of himself, his heirs and assignees. Thereafter he obtained a charter of adjudication, was infest, and, in 1795, sold for himself, and "as trustee for the representatives of Henderson," the whole subjects falling under Walker's conveyance to Hamilton. From Hamilton the subjects passed, by several transmissions, to Raeburn.

On the 23d of March 1830, Baird agreed to purchase from Raeburn the property for £900, provided that his agent should be "satisfied with the titles," and that Raeburn would guarantee the rents for one year after Whitsunday 1830. Raeburn agreed to these conditions, and his agent Dickie sent the titles to Baird's agent, who, on the 4th of May, wrote that they were liable to three objections; 1st, that there was no evidence that Walker's debts and legacies were paid; 2d, that although Whyte had possessed only one pro indiviso half of the subjects in his own right, and though the other half was conveyed to him in trust, in order to secure it for the grandchildren of the trustor, and the trust contained no powers of sale, yet he had disposed the whole subjects; and, 3d, that one of the sasines contained 150 more words than corresponded to the stamp exhibited. Baird's agent concluded by stating that he was to be absent from town for three weeks, and, "in the meantime, you may communicate with my partner." Dickie afterwards got back the titles from the partner; and, on the 12th of July, he wrote in answer to the objections, 1st, that the debts and legacies of Walker were not real burdens, and did not appear in the record: 2d, that Whyte, by accepting Henderson's conveyance, became liable to pay his debts, and was entitled to sell his whole estate, if necessary, for that end; he also contended, from some provisions of the trust, that Whyte had full powers of sale: and, 3d, that an additional stamp was about to be affixed to the seisin. He sent back the titles to Baird's agent, who gave a receipt for them, "to be reconsidered by him, and returned on demand." Baird was informed of these proceedings by his agent, and on the 15th of July, wrote his agent that, after so long delay, he was surprised at Raeburn's attempting still to remove the objections to the title, and added, "Indeed it is now too late, even although you find the titles correct, as I have invested the money I intended to make the purchase with, otherwise," &c. On the 17th of July, this letter was forwarded by Baird's agent to Dickie. On the 21st of July, Dickie wrote, expressing his surprise that Baird should attempt to resile from his

agreement, and requesting a draft of the disposition to be sent to him for revision. On the 9th of August he again wrote Baird's agent, " According to your request I send you copy extracts from the title-deeds of the Fountainbridge property on record, and must now request the favour of your sending me the draft of the disposition for revision, as Mr Raeburn is anxious to get the transaction settled." On the 11th, Baird's agent answered that Baird believed the transaction at an end, from the delay in answering the letter of the 4th of May, and that his own " opinion as to the defect in the titles was in no way altered, in re-perusing the excerpts sent." Dickie again wrote on the 19th, desiring a draft of the disposition in favour of Baird, to be sent to him for revision, and threatening an action by Raeburn, to compel implement of the bargain. On the 27th, Baird's agent wrote that he had got this letter while in the country ; that as Baird had merely meant to purchase on speculation, and might have considerable difficulty, from the state of the titles, in reselling the property, he could not " think of making the purchase, or proceeding farther in the transaction ; this he (Baird) considers himself the more justified in doing from my offer to Mr Raeburn, expressly stipulating that the titles were to be ' to my satisfaction : ' I shall, however, in case you think proper to raise an action as you threaten, reserve to him the defence of your never having replied to, or taken any notice of my letter to you of the 4th of May last, till the 14th of July thereafter, by which he was led to conclude the transaction at an end. I return the title-deeds," &c.

After another interchange of letters, in which Baird's agent repeated his objection to the titles, Dickie wrote on the 23d of October, that, in terms of an opinion of counsel, he had obtained a ratification of Whyte's disposition in 1795, from the grandchild of Henderson, who had now been served heir-at-law to him. He added, " and as this, in the opinion of counsel, obviates every objection to the validity of the titles, I have now to intimate, that if Baird still declines to fulfil his bargain, I will execute a summons of implement against him." Baird's agent replied, that, without binding himself to be guided by the opinion obtained, he should be glad to see it and the memorial, before answering the letter of the 23d. Dickie refused to communicate the opinion, and Raeburn raised an action of implement.

Pleaded in defence by Baird—

He was not bound to make the purchase unless the titles were " to his agent's satisfaction." Objections being stated by his agent on the 4th of May, and the titles afterwards returned, and no answer being made till the 12th of July, he was entitled to believe the transaction at an end, and to invest his money otherwise ; and he had done so. As the titles were never completed till October, when the opinion of counsel was taken by Raeburn, the latter had no right to insist that Baird was still bound to implement a purchase entered into in March preceding, on the faith that he should without delay receive an unchallengeable title to the subject.

July 5, 1832.
Raeburn v.
Baird.

No. 367.

July 5, 1832.
Raeburn v.
Baird.

Pledged by Raeburn—

The titles were good as at first offered ; because Whyte, the trustee, who sold in 1795, had necessarily a power of sale, if required, to pay the debts which he was personally bound by acceptance of the trust to pay ; and it must now be presumed, post tantum tempus, that it was in the legitimate exercise of such power that he had sold. But, separately, the obligation undertaken by Raeburn, was merely to furnish Baird, debito tempore, with a good title. As Baird was not to take natural possession of the subjects sold, as at Whitsunday 1830, and Raeburn guaranteed the rents to Whitsunday 1831, Baird sustained no prejudice whatever, in consequence of a good title not being completed till October 1830. Nothing had occurred to justify Baird in believing the transaction to be broken off by the interval, before replying to the letter of the 4th of May, as it was necessary to make considerable investigation as to the titles, before replying to that letter.

The Lord Ordinary found, “ that by missive letters, dated 23d March, 1830, the defender agreed to purchase the property mentioned in the summons, at the sum of £900, provided his agent, upon examination, was satisfied with the titles, and the pursuer would warrant the property free from all incumbrances and servitudes, and would guarantee the rents for one year from Whitsunday : that the titles having been examined by the defender’s agent, he, on 4th May, addressed a letter to the pursuer’s agent, pointing out three objections to the process, the first of which was not well founded, and is not now insisted in as a defence against the action, the third admitted of being easily obviated, and has been obviated by an additional stamp,—and the second being an objection to the powers of a trustee who was feudally invested in a pro indiviso half of the property, to dispose of it for the purposes of the trust, if well founded, was removed by the ratification of the person who had the residuary interest in the trust estate, and who, of course, was entitled to call the trustee to account for his management : that the said letter of 4th May concludes,—‘ In my opinion, the title is not good ; and until I get good reason to change my opinion, I cannot recommend the title as a valid one,’ and after mentioning that he would be absent for three weeks, he adds,—‘ In the meantime, you may communicate with my partner :’ that the pursuer’s agent wrote, on 12th July, a detailed answer relating to the objections, maintaining that there was nothing material in the objections, and sent the titles again for reconsideration, for which the defender’s agent gave a receipt, ‘ to be reconsidered by him, and returned on demand :’ that before doing so, the defender’s agent wrote to the defender, who, in a reply dated 15th July 1830, stated, that ‘ after so long a delay, indeed it was too late, even although you find the titles correct, as I have now invested the money I intended to make the purchase with otherwise ;’ and concluding, ‘ I had every reason to presume that the transaction was at an end :’ that this letter was transmitted by the defender’s agent to the pursuer’s agent on.

the 17th July : that there was no stipulation in the agreement, that if the titles were not completed by the term day, or any particular day, there should be a resolution of the bargain ; nor is it alleged that the defender, or his agent, pressed for an answer to the letter of 4th May, or intimated that the titles must be completed by a particular day, otherwise he would hold the transaction at an end : that as the right was truly in the pursuer, and the objections, where well founded, were easily obviated, and as the subjects were tenanted at this time, and the natural possession was not to be taken by the defender, the delay in answering the letter of 4th May to 12th July, was not such as to entitle the defender to resile, without giving any notice, or making any demand to have the title completed, under the penalty of the bargain being rescinded on failing so to do : therefore decerned and ordained the defender to fulfil and implement his part of theforesaid missives of sale and agreement, in terms of the libel, on the pursuer fulfilling his part : found the defender liable in expenses."

Baird reclaimed.

LORD BALGRAY.—I have formed a decided opinion in this case. There is no plea of delay sufficient to entitle the defender to be free of his bargain. When a person purchases heritage, a progress of forty years must be produced ; these titles must be examined by the purchaser, and if objections are stated, or searches are wanting, and so forth, there must elapse some time before such investigation can be completed. This is a matter within the view of all parties, and therefore, when a purchaser means to make it an essential condition of his bargain that his titles must be tendered in a perfect condition by a given day, he must take care to express this condition in the most distinct terms ; and on failure to fulfil that condition, he should immediately declare his bargain to be at an end. But no such thing is done here ; and I would observe, as an important element in this question, that no actual possession of the purchased subject was to take place on the part of the purchaser at the first term after his bargain. The bargain is in March 1830 ; at this time the subject is let till Whitsunday 1831, and the seller guarantees the rents till that term. I am inclined therefore to think, that a good title made up within that year was sufficient implement of the seller's contract. I hold, therefore, that he has fulfilled his part, and that the purchaser is bound to fulfil his. Besides, I would observe, that I do not see any distinct and final intimation that the bargain is to be at an end until the month of October, and I see nothing to warrant such an intimation to have been given even then. The title now offered is a good legal title. Whyte held a general conveyance of the heritable estate of Henderson, and he led an adjudication in implement against Henderson's heir-at-law. This was a perfectly good feudal title, and many great estates in this country are held by no other. It was a fair objection on the part of the purchaser, that there was an apparent excess of power by Whyte in conveying the whole subject, since one half was held by him only as trustee for Henderson's grandchild ; but the objection is completely removed by the service and ratification of that grandchild, who had the only interest or title to challenge the conveyance.

LORD PRESIDENT.—In order to give any ground for the plea of delay, the purchaser ought to have taken his stand, after he had once intimated a desire to withdraw from the bargain ; but in place of that, he takes back the titles to reconsider,

No. 367.
July 5, 1832.
Raeburn v.
Baird.

No. 367. and keeps the matter open. Looking to the whole circumstances, I think no delay occurred, such as Baird could avail himself of, to repudiate his bargain.

July 5, 1832. Raeburn v. Baird. LORD CRAIGIE concurred, observing that Whyte's title was made up with perfect regularity.

Walker, &c. v. Neilson's Trustees. LORD GILLIES.—I also think the interlocutor correct. There was a general conveyance in favour of Whyte, on which he regularly led an adjudication in implement, after charging the heir of his author to enter. This was a correct mode of making up titles. But then Whyte proceeds to grant a disposition which appears to have been ultra vires. He sells the whole subject, apparently without making any investigation, judicial or extrajudicial, as to the state of the trustee's affairs, and the necessity for such a sale. I think the conveyance of the trust half of the subject might have been set aside at any period within the years of prescription. But any defect arising from this cause, is completely cured by the ratification of the heir of the trustee, the party for whose behoof the pro indiviso half was held in trust by Whyte. The title to the subject sold by Raeburn became thus unchallengeable, and I do not think the purchaser entitled to plead the delay as liberating him from his contract. Had he meant to use this plea, he should have broken off decidedly, instead of protracting a discussion on the merits of the titles.

His Lordship added, on the question of expenses, that as Raeburn had mentioned to Baird the opinion of counsel which he had taken, he should, under the circumstances, have complied with Baird's request to see it; and therefore his Lordship considered that Baird should only be found liable in expenses subject to modification. The other Judges adopted this suggestion.

THE COURT accordingly adhered on the merits, but altered as to expenses, and found Baird liable only since the date of the Lord Ordinary's judgment.

J. DICKIE, W.S.—H. HANDYSIDE, W.S.—Agents.

No. 368. THOMAS WALKER and JAMES M'WILLIAMS, Advocators.—Skene—Neaves.

NEILSON'S TRUSTEES, Respondents.—Jameson—A. M'Neill.

Process—Advocation.—1. A bill of advocation, which contained a summons and defences, with three interlocutory judgments, the last of which gave leave to advocate, accompanied by a certificate of caution being found, having been passed de plano—held, that the bill was irregularly passed. 2. Observed that, though the interlocutor of a Lord Ordinary passing or refusing a bill of advocation of an interlocutory judgment is final, where the procedure is regular, it may be brought under review if the procedure be irregular.

July 5, 1832. IT is provided by 6 Geo. IV. c. 120, § 41, and A.S. 11th July 1823, § 2, that a bill of advocation complaining of the final judgment of a Sheriff, 1st Division, Ld. Corehouse, shall contain a copy of the summons or petition, and defences or answers, with such of the interlocutors as are complained of, but without any other narration, and without argument; and that such bills shall be passed at once, if a bond of caution has been lodged in the Inferior Court for the expenses of both Courts.

By § 45 of the statute, and § 4 of the A.S. 11th July 1828, it is enacted—
No. 368.
that bills of advocation against interlocutory judgments on the head of
incompetency, &c., may be passed without caution; and that the inter-
locutor of the Lord Ordinary, passing or refusing such bills, shall be final.

July 5, 1832.
Walker, &c. v.
Neilson's Trustees.

Neilson raised an action against Walker and M'Williams before the Sheriff of Lanarkshire (which was afterwards insisted in by Neilson's trustees), concluding for payment of £60, as the balance remaining due under a bill for £63. It was pleaded in defence, *inter alia*, that the bill was prescribed, and that it was a vitiated document. A record was closed, and the Sheriff "allowed the parties a proof *prout de jure*." The defendants reclaimed, but the Sheriff, "in respect that the proof allowed is before answer, whereby the whole pleas of parties are reserved entire, adhhered." They thereupon applied for leave to advocate, and the Sheriff "granted leave to advocate." A bond of caution was then lodged, and a bill of advocation presented, setting forth the summons and defences, the three interlocutors, and thereafter proceeding thus:—"The complainers have been advised that these interlocutors, in so far as a proof has been allowed, are erroneous and contrary to law, and are therefore humbly submitted to your Lordship's review; and the complainers having found caution, conform to certificate of the Sheriff-clerk produced with the bill, for these and other reasons, &c., the said action ought to be advocated," &c.

The Lord Ordinary passed the bill *de plano*, without ordering service on the other party. When the cause came before the Lord Ordinary in the Outer House, Neilson's trustees objected to the procedure as irregular, contending that it was ultra vires of the Lord Ordinary on the bills, to pass the bill *de plano*. His Lordship, however, considered that he had no power to review the proceedings in the Bill-Chamber, and therefore "repelled the preliminary plea of incompetency *hoc statu*." A record was made up, in which the plea of incompetency was set forth, and the record being closed, that plea was insisted in by Neilson's trustees.

Pleaded by Neilson's Trustees—

Where a judgment is interlocutory, the bill may be passed without caution at all; but if caution be ordered, it is only after the Lord Ordinary has advised the cause, and such caution is found in the Bill-Chamber. But in consequence of the caution having been found in the Inferior Court, the Lord Ordinary on the bills had been misled, so as to consider the bill one of those which must be passed *de plano*; and he had passed it *de plano*, which was irregular and ultra vires, as the respondents had an obvious interest in being heard whether the bill should be passed, and, if passed, what caution should be found, especially as the Lord Ordinary's interlocutor was final.

Pleaded by Walker and M'Williams—

The bill of advocation set forth the res gesta of the Inferior Court,

No. 368.

July 5, 1832.
Walker, &c. v.
Neilson's Trus-
tees.

and it was impossible to read it without perceiving that it was an interlocutory judgment which was to be advocated. There was no irregularity in setting forth the summons and defences, and the interlocutor complained of, in such a bill, without any other narration, and without any farther argument than appeared necessary to explain the case, and to show the necessity of advocating. It was competent for the Lord Ordinary, if he saw clear ground for it, to pass such a bill de plano, especially as he knew that full caution had been found for expenses in both courts; and it was no objection that such bond of caution had been lodged in the Inferior Court, in place of the Bill-Chamber, as it was equally available to the respondents in either event, and there was no regulation upon the subject. But if an irregularity had been committed, the proper remedy was by means of a reclaiming note on the part of Neilson's trustees, which note was necessarily rendered competent by the existence of such irregularity.

The Lord Ordinary reported the case, and being requested to state his opinion, observed that he considered the Lord Ordinary on the Bills to have been misled by the form under which the bill was presented to him: that his Lordship must have considered it one of those bills which he was bound to pass de plano, and as a matter of course; and that it could only have been owing to this mistake that the bill was passed without giving the respondents an opportunity of being heard. He farther observed, that he thought it was competent for the respondents to have presented a reclaiming note against the judgment, because, as it was irregularly obtained, it was not within that provision of the statute declaring such judgment, when regularly pronounced, to be final.

LORD PRESIDENT.—It was quite an irregular procedure to pass a bill like this without giving the respondents an opportunity of being heard. The Lord Ordinary might, without this, have refused the bill, but could not pass it. A bill is just another word for a petition, and a bill praying for letters of advocation, except in those cases where it must pass de plano, cannot be regularly granted, more than any other petition, until an opportunity is afforded to the respondent to be heard. It may seem very clear upon the statement in the bill or petition, so long as there is no contradictor, that the prayer ought to be granted; but in this, and in all such cases, justice absolutely requires that the opposite party, whose interest is involved, shall have an opportunity to be heard before the bill or petition is disposed of. I think the proceeding of the advocates has been irregular from the outset, and that the Lord Ordinary should remit simpliciter, allowing the parties, however, to bring a new advocation in competent form.

LORD GILLIES.—I concur. The whole irregularity may be traced originally to the error committed by the advocates, in finding caution in the Inferior Court before offering a bill of advocation. That was an error of commission, and not of omission, and its consequences are very important. The bill of advocation sets forth at its close, as a reason of advocation, just as if it had been an advocation of a

final judgment, that caution had been found in the Inferior Court, conform to No. 368. certificate of the Sheriff-clerk produced, and therefore it prays for advocation. The regular prayer should have been to pass without caution, or on such caution as the Walker, &c. v. Lord Ordinary might ordain to be found in the Bill-Chamber. This is a most Neilson's Trust-
July 5, 1832.
important error of the advocates, as it seemed at once to mark the bill as belonging-tees.
to that class which must be passed de plano. Indeed, it was, in substance a Young v. Pol-
statement to the Lord Ordinary that it was such a bill, and thus he, or the Clerk to lock.
the Bills, looked on the fact of the caution being found in the Inferior Court, and
the accompanying certificate by the Sheriff-clerk, as a warrant for its being passed
de plano.

LORD CRAIGIE considered that neither party was free from fault, as the respondents should have pressed their objection at an earlier stage of the procedure.

LORD BALGRAY.—In common practice, every bill of advocation of a final judgment concludes with the statement, that caution is found in the Inferior Court, and a certificate to that effect is produced with the bill. It is probably by adverting to this part of the bill, and to the fact of the certificate being produced, that the clerk to the bills is guided, in writing out the word "pass," which he does where the bill passes de plano; and where a Lord Ordinary finds this word written, he signs it without perusing the bill, and the final interlocutor is thus pronounced. Now, as a certificate was produced from the Sheriff-clerk in this case, and as the bill concluded with the statement, that caution had already been found in the Inferior Court, it is probable that the judgment passing the bill was written out de plano, the Lord Ordinary being entirely misled as to the nature of the bill, and having considered himself warranted in thinking that it did not require to be perused. I would also observe, that I think a reclaiming note was a competent remedy, in the circumstances of this case, and that, had it been presented, the Court would have recalled the interlocutor passing the bill, as being irregularly pronounced.*

The Lord Ordinary then pronounced this interlocutor: "Having advised with the Lords of the First Division, &c., dismisses the present advocation in respect of the bill having been irregularly passed; remits the cause simpli-citer to the Sheriff, and decerns, reserving to the advocates to advocate of new in a regular manner, if so advised, and to apply for leave therefor; finds expenses due," &c.

G. GORDON, S.S.C.—

—Agents.

MRS MARGARET YOUNG or THOMSON, Advocate.—*Cuninghame.* No. 369.
JAMES POLLOCK, Respondent.—*Jameson—J. Paterson.*

Bill of Exchange.—Sequel of the case reported ante, p. 8, and p. 570. July 5, 1832. The re-examination of Pollock having taken place, and his additional de-
position being now advised, a majority of the Court considered, that though ^{1st DIVISION.} Ld. Corehouse,
S.

* The Court remarked, that there was no ground for supposing that the Lord Ordinary on the Bills had been intentionally misled, but that, however innocently the mistake had occurred, the irregularity was fatal to the procedure.

No. 369. the oath was of a suspicious tenor, it did not authorize them to alter the judgment; and their Lordships therefore adhered, but found the advocate liable in expenses only, subject to modification.

July 5, 1832.
Young v. Pollock.

M'Callum, &c.
v. Christie.

W. WADDELL, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

No. 370.

SINGLE BILLS, &c.

Process—Sequestration.—When a petition for sequestration is presented immediately before the Court meets, no deliverance in future will be pronounced on that day, except an interlocutor superseding the petition till next day.

THE Lord President took occasion to observe, before proceeding to the business of the day, that a practice prevailed, particularly towards the close of a Session, of laying down petitions on the bench, just before the Court met, and that the Court was immediately moved to pronounce a deliverance upon them, under circumstances which created too great a hazard of irregularities being overlooked. Many such papers were petitions for sequestration; and in regard to these, the petitioner had an interest that a deliverance should be pronounced without delay, as such deliverance formed afterwards the terminus a quo, in computing the date of the bankruptcy. But in future his Lordship suggested that no other deliverance should be pronounced, even in such cases, than an interlocutor superseding consideration of the petition until next day, because that interlocutor was sufficient to protect every legitimate interest of the petitioner, and it would afford full time for examination of the circumstances under which the petition was presented. His Lordship added, that the special occasion which had induced him to propose this rule for the future, was the fact of a petition for sequestration having been granted yesterday de plano, though his Lordship was afterwards strongly impressed with doubt whether the party could be held as falling within the description of individuals against whom alone the statute allowed sequestration to be awarded.

The other Judges acquiesced in the propriety of the rule proposed by the Lord President. Lord Balgray had been incidentally led to animadvert on the same subject very shortly before.

No. 371.

M'CALLUM and DALGLIESH, Pursuers.—*More.*
WILLIAM CHRISTIE, Defender.—*Deas.*

Process—Reclaiming Note.—The Lord Ordinary having sustained a preliminary defence, and the pursuers having reclaimed, and papers being appended to the reclaiming note, which were not in process before lodging the note, these papers ordered to be withdrawn, though they consisted of a correspondence, part of which had been read to the Lord Ordinary.

July 7, 1832.

1st DIVISION.
Ld. Corehouse.
S.

M'CALLUM and Dalgliesh, as creditors of a bankrupt, raised an action against Christie, the trustee on the bankrupt estate, who pleaded that the action was incompetent. At discussing this defence, the pursuers read part of a correspondence to the Lord Ordinary, which was not in process. The Lord Ordinary “sustained”

W. B. K. LAWRIE, Pursuer.—*Shene—Thomson.*
JAMES DONALD and Others, Defenders.—*Bell.*

No. 372.

July 5, 1832.
2d Division.
Lord Glenlee.
T.

SEQUEL of the case mentioned ante, IX. 147. The only point remaining for decision related to certain objections taken to an accountant's report by the pursuer, who claimed that the interest of the entailer's debts should be set off half-yearly from the rents for which he had been found liable, with interest, so as in effect to allow him interest on the interest of these debts. The Court holding this claim (which they besides did not consider well-founded) to be excluded by the previous proceeding in the cause, approved of the report, and decreed in terms thereof.

Lawrie v.
M'Donald, &c.

M'Lellan, &c.
v. Finlay.

A. B. v. her
Creditors.

JAMES DUNLOP, W.S.—VANS HATHORN, W.S.—Agents.

A. M'LELLAN and SON, Pursuers.—*D. F. Hope—Russell.*
ALEXANDER FINLAY, Defender.—*Robertson.*

No. 373.

ACTION by M'Lellan and Co., coachmakers in Glasgow, to recover July 5, 1832. the balance of the price of a carriage furnished by them to the defender, which he had on frivolous grounds withheld. The Lord Ordinary de-
cided against him, with expenses, and the Court adhered.

2d Division.
Ld. Fullerton.
R.

J. BROWN,—A. & J. PATERSON,—Agents.

A. B., Pursuer.—*Maitland.*
HER CREDITORS, Defenders.—*R. Bell.*

No. 374.

Cessio Bonorum.—An annual sum of £28 allowed to creditors out of a pension of £70, payable to the widow of an officer, and a power of attorney directed to be granted to a party who should draw the full pension, and pay over to the creditors the sum assigned.

THE widow of an officer having a pension of £70, and whose children July 6, 1832. had also a pension of £60 per annum, brought process of cessio bonorum against her creditors, to whom she owed between £200 or £300. The Court, in determining the amount to be assigned, threw out of consider-

2d Division.

the preliminary defence; dismissed the action as incompetent," &c. The pursuers reclaimed, and printed the correspondence in an appendix. When the case was moved in the Single Bills, the defender objected to the competency of its being appended, as it was only put into process that morning. The Court ordered it to be withdrawn.

M'CALLUM and DALGLIESH, W.S.—BROWN and MILLER, W.S.—Agents.

No. 374.
July 6, 1832.
A. B. v. her Creditors.

Tate, &c. v.
Pringle.

ation the pension of the children, as in so far relieving their mother of the burden of maintaining them out of her own funds, directed her to assign £28, and to grant a power of attorney for drawing the whole pension, and paying over that sum to the creditors, as provided in the case of Murcheson, February 6, 1830, (*Ante, VIII. 464.*)¹

No. 375.

JOHN TATE and Others, Petitioners.—*Walker.*
JOHN PRINGLE, Respondent.—*Whigham.*

Judicial Factor—Cautioner.—Creditors on a property over which a judicial factor had been appointed, having had his accounts audited without intimation to the cautioner—Held not to be thereby precluded from getting up the bond, to put it on record with a view to do diligence against him.

July 6, 1832.
2d Division.
F.

In 1812, Mr Robert Rattray, W.S., having been appointed judicial factor on a small property, which was the subject of a process of ranking and sale, the respondent Pringle enacted himself as his cautioner, and subscribed a bond of caution, which was lodged in the clerk's hands. In June 1831, the petitioners, Tate, &c., creditors in the ranking, applied to the Court to have Rattray's accounts remitted to the auditor to be taxed, but without intimating their petition to Pringle, the cautioner. The accounts were thereafter taxed by the auditor, and a balance reported to be due by Rattray of £1663, for consignation of which, the Court granted an order on him. Rattray having failed to comply with this order, and declared his insolvency, Tate, &c., presented a petition for recall of the factory, and the appointment of a new factor, and for a warrant on the clerk to transmit the bond of caution to the record of deeds to be recorded, so that they might operate on it against Pringle, for recovery of the balance due by Rattray.

To this Pringle objected, on the ground, that having been no party to the auditing, the report was not conclusive against him, and that he was entitled to an investigation of the accounts, and also to the benefit of a plea founded on the neglect of the creditors, and their delay to call Rattray to account; and he contended, that as it would still be competent for him to appear, and have these matters determined under the application for auditing the accounts,² he ought not, by the bond being recorded so as to enable Tate, &c., to give him a charge, to be compelled to state these pleas in the form of a suspension, where he would be obliged to find caution; whereas, if the petition for auditing had been intimated to him as it ought to have been, he would have been entitled to have stated them under that application, and without finding caution.

¹ The name is there printed by mistake “Robertson.”

² *Moreland v. Sprott*, Dec. 4, 1829, (*Ante, VIII. 181.*)

LORD JUSTICE-CLERK.—There was no necessity for calling the cautioner.

No. 375.

LORD CRINGLETIE.—The statements in the answers are premature. No harm is done by ordering the bond to be recorded.

July 6, 1832.
Tate, &c. v.

LORD MEADOWBANK.—If we have any discretion in the matter, I think we are bound to consider in equity whether every thing has been done which the cautioner was entitled to require; and really, when no steps had been taken for so long a period, the creditors ought to have intimated to him the application to have the accounts audited, and we have now to consider whether in equity they are entitled to call upon us to stretch our powers to put them in a different situation from that in which they at present stand. I am not so clear that we should grant the application.

LORD GLENLEE.—I never understood that it was necessary to call the cautioner in an application for auditing a factor's accounts.

LORD JUSTICE-CLERK.—The cautioner is not at all ill dealt with. It was only on the failure of the factor to consign that it was necessary to have recourse on him, and the only question here is, if the creditors are entitled to have the bond, to be able to put it on record. I think they are, but Pringle will not thereby be precluded of any plea competent to him.

THE COURT accordingly granted warrant for delivering up the bond to be put on record.

WALKER, RICHARDSON, and MELVILLE, W.S.—JAMES BRIDGES, W.S.—Agents.

WOOD'S TRUSTEES and MRS VEITCH, Petitioners.—Keay—Cuninghame. No. 376.
CHARLES FERRIER, Respondent.—D. F. Hope—Forsyth.

Sasine—Ranking and Sale—Interim Warrant.—A crown charter of resignation in favour of a series of heirs of entail, containing a clause of dispensation in favour of the heirs, for taking infestment in diverse lands at the principal manor-place, held to warrant the granting a bond of annuity with a similar dispensation. 2. Interim warrant granted on a judicial factor, for payment of a preferable annuity out of the arrested rents of lands the subject of a ranking and sale, before any common agent was appointed, or a state of the debts made up, or a proof of rental taken.

GRAHAM of GARTMORE held various discontiguous estates under an entail constituted by a crown charter of resignation, which contained a clause of dispensation, declaring, “quod unica sasina nunc per dictum Robertum Graham, et omni tempore futuro suscipienda per prædict. heredes talliæ apud manorici locum de Gartmore vel super illa parte fundi dict. diversarum terrarum,” &c. In 1829, in consideration of the sum of £13,000, Gartmore granted to Henry Wood a redeemable heritable bond of annuity of £1352, 12s. 6d. during Gartmore's life, over the barony of Gartmore, and certain other discontiguous properties contained in the crown charter. This bond contained a precept for giving infestment at Gartmore manor-house, in virtue of the clause of dispensation, and infestment was there given accordingly. At a subsequent period the bond was

July 6, 1832.
2d DIVISION.
Ld Medwyn.
T.

No. 376.

July 6, 1832.
Wood's Trustees, &c. v.
Ferrier.Kerr, &c. v.
Woods, &c.

assigned in part to the late Peter Wood, whose trustees, the petitioners, were now in right thereof, and in part to the other petitioner Mrs Veitch. Gartmore having become insolvent, and having granted a trust-deed, (which was found ineffectual against creditors objecting*) the present petitioners obtained decree of maills and duties, but agreed to the trustees drawing the rents, on condition of paying their annuity, which was done down to Martinmas last. In the mean time certain creditors brought a ranking and sale of Gartmore's estates as to his life-interest therein, which was sisted in limine, as mentioned ante, 619, till it should be determined whether the entail was effectual or not, the lands having been previously sequestrated, and a judicial factor appointed. The annuities falling due to the petitioners at Whitsunday last not having been paid, they now applied to the Court for an interim warrant on the factor to make payment of the same out of the rents in his hands. Their bond was the first security on the lands over which it was granted, and the factor had sufficient rents in his hands to answer their annuity; but Ferrier, trustee on the estate of White, a personal creditor of Gartmore, had arrested them, and he objected to the warrant being granted, chiefly on the grounds—

1. That the infestation on the bond was *ex facie null*, as taken at the manor-house, for several discontiguous estates, in virtue of a clause of dispensation which was restricted to the heirs of entail themselves; and,
2. That it was premature to grant such warrant before any proof of the rental or debts had been taken in the ranking, and before a common agent had been appointed.

THE COURT overruled the objections, and granted warrant for payment of the annuity, restricted to a sum which had been in use to be accepted from Gartmore himself, and under reservation of a claim for the full amount as contained in the bond.

THOMSON PAUL, W.S.—J. B. GRACIE, W.S.—JAS. SWAN, W.S.—Agents.

No. 377.

KERR and INGLES, Advocators—Jameson—A. M'Neill.
G. Woods and T. Croudace, Respondents—D. F. Hope—Cheape.

Prescription—Process.—In an action in an inferior court against a woman for payment of the price of furnishings made to her deceased husband, more than three years before the action was brought, she admitted a partial payment by her within the three years, but alleged that this was in the erroneous belief that the goods had been truly furnished, which she now denied, and further pleaded prescription; the inferior judge having pronounced an interlocutor allowing the pursuer a proof of the delivery, against which she did not reclaim; and a proof having been taken and judgment pronounced against her; held, that she was precluded from resorting in an advocacy to the defence of prescription.

* Ker and Dickson v. Graham, January 28, 1830; (ante, VIII. 408.)

Woods and Croudace, paper-makers at Settle in Yorkshire, in 1829, raised an action before the sheriff of Renfrewshire against the late Mrs Stewart, as executrix of her deceased husband, a bookseller in Greenock, for payment of £30, being the price of a quantity of paper alleged to have been furnished to him in 1824, after deducting £3, stated to have been paid to account by Mrs Stewart after her husband's death, but within three years of the date when the paper was furnished. In her defences, Mrs Stewart (besides certain preliminary objections unnecessary to be noticed) pleaded on the merits: " Supposing, however, the case, as it stands, to be competent against the defender, she has to state, on the merits, that the goods charged for were never received. The first intimation the defender had of the existence of such a claim, was in March 1826, when the traveller, or one of the partners of the pursuers' house, called on her, and she in ignorance, and as it afterwards turned out, in error, paid the £3 credited in the account produced with the summons. On afterwards making enquiry at the daughter, who had the exclusive management of the business at the time the goods were alleged to have been furnished, the defender was made aware of their never having arrived. It is therefore the duty of the pursuers to show, that the goods charged in the account libelled on were ordered by the defender's husband, and to bring forward some competent evidence of their having been sent off to the address of the defender's husband, and, in the absence of such evidence, the defender has no doubt that your Lordship will assoilze her from the conclusions of the libel, and find her entitled to expenses."

She further added these pleas, " The paper alleged to have been furnished to the deceased was never received, and there is no evidence of its having been ordered, or sent off by the pursuers, which evidence they are bound to produce. Lastly, Should the pursuers be found to have right to sue the defender for the debt claimed, without their having previously constituted the claim against the proper person, she avers, that the debt is not due; and as it has undergone prescription, the resting-owing can only be proved by the writ of her deceased husband, or by the acknowledgment of his heir."

The sheriff having repelled the preliminary defences, ordered condescendence and answers, and thereafter allowed the " pursuers a proof, prout de jure, of the defender's late husband having ordered and received the goods in question, and of what is set forth in the condescendence as connected therewith, and to the defender a conjunct probation."

Mrs Stewart did not reclaim against this interlocutor, and a proof was accordingly led, which established the fact of the paper having been ordered and delivered. On advising this, the Sheriff found that Woods and Croudace had fully instructed the order and delivery of the paper, and therefore decerned in the constitution of the debt; and farther decerned for payment against the advocates Kerr and Ingles, writers in Greenock,

No. 377.

July 6, 1832.
2d Division.
Ld. Fullerton.Kerr, &c. v.
Woods, &c.

No. 377.

July 6, 1832.
Kerr, &c. v.
Woods, &c.

as executors of Mrs Stewart, who had in the meanwhile died, and in whose place they had sisted themselves.

Kerr and Ingles then brought an advocation, in which they rested chiefly on the plea of prescription.

The Lord Ordinary pronounced this interlocutor: "Finds that the action was originally brought by the respondents, against the late Mrs Janet Webster or Stewart, as the executrix of her husband Thomas Stewart, for the price of a quantity of paper, furnished to the said Thomas Stewart by the respondents, and that the action is now insisted in against the advocates, her executors: Finds that the said original defender, by her pleadings in the inferior court, waved the plea of prescription, in regard to the constitution of the debt, and went to proof with the respondents, in the question, whether or not the goods, of which the price was claimed, had been forwarded to and received by Thomas Stewart, her husband: Finds it established by the proof, that the goods were forwarded to, and received by Thomas Stewart: Finds that it was admitted by the original defender, in her defences, that, in March 1826, within three years from the furnishing of the goods, she received intimation of the existence of the claim, and paid 'the three pounds credited in the account produced with the summons.' Finds, that while she, in her pleadings, avers that this payment was made in error, she describes that error to have consisted in making the payment before she had obtained information that the goods were never received by her husband: Finds that these statements by the original defender, are necessarily inconsistent with the supposition of the price of the goods having been paid, and substantially amount to an admission, that no payment but the three pounds ever was made: Therefore repels the plea of prescription in regard to resting owing, and remits the case, simpliciter, to the sheriff, and decerns; Finds the respondents entitled to expenses," &c.

Kerr and Ingles reclaimed.

Jameson, for the Reclaimers.—The only point before the Court is the question of prescription. Now, this was pleaded in the original defences, and entering into the merits was not a waiver of it, because, according to the present form of process, every plea must be stated at once; and if the Sheriff committed error in allowing a proof, this may competently be corrected in an advocation.

D. F. Hope, for the Respondents.—This is a special case. It is admitted that the account was presented within the three years, and that a partial payment was then made. No doubt, the admission is qualified by the statement that the partial payment was in the woman's belief that the goods were ordered and delivered; but she goes to issue on the point of fact, without even reclaiming against the interlocutor allowing the proof. If such proceedings had taken place in this Court, it is clear she would have been barred from resorting to the plea of prescription; but it is equally waived in the inferior court. Then if the plea of prescription has been waved so far as regards the constitution of the debt, the admission of partial payment is important

as to how far it could be pleaded as to the resting-owing. It amounts to an admission that no more than £3 was paid, and so excludes the plea of prescription. No. 377.

Jameson, in reply.—In considering the question of prescription, the proof must be laid out of view, because, if the plea be not waved, it would have excluded the Woods, &c. proof. Now the three years having run before the action was raised, two things Lang v. Bruce. sell to be proved—the constitution and the subsistence of the alleged debt. Neither of these, however, is established by the admission of the defendant. Even an admission of the furnishing by an executor is not enough, as the deceased may have paid. But it is said the admission is equivalent to an acknowledgment that the whole was due except £3. That, however, is not the case. She does not say that the whole was due, but that she was erroneously persuaded that £3 was due; and how can an admission of £3 being paid within the years of prescription make out that £30 more was due, and still remains so? The plea of prescription was no doubt virtually repelled by the Sheriff's interlocutor allowing a proof, but no party is bound to advocate before final judgment, under the penalty of being held foreclosed.

LORD CRINGLETIE.—She might at least have reclaimed to the Sheriff against allowing a proof, but she did not; and now, she having died, it would be the height of injustice to sustain the plea.

LORD JUSTICE-CLERK.—Attending to all the circumstances and the pleadings, I am satisfied the interlocutor is right. Instead of standing on the plea of prescription, she goes to issue on the proof, and does not advocate from the interlocutor allowing it as an illegal mode of proof; and then the proof being clear, it is too late for her to go back on the plea of prescription.

LORDS GLENLEE and MEADOWBANK concurring,

THE COURT adhered.

JAMES STUART, S.S.C.—THOMAS LEBURN, S.S.C.—Agents.

THOMAS LANG, Advocator.—*Shene—Cuninghame.*
ARCHIBALD BRUCE, Respondent.—*Sol.-Gen. Cockburn—Whigham.*

No. 378.

Sale—Bankrupt—Proof.—1. Cattle, specifically distinguished, were bought on the seller's premises by public roup; by the articles of roup, the seller was bound to keep them for a certain period after the sale; the cattle were with this view driven by servants of the seller, at the desire and with the assistance of the buyer, to the seller's unlocked parks; bills were granted for the whole price, and retired; part of the cattle were carried away from the parks by the buyer, who lived at a distance; and after the seller had called a meeting of his creditors, but before it was held, and while they were in cursu of rendering him bankrupt, the buyer, within the period during which the seller was bound to keep the cattle, sent a servant to take delivery of the rest of them, which being resisted, he applied to the Sheriff for an order of delivery, which was opposed by the creditors, and during the discussion the estates of the seller were sequestered under the bankrupt act,—Held (after the whole Court had been equally divided, and one Judge agreed not to vote, so that a decision might be pronounced), that the buyer had right to the stock preferably to the trustee; but ordained to find caution to repeat the value, in the event of reversal on appeal. 2. An offer of proof, that the auctioneer declared orally at

No. 378. the sale, that on the lots being knocked down, they were to be held as delivered to the purchasers,—held by the Lord Ordinary, and approved of by the consulted judges, that such proof was incompetent, there being written articles of sale containing no such provision.

July 7, 1832. RENNIE of Phantassie advertised a sale of cattle and sheep, by public roup, on the 27th July 1829, under written articles, which, inter alia, contained these conditions : “ *First*, the stock to be put up in lots, and knocked down to the highest offerer, and afterwards to be at the risk of the purchaser. *Second*, the stock to be kept 14 days by the exposor; or, if the purchaser should prefer lifting in equal proportions, commencing the first week, then the last portion will be kept one month from the day of the sale. *Third*, the purchaser to pay ready money, or grant bill at two months, with security, before leaving the sale, for the stock purchased by him; five per cent discount to be allowed for ready money.”

The cattle sold were put up in lots, in a court or yard in the possession of Rennie. There were specific marks on the cattle of each lot when put up, except one lot of seven, which was distinguishable from all the rest by the absence of such marks. Thomas Lang, butcher in Glasgow, bought three lots of ewes, and four lots of cattle, at the roup, including the lot of cattle which was unmarked. Immediately after the sale, Lang caused the seven unmarked cattle to be driven to Glasgow; the rest of the stock bought by him was driven away by persons said to be Rennie’s servants, along with other stock, from the stack-yard where the roup took place, to grazing parks occupied by Rennie. This was done in reference to the second article of roup; and Lang averred, that he “ himself superintended the driving of the cattle out of the stackyard to the said parks or enclosures, and took the assistance, for that purpose, of such persons as were around him.” There were no locks on the gates of the parks into which they were driven. Next day, Rennie’s servants, by the direction of Lang, drove 40 of the ewes bought by him to a park in the neighbourhood of Edinburgh, belonging to Sir Robert Dick, and occupied by one Hutchison. Lang sent his servants from Glasgow to this park, who drove the ewes to Glasgow.

He returned to Glasgow on the 29th August, and accepted two bills drawn upon him by Rennie, one for £300 at two months, and one for £495 at three months. These bills covered the price of the stock bought at the roup, and 80 other ewes bought under another transaction. The bills were immediately discounted by Rennie, and eventually retired by Lang.

On the 5th August, Lang wrote to Rennie’s grieve,—“ I will take it kind if you will send off to-morrow the ten stots that were sent to Markle,* and put them into John Hutchison’s park at Sir Robert Dick’s, where I

* One of Rennie’s grazing parks.

will have a man to take them away on Friday night or Saturday morning No. 378. early; and if you will be so good as send off forty of the ewes on Monday the 10th current, to the same park at Sir Robert Dick's, I will have another man there to take them away."

July 7, 1832.
Lang v. Bruce.

Pursuant to this letter, ten stots and 40 ewes were driven to Hutchinson's parks by Rennie's servants, whence Lang's servants drove them to Glasgow.

On the 13th of August, Rennie's law-agents, by his desire, addressed a circular to his creditors, stating, that "in consequence of embarrassments, which, it is hoped, will be only temporary, you are earnestly entreated to attend a meeting of the creditors of John Rennie, Esq. of Phantassie, to be held in the Royal Exchange Coffee-house, Edinburgh, on Wednesday the 19th current, at two o'clock, when a state of his affairs will be laid before the meeting, and a proposal submitted for the consideration of the creditors.

"From the nature of Mr Rennie's concerns, it is of the utmost consequence that a resolution as to the management of the affairs be immediately come to.

"Any letters relative to the business of the meeting may be addressed to Gibson-Craigs and Wardlaw, No. 7, North St Andrew Street, Edinburgh."

At a period which Lang alleged to have been "within or about 14 days of the sale," he went to Phantassie to drive away the remainder of his cattle. Rennie's grieve refused to allow him to do so. On the 19th of August, a meeting of Rennie's creditors was held, at which Lang was present. He alleged that he had received no circular as a creditor, and merely went to insist on his right to the stock bought by him. It was stated to the meeting that Rennie ought to be immediately made bankrupt, and steps were taken to do this as speedily as possible. A committee was named, "with full powers to arrange with all purchasers of cattle whether they shall be delivered or not," &c. On the same day, Lang caused his law-agents to write to Gibson-Craigs and Wardlaw, stating, that "some days ago" he had sent to Phantassie for his cattle, which were withheld; and that he meant to apply to the Sheriff for authority to drive them off. He asked an order for delivery of the cattle, and added, that he was willing to find security for the two bills. On the 20th of August, Gibson-Craigs and Wardlaw replied, that "the committee appointed at the meeting of Mr Rennie's creditors are willing to deliver this stock on obtaining satisfactory security that the bills will be paid. Therefore, if Lang will retire the bills, the cattle will be delivered; if not, have the goodness to say what security he is willing to give, and it will be laid before the committee." On the 24th of August, Lang's agents wrote: "We beg to repeat what Mr Lang offered verbally to you to-day, viz. that he is ready, upon receiving up the cattle, to find undoubted security for the amount of the bills; and we beg to add, that as you ex-

No. 378. complained to him to-day that the cattle would not be given up, even upon this being done, we shall to-morrow present a petition to the Sheriff of July 7, 1832.
Lang v. Bruce. Haddingtonshire."

On the 25th of August, a petition to the Sheriff was accordingly presented against Rennie, craving "to ordain him to desist and cease from interfering with the petitioner and his servants, in driving away the remainder of the lots of stots and ewes," &c. The Sheriff ordered answers in 48 hours. On the 26th, another meeting of Rennie's creditors was held, at which the committee reported that they had refused "to give delivery of any of the stock which still remained in Mr Rennie's possession." Messrs Thomas Allan and others were then appointed "a committee till the first meeting under the sequestration," being recommended to sell any stock about which there was no dispute, "and to take all other measures regarding the estate, using their best discretion," &c. On the 27th, a paper was laid before the Sheriff of Haddingtonshire, entitled, "Note for Messrs Thomas Allan and others, a committee appointed at a meeting of the creditors of Mr Rennie, held on the 26th of August," craving three days to answer Lang's petition. The Sheriff, on the same day, "refused the note, in respect that there is no mandate produced for the parties presenting the note." On the 28th, the Sheriff ordained Rennie, who had lodged no answers, "to desist from interfering with Lang in driving away the stots and ewes as craved," &c. A reclaiming petition was, on the same day, lodged in the name of Rennie, praying the Sheriff to find that the sale of the stock "not having been completed by delivery, the property still on hand remains with the petitioner and his creditors, &c., or, to sist procedure until all parties are called." The Sheriff ordered answers to this petition; and on the same day (28th of August), a sequestration was awarded against Rennie under the bankrupt act. On the 2d of September, Rennie wrote to the agent who had presented the reclaiming petition to the Sheriff. "This will be handed you by Mr Lang of Glasgow, who is one of the petitioners with regard to his cattle getting away, who, I think, from the security he offers, ought, in my opinion, to get away his cattle; and I write this also to say, that you will stop all further proceedings in my name, both as regards him and the other two, M'Nicol and Peter Bell. When I signed the mandate to you, I really supposed it was in favour of them getting the stock away, instead of which, I am sorry to find, it has been the reverse: so, if any more proceedings is gone into against these men, it must be done by some one else than me, as I consider it contrary to all justice."

In the mean time a minute and claim was lodged in the name of the creditors of Rennie; and on the 2d of September, the Sheriff ordered it to be answered by Lang; and on the 4th, found the creditors of Rennie entitled to be heard for their interest, and appointed them to give in defences or answers. These were lodged in the name of Messrs Thomas

Allan and others, on the same day; and on the 7th, the Sheriff found that No. 378. Rennie could not be reponed against the decree of the 28th of August, ^{July 7, 1832.} ~~Lang v. Bruce.~~ but allowed Allan and others to petition to be reponed against it. A petition was given in for them, and on the 9th they were reponed. On the same day, Bruce was appointed interim-factor on Rennie's estate, and on the 19th trustee. He was sisted as a party on the 21st, in place of Allan and others; and a record was made up, in the course of which the stock in dispute was sold by consent of all parties, and the price was lodged in a bank to abide the issue of the cause.

The Sheriff found "that at a public sale held at Phantassie, the 27th day of July 1829, the petitioner purchased from Mr John Rennie 29 stots and 120 ewes, and that he also, about the same time, purchased separately from him other 80 ewes, for the price whereof Mr Rennie drew two bills, one payable at two months, and the other payable at three months after date, which were duly accepted; that seven of the stots were driven off the same, or the next day, to Glasgow; that the other cattle, and the sheep purchased at the sale, remained after the same, on Mr Rennie's farms, at his expense, till they should be sent for by the petitioner; that, soon after the sale, 40 of the said ewes were delivered on demand to the petitioner's servants, and that the petitioner having, about a week after, sent for other 10 stots and 40 ewes, they were also delivered; that, within three weeks after the sale, the remaining ewes and stots being demanded by the petitioner, he was refused delivery thereof by Mr Rennie, on the ground of his being then insolvent; that the agents for the committee appointed by Mr Rennie's creditors, at their first meeting, offered to deliver the sheep and cattle in question to the petitioner, if he should find satisfactory security; that the petitioner, on the other hand, offered to find security if the cattle and sheep were delivered, but that it is not alleged that satisfactory security was found; that the petitioner having brought the present petition for interdict, was opposed by the committee of creditors, and thereafter by the intrant, as trustee on Mr Rennie's sequestered estate; that the petitioner does not allege, that, after the sale, he put any distinguishing marks on the cattle and sheep purchased; that the 80 ewes, purchased as aforesaid, not being in Mr Rennie's custody at the time of the sale, no delivery of them was given, and it is not alleged that any afterwards took place: Finds, therefore, that, quoad them, the petitioner has no claim for interdict against the trustee on Mr Rennie's sequestered estates;—in so far, asoilzies the intrant, and decerns. But, in respect it is alleged by the petitioner, as to the other cattle and sheep left on Mr Rennie's farms, that the auctioneer at the public sale explained, that, on the lots being knocked down, they were to be held as delivered to the purchasers, and also that the petitioner superintended the driving of the said cattle and sheep, when purchased, to their places of destination after the sale; before further answer, allows him a proof of his said allegations," &c.

Lang brought an advocation, with a view to have the proof taken before

No. 378. a jury. The Lord Ordinary found "that it is not competent for the advocate to prove, by parole evidence, that the auctioneer declared at the July 7, 1832. sale, that, on the lots being knocked down, they were to be delivered to Lang v. Bruce. the purchasers, there being written articles of sale, in which there was no such provision : That it is not relevant to infer delivery, that Mr Rennie's servants, at the advocate's desire, and with his assistance, drove the sheep and cattle from the court where the auction took place to an adjoining field, both being the property, or in the occupation of Mr Rennie : That there is no relevant allegation, either of constructive or symbolical delivery of the sheep and cattle to the advocate ; therefore advocated the cause, assailed the respondent, the trustee on Rennie's sequestrated estate, from the advocate's claim of interdict ; adhered to the interlocutors pronounced in the Inferior Court before the record was closed—reserving the advocate's claim against Mr Rennie's creditors, or their committee, in consequence of the letter of their agents, dated 20th of August 1829 : Found no expenses due," &c.

Lang reclaimed ; the Court ordered cases, and afterwards required the opinion of the whole Judges.

LORDS GLENLEE, CRINGLETIE, FULLERTON, and MONCREIFF, returned this opinion :—

" In July 1829, John Rennie, then carrying on extensive business as a farmer, advertised a sale by auction of cattle and sheep, to take place on the 27th of that month.

" The pursuer, Mr Lang, states, that written articles of sale were read over by the auctioneer, and, though this is denied by the defender, it is not disputed that there were written articles in the terms quoted in the condescension. The three first articles were in these words :—' 1st, The stock to be put up in lots, and knocked down to the highest offerer, and afterwards to be at the risk of the purchaser.'

" ' 2d, The stock to be kept 14 days by the expositor, or, if the purchaser should prefer lifting in equal proportions, commencing the first week, then the last portion will be kept one month from the day of the sale.'

" ' 3d, The purchaser to pay ready money, or grant bills at two months, with security, before leaving the sale, for the stock purchased by him ; five per cent discount to be allowed for ready money.'

" The pursuer states, that the auctioneer verbally announced, that the lots were to be considered as delivered as soon as they were knocked down to the purchaser. But this is not expressed in any of the written articles, and the Lord Ordinary has found it incompetent to be proved by parole.

" The pursuer purchased 129 ewes for £209, and 29 oxen for £466, 10s., in all £675, 10s. ; besides 80 ewes, which were not on the farm at the time, and about which there is no question.

" The cattle and sheep were exposed to sale in the stackyard, and immediately after being bought, they were removed by persons attending for the purpose, to fields belonging to Rennie, the use of which was granted for the time to the purchasers, in terms of the articles of sale, for keeping the cattle and sheep, till they could be

conveniently removed. All these animals bore marks which had been put on them before the sale, except one lot, and those composing it were equally marked, so as to be distinguished from all the rest by this peculiarity. No. 378.

July 7, 1832.
Lang v. Bruce.

"The pursuer was not required to find security, as provided by the third article. But Mr Rennie, who clearly had power to dispense with the condition, drew two bills on the pursuer, of the date of the sale, one for £300, at two months, and the other for £495, at three months, making £795, which sum included the price of the 80 ewes, not involved in this question. These bills the pursuer accepted; they were discounted by Mr Rennie, and paid by the pursuer when they fell due.

"On the day of the sale, or the day after, the pursuer drove off from the ground seven of the oxen and forty of the ewes, and on the 5th of August, he brought away ten more oxen and forty ewes.

"Mr Rennie went to London soon after the sale, and returned about the 12th of August. On the 19th of August, a letter was addressed to some of Mr Rennie's creditors, which stated, that, 'in consequence of embarrassments, which it is hoped will be only temporary, they were requested to attend a meeting on the 19th.'

"The pursuer states, that about 14 days after the sale, he went to Phantassie for the purpose of driving away the remainder of the cattle and sheep which he had purchased—that he did not see Mr Rennie—and that his grieve or foreman refused to allow him to take them away. He adds that this was before there was any public notification, and before he knew any thing of Mr Rennie's insolvency. But we think, from the circumstances stated by both parties, that it must have been after the circular letter was addressed to the creditors, though it seems probable that Mr Rennie did not consider the pursuer as a creditor, and may not have addressed any letter to him.

"The refusal to allow the pursuer to take away the cattle, appears to have taken place by the interference of a committee of Rennie's creditors;—Rennie himself has disclaimed it. The pursuer then applied to Mr Gibson-Craig, as Rennie's agent, who answered, that if the pursuer would find security to pay his bills, the cattle and ewes should be delivered. The pursuer came to Edinburgh, and says he offered security; but, in the meantime, the creditors had changed their minds, and would not give delivery. The pursuer then presented his petition to the Sheriff, praying him to ordain Rennie to desist and cease from interfering with the petitioner and his servants, in driving away the remainder of the lots of stots and ewes which he had purchased, and to deliver them up to him, and for damages. There is no doubt that this petition was presented while there was, as yet, no sequestration, or application for sequestration. No appearance was made for Rennie at first, but appearance was made for certain gentlemen, as a committee of his creditors, by a note, asking further time to answer. This was refused, in respect that no mandate was produced, and on the 28th August, the Sheriff gave decree. A reclaiming petition was put in, in Rennie's name, which he immediately disclaimed.

"The first deliverance on the petition for sequestration of Mr Rennie's estate, was on the 28th August 1829.

"The proceedings then went on before the Sheriff, and he allowed the pursuer to prove his averment, that it was verbally announced at the sale, that the lots were to be considered as delivered as soon as they were knocked down to the purchaser. The pursuer brought an advocation on the act 6th Geo. IV. c. 120, § 40, in order that the proof might be taken by a Jury.

No. 378.

July 7, 1832.
Lang v. Bruce.

"Under this advocacy the whole merits of the case were discussed before Lord Corehouse, and his Lordship pronounced his interlocutor, finding it not competent to prove the pursuer's averment by parole, in respect that there were written articles—finding it not relevant to infer delivery, that Rennie's servants, by the pursuer's desire, drove the sheep and cattle to the adjoining fields, the property, or in the occupation of Rennie—and finding that there was no relevant allegation, either of constructive or symbolical delivery.

"From this state of facts, we are of opinion, that two questions of importance arise, 1st, Whether the sale is to be considered as having been completed by delivery, either on the day of the auction, or at any time before Mr Rennie's declaration of insolvency? And 2d, supposing that the sale was not completed by delivery, whether Mr Lang was entitled to demand delivery, posterior to the time when the circular letter to Mr Rennie's creditors was issued, and at the date of his petition to the Sheriff?

1st, We are of opinion that the question, whether the sale was completed by delivery, actual or constructive, is attended with great difficulty. The transaction is one of a very peculiar nature, and the effect of it must be considered, by taking a comprehensive view of all its distinguishing qualities.

"We are of opinion that the interlocutor of the Lord Ordinary is right, in holding that it is not competent to prove, by parole, that any thing was stated by the auctioneer which is not expressed in the written articles. But laying this aside, we think that there are circumstances in the conditions of sale, which are deserving of great attention.

"The sale was by public auction, a circumstance by no means unimportant, because the auctioneer, in such a case, does in some sense stand between the vendor and the purchaser, and there is a public act in the declaration of the purchase in presence of the company. The sale was not made in the place where the cattle and sheep were naturally; they were brought to the court-yard for the purpose. The first article bears, that as soon as a lot is knocked down, it shall be at the risk of the purchaser. We are aware that this is not conclusive as to the question of delivery, but it is undoubtedly a material circumstance in that question. Then, by the second article, it is stipulated in favour of the purchaser, that the stock shall be kept 14 days by the exposurer, and, in the option of the purchaser, the last portion of any lot shall be kept one month, implying, of course, without grass-mall. This appears to us to be highly important. The purchaser had a right to carry away the stock instantly after the sale; but, from the nature of the trade, this would be impracticable for many persons likely to become purchasers, and therefore, in order to induce them to offer, it is held out to them as a benefit, and an additional value on the thing sold, that they are to be entitled to feed the animals on the grounds of the vendor for a limited time.

"There can be no doubt, that it will be a very hard matter, if this provision for the purchaser's benefit shall be turned to his grievous loss. The legal effect may be so. But the hardship is so clear, that a Court of Law must be well satisfied of the principle which requires it, before pronouncing such a decision.

"We hold the price to have been paid, because Mr Rennie received the pursuer's accepted bills in the form in which he chose to draw them, and these bills were discounted by Rennie, and have been paid.

"The cattle and sheep were driven from the court-yard into the fields appointed in terms of the articles. A part were taken away immediately, and another part

sometime after, and they were taken without any new warrant or order from Rennie, or from the auctioneer, but as a matter of course, at the will of the pursuer.

No. 378.

July 7, 1838.
Lang v. Bruce.

" If there had been nothing in the articles of roup binding the exposer to keep the stock for a limited time, and if the pursuer had driven his cattle from the yard to a certain distance, and had then made a separate bargain with Rennie, to keep them in the very same fields into which they were put, upon a grass mail, we presume it could scarcely have been disputed that they were delivered, and that neither Rennie nor his creditors could afterwards have retained them.

" The question is, whether there is any essential difference between the case, as it stands, and that case. The difference is, that here it is pars contractus that the stock shall be kept by the exposer. The fields are given to the use of the purchaser by the articles of sale. The grass-mail is paid in the price paid for the whole thing stipulated, including this benefit. The animals are all marked, and separated from all others. There is no division still to take place of a part from a larger quantity. And finally, they are placed in open fields, clearly intended to be at the command of the purchasers.

" We have considerable difficulty in seeing a solid principle for holding that the purchaser had not a legal possession under such circumstances. We do not consider it to have been a symbolical delivery, nor do we think, that there is properly any question about constructive delivery. The doubt we entertain is, whether the facts ought not to be regarded as constituting an actual possession in the purchaser, in the same manner as if the cattle and ewes had been driven into the fields of a neighbouring farmer, to be kept for the purchaser's behoof.

" Although, however, we are strongly moved by this view of the case, and should not be prepared to decide against the pursuer, if the case entirely depended on it, we are sensible that it is a point of great difficulty, and that, according to the more rigid principles of the law of sale, there may be legal ground for holding, that the sale was not completed even under such circumstances. And, therefore, we do not mean to rest our opinion on the whole merits of the case upon this point.

" 2d, The second question is, whether, supposing that the sale was not completed by delivery, the resistance or obstruction which was given to the pursuer, when he went for the purpose of taking away the cattle and ewes, was a legal resistance, and whether he had a right to take delivery when he so attempted it, and to obtain an order to enforce his right, at the time when he presented his petition to the Sheriff?

" This point is not particularly adverted to in the Lord Ordinary's interlocutor, but it appears to us to be of great importance; and we are of opinion that the pursuer's argument with regard to it is well founded in law.

" The proposition maintained by the defender on this part of the case seems to be, that mere insolvency, or, at all events, insolvency in any manner declared, deprives a man of all power of dealing with his property, and from this he infers, that even where goods have been sold and the price paid, it is incompetent for him to give, or for the purchaser to take delivery.

" We are not prepared to assent to this doctrine. Excepting one dictum of an eminent judge, standing opposed to the judgment in the case in which it was delivered, and in the reports of which we strongly apprehend there must be some mistake, we have seen no authority for giving so strong an effect to mere insolvency, without either diligence or sequestration. In the passage quoted from Mr Bell's

No. 378. work in the defender's case, though other particular cases are mentioned, no such case is stated as that of the delivery of goods which had been fairly sold and the price paid, and which, by the terms of sale, were instantly deliverable. The passage is taken from that part of the learned author's work which treats merely of the general principle of the bankrupt law. But to hold that a man's whole property is literally transferred to his creditors by the mere fact of insolvency, and that no legal transaction can take place regarding it, would supersede a vast portion of the existing bankrupt law, and cut down a great many transactions, as to the legality of which there is at present no doubt.

July 7, 1832.
Lang v. Bruce.

"The principle of both the ancient bankrupt statutes stands directly opposed to this idea. For the act 1621 would have been entirely useless, if it had been true that, at common law, a man is by mere insolvency divested of his whole property, and that it becomes thereby completely vested in his creditors; and with regard to the act 1696, the whole structure of it supposes that *notour bankruptcy*, by diligence, must be added to insolvency, before the deeds and transactions to which it applies can be set aside, even by reduction, and the numerous decisions upon that statute abundantly prove that even the application of the principle of it is far from being universal. The same may be said of the modern statute of 54 Geo. III., which, besides the qualified character of its enactment, generally contains the express clause,—' Declaring always, that nothing herein contained shall oblige a bona fide purchaser of any part of the moveable effects from the bankrupt while in actual possession, and for a price paid, to restore the effects so purchased, nor the debtor of a bankrupt who has paid his debt to him bona fide before he knew of the bankruptcy, to pay it a second time to the trustee.'

"This language of the statute certainly stands very much opposed to the defender's notion of the common law, in the way he applies it to this case. Such statutes could never have existed if that idea had been correct. But the clause just quoted stands in diametrical opposition to the general doctrine maintained, as it proves, that the property of a man who is insolvent, is not transferred to his creditors by insolvency alone, and that he is not divested of all power of transacting with regard to it.

"It is clear that the pursuer demanded, or went for the purpose of taking complete delivery of the remainder of his stock, before there was any diligence or sequestration. If Rennie had been there himself, it is clear that he would not have resisted this. But it was resisted by a self-constituted committee of creditors, or by the servants under their orders. They pretended no judicial authority, and they had no diligence to vest any such right in them.

"We humbly think, therefore, that as the pursuer did what he could to obtain complete possession of the stock, and was only prevented from obtaining it by an interference on the part of interested and unauthorized individuals, the case must clearly be treated in the same manner as if he had actually got possession of the animals, in so far as he had it not before, and the question now were, whether he was bound to restore them?

"And we are the more decidedly of this opinion, because the pursuer resorted to the legal remedy, while yet there was no sequestration. Being resisted in his endeavour to take away the stock, he demanded the authority of the Sheriff to compel delivery. We attach great importance to this proceeding; supposing even that there was any delicacy in Rennie's own situation, or in that of his servants, and passing over the irregular interference of the creditors, we cannot see that any good

answer could be made to the pursuer's judicial demand of delivery at that time; No. 378. Rennie made none, and could make none. The creditors had no persona standi, except in his name, and they could attempt nothing, except for the purpose of gain-
ing time, till a sequestration should be awarded. But it appears to us, that the pursuer's petition to the Sheriff must stand or fall by its merits, at the date when it was presented. The sequestration may have made a difference in other views. But as to the present point, it seems to be altogether unimportant. Notwithstanding what had happened, there might never have been any sequestration, or there might have been none for months after. And the question is, what legal answer could be made to a man, who had purchased stock at a public auction, who had paid the price, taken delivery of a part of the animals, and been resisted in removing the rest, and who now demanded from the Sheriff an order on the vendor, not being legally bankrupt, to deliver the remainder? We can see no good answer, and therefore we conclude, that he was entitled to the decree of the Sheriff, which he obtained in the first instance.

July 7, 1832.
Lang v. Bruce.

" And being of this opinion, we think that this case is the same as it would have been if the cattle and ewes had been actually taken away from the fields at the time when the pursuer first went for the purpose, and was resisted. If that had been the state of the case, we should first enquire, whether any of the bankrupt statutes could have been held to apply to it. We think not. The statute 1621 is out of the question; for the pursuer was neither conjunct nor confident, and he had paid a full and fair price for the stock of which he would thus have obtained delivery. Would the act 1696 have applied to it? No attempt has been made to show that it would—there is no reduction of the transaction such as the act required. And we think it very clear that it would not have applied. The sale was a bona fide sale itself, within sixty days of the bankruptcy. The obligation was for instant delivery, and the delay of delivery was solely for the accommodation of the purchaser, but in his option. This, therefore, never could be converted either into the undue payment of a prior debt, or into an undue preference of any kind. It would be but due implement of an onerous contract, bona fide entered into within the sixty days. But, most especially, nothing of the kind could be maintained, if it be true, as we have stated, that the pursuer had a right to the order of the Sheriff to compel delivery. The idea of a partial preference originating in such a contract, to be reduced on the act 1696, seems to us to be altogether untenable; and it has not been stated.

" But if the transaction could not have been touched upon the bankrupt statutes, could it have been reduced, and restoration claimed at common law? We are unable to discover any authority for such a conclusion. To say that there could be fraud in the pursuer attempting to take possession of the articles which he had honestly purchased and paid for, and had only left in the fields on a bargain for his own benefit, seems to us to be impossible. And if there was truly no legal obstacle to his demand of delivery, when he made it judicially, fraud, whether actual or constructive, must be out of the case.

" And what, then, is the ground at common law, on which it could be maintained, that the claim of repetition would have been well founded? The defender can only revert to his general proposition, that, by the declared insolvency, the property was transferred to the creditors. No question remains as to Rennie's power of doing a voluntary act, if the pursuer had a right to delivery by order of the Sheriff. But in truth no voluntary act was necessary. The pursuer could have taken away his cattle without any aid from Rennie or his servants. They were not locked

No. 378. up like grain in a granary. They had not to be measured or parcelled out from any larger quantity. In short, it required a voluntary act by Rennie, or by some one, to prevent delivery. But at all hazards, the order of the Sheriff must have excluded the idea of any thing being done by voluntary act. Is it to be held, then, that the property was actually transferred by insolvency? This is the point pressed by the defender for decision. We have stated our reasons for thinking that it is not well founded in its application to this case; and we have only now to advert to the single authority to which the defender refers in support of his doctrine, in the dictum ascribed to a learned Judge, most justly esteemed as a high authority in the law.

July 7, 1832.
Lang v. Bruce.

"The case of *Broughton v. Aitchison*, November 16, 1809, related to the sale of a definite quantity of wheat to be delivered out of a certain loft, from a larger quantity which was there lying. It was a sale by private bargain. The price, or nearly the whole price, was considered as paid. An order of delivery was granted, and was held to have been intimated, and the purchasers paid one shilling to the vendor's servant for turning the grain. It was kept in a locked granary, and the key was in the possession of the vendor's servant. The vendor stopt payment on the 30th September. On the 1st October, the purchaser demanded delivery, which was refused by the vendors themselves. On the 3d October they applied to the Sheriff; on the 8th sequestration was awarded; and, on the 14th, the Sheriff gave an order for delivery.

"That was evidently a very nice case. The judgment of the Court sustained the right of the purchaser; but the defender says that the Court were nearly divided, that it was against the opinion of the Lord President, and that the authority of it has since been doubted. We think that the decision is doubtful, though, without seeing more of the circumstances than appears from the report, we are not prepared to say that it was positively wrong. But the doubts which we entertain concerning it arise from the circumstances in which it differed from the present case. It was not a sale of specific marked articles, but of a specified number of bolls of grain, to be separated and measured out from a larger quantity, the allegation made to the contrary being inconsistent with the terms of the written contract. The grain had never been separated, nor at all moved from the granary, from first to last. It remained under the lock and key of the vendors. Under these circumstances, delivery could only be got by voluntary acts, still to be performed by the vendors; and they thought themselves bound to refuse to do any such act, after a very public stoppage of payment. In all these points, the case was opposite to the present case. We are not surprised that there were doubts regarding it, but we are of opinion that the same difficulties do not attach to the case now under consideration. Here the specific cattle and ewes were sold in an auction yard, being previously marked and separated from all others. Though they were moved back to the vendor's fields, this was on a specific bargain for the purchaser's convenience. They were in open fields, from which the purchaser could take them when he pleased, and it was only as a matter of propriety that he gave notice to the vendor's servant when he did so. Part were taken at different times, and he came for the rest, but was resisted. We think that there is the most marked difference in these facts. And there is to be added to them, that the declaration of insolvency was not of the same decided and public nature which occurred in that case.

"A great part of the observations ascribed to the Lord President upon that case appear to be consistent with sound principles of law, though we do not think that

they apply to the present case, and might not be free from difficulty, even in their application to the whole circumstances of that case. But if the defender is justified in deducing from the different notes of his Lordship's speech, the abstract proposition that, after any declaration of embarrassment or insolvency, such as that which was made by Mr Rennie, the bankrupt's property is actually transferred to his creditors, and nothing can be legally done with regard to it, we are of opinion, with the utmost respect to that high authority, that the proposition is too broad; and, in particular, that it is not well founded in its application to such a case as the present.

"On the whole, we are of opinion that the pursuer was entitled to decree under his application to the Sheriff, and that he is still entitled to a judgment in his favour for the value of the cattle and ewes in question."

LORD CRINGLETIE, in subscribing this opinion, added the following note:—
"The foregoing opinion is particularly guarded in some points on which I would be more determined; nevertheless I do not think it objectionable on that account, and most heartily concur in it."

LORDS JUSTICE-CLERK, MEADOWBANK, MACKENZIE, COREHOUSE, MEDWYN, and NEWTON, returned this opinion:—"There is little difference betwixt the parties in this case as to the facts; and the decision seems to depend on two questions in point of law.

"These are, 1st, Whether or not the circumstances in which the sale to the pursuer took place, or those which immediately followed the sale, amounted to delivery, so as to transfer the property of the cattle bought from Mr Rennie to the pursuer? And, 2d, Supposing there was no delivery at the time of the sale, was Mr Rennie or his overseer justifiable in refusing to deliver the remaining lots, when these were demanded by the pursuer, subsequently to Mr Rennie's declaration of insolvency?

"On the first point we do not think that there were any circumstances at the time of the sale, which can be held equivalent to delivery. Here it is necessary to lay out of view the alleged verbal declaration of the auctioneer, as we are of opinion that the interlocutor of the Lord Ordinary is clearly right, in so far as it finds that such declaration cannot be proved by parole testimony. Taking the articles of roup then as they stand, the only one which can have any effect on the question, is that by which the exposurer became bound to keep the cattle sold for certain specified periods; but this cannot, in our opinion, have the effect either of delivery, or of rendering delivery unnecessary. It appears to mean nothing more than that the buyer should have the power, for his accommodation, to delay taking delivery for the periods limited. In every case of sale, where the article bought cannot be kept without expense—as, for example, that of horses or cattle—it is the interest of the seller to avoid this expense by immediate delivery; while, on the other hand, if the buyer has no immediate occasion for the article, or means of applying it instantly to profit, it is his interest to stipulate that the seller shall retain the possession until it suits him to take delivery. For this burden, where he undertakes it, the seller, it may be presumed, receives a higher price; but the stipulation does not change the law as to the transference of property, so as to render the bare contract effectual for this purpose.

"Neither does any thing which took place immediately after the sale appear sufficient to operate as a transference of the property. The cattle being previously the property of Mr Rennie, and in his possession, were brought from his enclosures

No. 378.
July 7, 1832.
Lang v. Bruce.

No. 378. to the yard where they were exhibited, and exposed to roup ; and after the sale they were driven back into these enclosures ; mixed with other stock of his pasturing there, and left under the charge of his servants exactly as before. They were driven back by his servants, and though the pursuer may have assisted them in doing so, it does not appear to us that this can alter the law.

July 7, 1832.
Lang v. Bruce.

" Had the pursuer, indeed, before the cattle were so carried back to their pastures, put his mark upon them, there might have been some room for contending that this amounted to a taking of possession ; but nothing of this kind took place. He argues, no doubt, that, as the cattle had all previously marks upon them, by which they were easily distinguishable, such new marking would have been preposterous ; and thence concludes that the property passed without it. But he overlooks that the purpose of applying the buyer's mark in such a case, is not to distinguish the animal from others of the same kind, but to point out that it has become the buyer's. It produces its effects only as a symbolical taking of possession, and as indicating that if the article is allowed still to remain with the seller, it remains, not as his property, but as a deposit, or the subject of location.

" Holding, therefore, that there was no difficulty at the time of the sale, the second and more difficult question comes under consideration, Was Mr Rennie, or those acting for him, justifiable in refusing to deliver when called upon ? If they were not so, then their refusal was evidently a wrong, which, as it was committed solely with a view to the interest of the general body of creditors, and for their benefit and behoof, cannot be allowed to avail them in the present competition.

" On this point we are disposed to concur in the law as laid down by the late Lord President Blair, in the case of *Broughton against Aitchison*—namely, that after proclaimed insolvency, the bankrupt can legally do no act to affect or change the rights of his creditors inter se. Having called them together for the purpose of placing the administration of his affairs in their hands in order to their payment, he cannot be suffered afterwards to do any thing which either has the effect of benefiting the general body at the expense of an individual creditor, or which gives to an individual a preference to which, in the distribution, he would otherwise have had no right ; and as the wrong thus committed is done, not for the benefit of the bankrupt himself, who can in general have no interest individually in the matter, but to serve that of the creditors meant to be favoured, they are not entitled to profit by what has been done for their behoof.

" We think the general doctrine above stated is strongly supported by a decision in a case which is the converse of the present, 9th July 1828, *Schuurmann and Sons against Goldie*.¹ Here the bankrupt, after having declared his insolvency by a circular letter, calling a meeting of his creditors, took delivery of a cargo of cheese, which he had ordered from a Dutch mercantile house ; but it was found that the creditors in general were not entitled to profit by this wrong ; and the trustee was ordered to rank the sellers preferably for the price. There was this peculiarity no doubt in the case, that a copy of the circular letter, addressed to an agent for the sellers in Leith, was, by neglect or design, kept back after those to other creditors had been sent, so that it could not have been received till after delivery was taken ; and it was said that, if the agent had received information as soon as the other creditors did, he might have stopped the goods in transitu. But it does not appear

¹ *Ante VI., 1110.*

that the delay to send notice, granting it to have been designed, was a fraud of a different nature from that of taking delivery in the circumstances, or that the general body of the creditors was entitled to profit by the one act more than by the other. And we see, therefore, no sufficient reason to think that the result would have been different, though the Dutch house had had no agent in this country to whom notice could have been sent.

No. 379.
July 7, 1832.
Lang v. Bruse.

" It is contended, however, that in the present case no act was necessary on the part of Mr Rennie, in order to give delivery to the pursuer. The cattle and sheep were, it is said, in enclosures which were open to the public, there being no locks on the gates, so that the pursuer might have taken them away without applying to Mr Rennie at all. But it does not appear to us that the pursuer could, without the knowledge and consent of Mr Rennie, or those acting for him, have had a right to enter these enclosures, and to remove the stock pasturing there, or that it makes any difference in that respect whether the gates were locked or not. The creditor, in an obligation to deliver a specific subject, is no more than an ordinary creditor, entitled to take implement at his own hand, without the consent of the debtor in the obligation. He has no more right, without this consent, to take a horse he has purchased out of the stable of the seller which he finds unlocked, than a creditor has to take payment of his debt from money in the repositories of the debtor, if he shall chance to find them open.

" But if the seller's consent is thus necessary before he can be legally deprived of the possession, the giving of this consent is an act on his part; and as it is an act which has a material effect on the rights of his creditors, by converting the personal right to claim delivery into the real right of property, it is one which cannot legally take place after a declaration of insolvency.

" On the whole, therefore, though the pursuer's case is certainly a hard one, we are disposed to think the interlocutor of the Lord Ordinary well founded, and that it ought to be adhered to."

On resuming the consideration of the case, LORDS PRESIDENT, BALGRAY, and GILLIES, intimated that they agreed with Lords Glenlee, &c.; and LORD CRAIGIE concurred with the Lord Justice-Clerk, &c. The whole fourteen Judges were thus equally divided, and, after the case had stood over for some time, it was suggested to Lord Craigie by the majority of the Lords of the First Division, that his Lordship should (as was said to be the practice in England in such circumstances) withhold his vote, so that it might be possible to pronounce a decision, against which the losing party had the remedy of an appeal. Lord Craigie adopted this suggestion, and the following interlocutor was pronounced:—

" In respect of the whole fourteen Judges being equally divided in opinion, and Lord Craigie having afterwards agreed not to vote, recal the interlocutor submitted to review, advocate the cause, and in respect that the cattle and sheep, for delivery of which the original petition was presented to the Sheriff of Haddington, were sold, of consent of parties, and the price consigned in the branch of the Bank of Scotland at Haddington, to abide the issue of the cause, prefer the advocator Thomas Lang, on the said consigned fund, for the price which the said cattle and sheep brought at the said sale, and ordain the holders of said fund to make payment of the said consigned fund, with the interest that may have become due thereon, to the

No. 378.

July 7, 1832.
Lang v. Bruce.

Berry v. Lamb.

said Thomas Lang, upon an ordinary receipt, with a stamp corresponding to the sum, subscribed by him, or by his agents in this cause, and grant warrant for payment thereof in his favour accordingly, and ordain the custodian of the deposit receipt granted for the said consigned fund, to deliver it up to the said Thomas Lang, or his said agents, for the above purpose; reserving to the said Thomas Lang all claims for the difference between the prices paid by him, and the prices which the said cattle and sheep brought at the said sale; and for difference of interest, and for damages; and to the respondent and the creditors of Mr Rennie, their defences thereto as accords. But in the particular circumstances of this case, ordain the advocate, before receiving up the said deposit receipt, or uplifting the consigned fund, to find sufficient caution to repeat the same to the respondent in the event of this judgment being reversed on appeal to the House of Lords: Find the said Thomas Lang entitled to expenses both in this Court and in the Inferior Court," &c.

Advocator's Authorities.—Mitchell, Nov. 12, 1799, (No. 10, Ap. Bankrupt); Cormack, July 8, 1829, (ante, VII 868); Eden on Bankruptcy, 271; Dig. L. xli. T. 25 21.; 3 Ersk 3 8; 1 Bell, 175; 2 St. 1. 15; 1 Bell, 197, note; Blenkinsop, 1 Moore, 328; Oliver, 1 Brod. and Bingh. 269; Phillimore, 1 Campbell, 513; Rameay, Dec. 12, 1665, (9113); War-rander, Feb. 17, 1715, (10609); Abercromby, Feb. 16, 1687, (11618); Russell, Dec. 23, 1699, (2 Fount. 75.)

Respondent's Authorities.—1 Bell, 8, 9; Broughton, Nov. 15, 1809, (F. C.); 1 St. 14. 2 and 7.; 2 St. 1. 11.; 2 Ersk. I. 19.; 3 Ersk. 3. 7. and 8.; 1 Bell, 166-170-180; Brown on Sale, 3 and 537; Kinnell, Nov. 18, 1790, (9073); Salter, Feb. 7, 1786, (14202); Hailes, 992; Collins, Nov. 23, 1804, (14223); Dudgeon, July 3, 1801, see 1 Bell, 181, note; Hodges, 1 Campbell, 233; Elmore, 1 Taunton, 458.

GAXIG and MORTON, W.S.—ALLAN and BRUCE, W.S.—Agents.

No. 379.

JOHN BERRY, Advocate.—Jameson—Monteith.
JAMES LAMB, Respondent.—D. F. Hope—Greenshields.

Partnership.—One of the partners of a company, who in the contract was appointed manager, with a certain commission for his trouble, having been employed by the others, but without any special agreement as to remuneration, to wind up the affairs of the concern on the expiry of the partnership—remuneration allowed him for his trouble by a commission, only at the same rate as was stipulated for in the contract during the subsistence of the company.

July 7, 1832. THE respondent Lamb was managing partner of a West India House at Glasgow, which carried on business under the firm of Lamb, Miller, Lt. Mackenzie, and Co. His remuneration as manager was provided for by the contract, as follows: " Declaring, that the said James Lamb, in consideration of his taking the management of the said business in Glasgow, shall be allowed a commission of two and one half per centum on all the purchases and sales made by the company at Glasgow, but which commission shall not exceed annually the sum of £500 sterling, unless the business done by the company, under the management of the said James Lamb, shall ex-

2d Division.

T.

ceed the sum of £30,000 sterling per annum, in which event, in addition No. 379.
to the said commission of £500 sterling, arising due as aforesaid, the said
James Lamb shall be entitled to a farther commission of one and one July 7, 1832.
fourth per centum upon the amount of business transacted by him exceeding Berry v. Lamb.
the said sum of £30,000 sterling; and these commissions the said James
Lamb shall be entitled to draw annually,—the expense of one clerk em-
ployed in the business of the company, and counting-house rent, being
defrayed out of the commission of the said James Lamb."

The concern was commenced in 1806, and was managed by Lamb till 1813; and in settling his remuneration under the clause above quoted during that period, the commission was allowed on purchases and sales, and on receipts and disbursements for vessels, but not on debts paid or recovered. The company having been dissolved in 1813, Lamb was, by the other partners, intrusted with the winding up of its affairs, without, however, any agreement having been made as to the remuneration for his trouble. He accordingly proceeded to realize the effects, discharge the obligations, and recover the debts of the company. This he effected very successfully, and with a profit of about £14,000, having been occupied altogether about a year in the business. The amount of sales made by him, together with the receipts and disbursements for vessels, was £127,000; of debts recovered, about £140,000, and of debts owing by the company discharged, £120,000. The pursuer Berry was one of the partners of the company; and having brought an action of count and reckoning against Lamb and the other partners, before the Magistrates of Glasgow, he objected to Lamb being allowed credit for a commission on winding up (not opposed by the other partners), of £3,841, being $2\frac{1}{2}$ per cent on the whole company funds realized by him. This process having been brought into the Court of Session by advocation, the Lord Ordinary remitted to Mr Donald Cuthbertson, accountant in Glasgow, to report on the quantity and nature of the business done by Lamb, and his opinion as to the amount of remuneration reasonable to be allowed for the business done.

Mr Cuthbertson accordingly returned a report, detailing the nature of the business done, as above mentioned, and stating his opinion, that the rate of remuneration stipulated for management during the subsistence of the partnership, was a reasonable rate for the business done on winding up, according to which he reported that the amount would be £1715, 15s., being $1\frac{1}{2}$ per cent on the sales, and receipts and disbursements for vessels, over and above £30,000, together with the £500 stipulated as the commission on such sales, &c. up to £30,000.

To this report Lamb objected, as not allowing him a reasonable remuneration for the extent of business performed.

The Lord Ordinary pronounced the following interlocutor: "Having heard parties' procurators, and thereafter considered this report and proof adduced, memorials for the parties, and whole process, finds, agreeably to this report, that the sum of £1715, 15s. is a proper remuneration to be al-

No. 379. allowed to the defender James Lamb, for winding up the affairs of Lamb,
 July 7, 1832. Miller, and Co.; finds him also entitled to legal interest on the sum due
Berry v. Lamb. to him from the 31st day of October 1814."*

Act of Sederunt. Lamb reclaimed; but
 THE COURT adhered.

A. and J. PATERSON, W.S.—J. HANNAY, W.S.—Agents.

ACT OF SEDERUNT

To regulate the Rotation and Business of the five Permanent Lords Ordinary in the Outer-House.

July 10, 1832. THE Lords of Council and Session, being duly assembled,—Having taken into consideration the Act of Sederunt of 20th November 1830, for regulating the "Rotation and Business of the Lords Ordinary in the Outer-House; and seeing, that by the death of Lord Newton, and the removal of Lord Fullerton to the First Division, the number of the Lords Ordinary officiating in the Outer-House is now reduced to the number contemplated by the statute of the first year of the present King, cap. 69, whereby it has become necessary to alter the arrangement of business and rotation of Lords Ordinary prescribed by Act of Sederunt of 20th November 1830,—Do therefore Recall the said Act of Sederunt, and ENACT and DECLARE, That from and after the 12th day of November next, and during the subsistence of the said Act of Parliament, or until otherwise provided for,—

* "Note.—The Lord Ordinary by no means thinks, that if he had decided the case without the aid of the accountant's report, he would have fixed upon a larger sum. He does not think that a case such as the present, of a person, the acting partner of a company, receiving certain allowances for his trouble as such, and then continuing after dissolution to manage their affairs till the concern is wound up, without any new and explicit bargain, fixing his emoluments for that trouble, is at all closely similar to the case of a stranger employed to wind up a bankrupt concern. The previous total ignorance of the bankrupt manager, and his freedom from any previous obligation to take trouble or responsibility in the matter at all, the confession of affairs, the disputed and bad debts and claims which generally exist in bankruptcy, do not seem to have had place here. Nor can the Lord Ordinary think it possible to admit generally the truth of the maxim, that an acting partner should be paid a higher rate of commission for winding up after dissolution, than for managing previously the affairs of a company. It may easily happen, and the Lord Ordinary thinks did happen in this case, that it is more advantageous for the manager to dispose of the whole stock of a company within a short time, at a certain rate of commission, than to carry on their ordinary business from year to year at the same rate. In some cases, a large fortune might rapidly be made by the one, while the other had only afforded a moderate income."

1mo, Each of the four senior Permanent Lords Ordinary shall, in his turn, ^{Act of Sede-} officiate as Ordinary for the week in the Outer-House, and upon oaths and wit-^{runt.} ^{July 10, 1832.} nesses, beginning with Lord Medwyn, of the Second Division, for the *first week*, ^{Weekly rota-} as the Lord Ordinary in the Outer-House then in rotation ; Lord Fullerton, of the ^{tion of Senior} First Division, for the *second week* ; Lord Mackenzie, of the Second Division, the ^{Permanent} *third week* ; and Lord Corehouse, of the First Division, the *fourth week* ;—Lord ^{Lords Ordin-} Medwyn the following week, and so on in time coming,—a Permanent Lord Or-^{nary.} ordinary of the one Division being always succeeded by a Permanent Lord Ordinary of the other Division alternately ; but with power to any of the other Permanent Lords Ordinary, when in the Outer-House, to take the oaths of witnesses and havers."

2do, The said four senior Permanent Lords Ordinary shall call their respective Order of call-^{ing Hand-rolls} Hand-Rolls each week, as follows, viz.—

The Senior Lord Ordinary of the First Division, upon Tuesday, Wednesday, Thursday, and Friday ;

The second Lord Ordinary of the said Division, on Wednesday, Thursday, Friday, and Saturday ;

The senior Lord Ordinary of the Second Division, on Tuesday, Wednesday, Friday, and Saturday :—and

The second Lord Ordinary of the Second Division, on Tuesday, Thursday, Friday, and Saturday.

Each beginning at Nine o'clock in the morning."

3rd, The Lord Ordinary officiating in the Outer-House for the week, shall call the Regulation-Roll, and the Roll of Advocations and Suspensions, on the first day of his officiating in the Outer-House, and the Ordinary Action-Roll on the second day of his so officiating ; with power to call his Hand-Rolls also on either of these days, if time permit, and his continued causes, as well as his Hand-Rolls, on the third and fourth days of his so officiating in the Outer-House ; with power also to the Lords Ordinary belonging to either Division, to call a Regulation-Roll daily for their respective Divisions, on each of the last nine Sederunt Days of the Winter Session, and last seven Sederunt Days of the Summer Session, as at present."

4to, The junior Permanent Lord Ordinary shall call his Roll of First Division Causes, upon Tuesday ; those of the Second Division upon Wednesday : his Roll of Teind Causes upon Saturday ; and his Continued Causes of both or either Division upon Thursday, and also call upon Saturday after the Teind Roll,—beginning at Nine o'clock in the morning.

MRS CALDER, Pursuer.—*Forbes.*
HER CREDITORS, Defenders.—*Buchanan.*

No. 380,

Cessio.—The widow of an officer, having an allowance of £40 per annum from a compassionate fund, and two of her daughters having an allowance of £10 each from the same fund, and two grandchildren by a deceased daughter being dependent on her, and a son, having been hitherto maintained by her, and her debts being £230—held entitled to the benefit of the cessio without assigning any part of her allowance to her creditors.

No. 380. MRS CALDER pursued a *cessio*, and stated that she was the widow of an officer, having an allowance of £40 per annum out of a compassionate fund, and that she had two daughters, each of whom was allowed £10 per annum from the same fund; that a deceased daughter had left two children, both of whom had been supported by her, and that she had a son, eighteen years of age, but hitherto unable to provide for himself. Her debts amounted to £230, and she had no funds to assign to her creditors.

Buchanan, for the Creditors, insisted that as there was an allowance of £60 per annum in all, some part of it ought to be assigned to the creditors.

LORD PRESIDENT.—The allowance to the daughters does not form any estate which the mother can assign. The only question is, whether a widow in her situation can be called on to assign any part of the £40 of her allowance. I think she is not bound to do so.

The other Judges concurred, and the Court granted the *cessio*.

No. 381.

JAMES BLYTH.—*Keay—Sandford.*

MABERLY'S ASSIGNEES.—*Shene—H. J. Robertson.*

DAVID WATSON and Others.—*D. F. Hope—Forzynth.*

NATIONAL BANK and COMMERCIAL BANK.—*More.*

Bankrupt—Foreign.—A London banker, who carried on business there by himself, and in Scotland by agents, stopped payment in London, and after this, but before the failure was known, various sums, chiefly in bank-notes, were delivered to his bank agents in Scotland, to retire acceptances in London, and on the failure being known, interdicts were obtained from the Sheriff against the agents' away-putting such sums till farther orders of Court; thereafter, a commission of bankruptcy was issued in London, and the assignees obtained a warrant from the Court of Bankruptcy there, to enter all houses of the bankrupt, and "all places belonging to him where any of his goods are suspected to be," and to seize "all money, &c., and all things whatsoever belonging to him;" and this warrant was backed by the Sheriff of Edinburgh; found, in a question between the assignees and the parties holding interdicts, that, as the question raised by the applications for interdict, was not strictly or legally a question of vindication of property, but a question of preference on funds legitimately in the possession of the agent and manager for the bankrupt, and which would be most properly discussed and determined under the proceedings in bankruptcy in England, the assignees were entitled to delivery of the bank-notes, reserving to all parties their respective rights and claims of preference to be insisted on in England.

July 10, 1832. ON the 2d of January 1832, Mr John Maberly stopped payment in London, where he carried on business as a banker, under the firm of John Maberly and Company. He had agents at Edinburgh, Glasgow, and Moncreiff, and other places in Scotland, carrying on the business of banking. At all these places the firm used was John Maberly and Company. On the same day Maberly wrote to James Blyth, his agent in Edinburgh, informing him that he had stopped payment, and desiring Blyth to close his banking transactions, except to the effect of receiving from the other

1st Division.
Lds. Corehouse
and Moncreiff.

B.

agencies in Scotland; the several balances due by the respective agents, No. 381. who were desired by Maberly to transmit these balances to Blyth. This letter was received by Blyth on the 4th, at which time he held Edinburgh July 10, 1832. and provincial bank-notes to the amount of £3486, besides some bills and Blyth, &c. v. specie, making altogether a balance of £3873 then in his possession. The Maberly's A-
signees.

The notes, bills, and cash thus in his hands, had, before receipt of the letter, been taken that day, according to his custom, to his own house, and locked up in a safe there. In adjusting his accounts with Maberly, Blyth debited him with his house rent. The other agents of Maberly duly remitted to Blyth their balances, amounting in all to £2681.

On the above day (4th January), and before the failure was known, Watson delivered a sum of £631 to Pellat, the agent of Maberly in Glasgow. This money, with other sums, was sent on the same day by Pellat to Blyth; and on the failure being made known in the course of that day, Watson sent instructions to an agent in Edinburgh, in consequence of which, a petition was presented to the Sheriff of Edinburgh, stating that Watson had given the money for the purpose of being transmitted to London, to retire an acceptance of his to one Burt, due on the 9th of that month; that the sum consisted of bank-notes; that with this view, and as was the practice, the money was remitted by Pellat to Blyth, with the necessary instructions for its application; that the identical notes given to Pellat were sent to Blyth, who had not broken open the parcel containing them, and that the notes could be identified. He therefore craved the Sheriff to ordain Blyth either to remit the sum to London to retire the bill, or to repeat it to him; and, in the mean time, "to interdict Blyth from away-putting the money to his prejudice, till the future orders of Court." The Sheriff, on 7th January, ordered answers, "and in the meantime granted interdict as craved."

Several other parties obtained similar interdicts under similar circumstances, but, in one instance, the money given to Pellat was, in order that Blyth should make a payment in Leith.

The National Bank also presented a bill of suspension and interdict against Maberly and Company, and Blyth, stating that Blyth had in his possession a quantity of the National Bank notes, and that they held a quantity of Maberly's notes; that these notes were respectively acquired by the parties on the faith of an agreement to exchange them twice a-week against each other; that Blyth had declined to make the exchange on 6th January, one of the usual days; and they craved an interdict against Blyth and Maberly's agents from "re-issuing, assigning, or parting with the possession of all or any of the notes of the National Bank of Scotland which may be in the possession of Maberly or his agents." On the 7th of January the Lord Ordinary, in respect that Maberly and Company had called a meeting of their creditors, and that it was "the duty of them and their agents to preserve entire, and without alteration, the whole funds, effects, and property, for behoof of all whom it may concern;

No 381. therefore, in hoc statu, granted warrant to the Sheriff of Edinburgh, La-
 July 10, 1832.
 Blyth, &c. v. Maberly's As-
 signees, &c. nark, &c., to take a special inventory of all the notes issued by the Na-
 tional Bank of Scotland, in the hands of Maberly and Company, or their
 agents, &c., for the purpose of ascertaining and preserving the same for
 behoof of all concerned, and that from the date of the last exchange;
 reserving entire, to all parties, their rights and interests in the said
 notes." The bill of suspension being passed, and interdict being grant-
 ed, Blyth reclaimed to the Second Division; but his note was, on the
 11th of February, refused, of consent, " Blyth consigning in the Bank of
 Scotland the amount of bank-notes of the National Bank admitted by him
 to be in his hands, amounting to £208."

Similar procedure was on a similar statement adopted by the Commer-
 cial Bank, which resulted in a consignation by Blyth of £250, also on the
 11th of February, to which amount the Commercial Bank's bill of sus-
 pension was passed, and interdict continued, by the Second Division.

On the 26th of January, the Lord Chancellor issued a fiat in bank-
 ruptcy against John Maberly and Company, and, on the same day, a
 commissioner of the Court of Bankruptcy granted a warrant, addressed
 to a messenger at arms, and to all mayors, &c., and all other his Majesty's
 loving subjects, " to will and require, authorize and empower you, and
 every one of you, to whom this warrant is directed, forthwith to enter into
 and upon the house and houses of him, the said John Maberly, and also in
 all other place and places belonging to him, the said John Maberly, where
 any of his goods are, or are suspected to be: you shall seize all the ready
 money, jewels, plate, household stuff, goods, merchandise, books of ac-
 counts, and all other things whatsoever, belonging to him, the said John
 Maberly; and such things as you shall so seize, you shall cause to be
 inventoried, and the same you shall return to me with all convenient
 speed; and what you shall so seize, you shall safely detain and keep in
 your possession, until I shall give you orders for the disposal thereof; and
 in case of resistance, or of not having the key or keys of any door or lock
 belonging to him, the said John Maberly, where any of his goods are,
 or are suspected to be, you shall break open, or cause the same to be broke
 open, for the better execution of this warrant."

By 1 and 2 Wm. IV. c. 56, and 6 Geo. IV. c. 16, § 12, the commis-
 sioner has full power " to take such order and direction, with all the
 bankrupt's money, fees, offices, annuities, goods, chattels, wares, merchan-
 dise, and debts, wheresoever they may be found or known, and to make
 sale thereof, &c. for satisfaction and payment of the creditors of the bank-
 rupt." By 6 Geo. IV. c. 16, § 30, it is provided, " that if, in the execu-
 tion of any warrant of seizure so granted by the commissioners as aforesaid,
 it shall be necessary to break open any house, chamber, shop, ware-
 house, door, trunk or chest of such bankrupt in Scotland, where any of
 the property shall be reputed to be, or to seize and get possession of such
 property, such warrant, after having been verified upon oath as aforesaid,

may be backed or indorsed with the name of the Judge Ordinary, of No. 381. Justice of the Peace in Scotland, who are hereby required within their respective jurisdictions to back or indorse the same, and such warrant so indorsed shall be sufficient authority to the person bringing such warrant, and to all officers of the law in Scotland, to execute the same within the county or borough wherein it is so indorsed, and in virtue thereof to break open the house, chamber, shop, warehouse, door, trunk or chest of such bankrupt, and to seize and take possession of such property, to be distributed under the said commission, or otherwise dealt with according to law."

July 10, 1832.
Blyth, &c. v.
Maberly's As-
signees, &c.

On the 1st of February, a petition was presented to the First Division by the messenger to whom the English Court of Bankruptcy's warrant was addressed, who craved the Court to interpose its authority to the warrant. After some discussion this petition was withdrawn.

The assignees having got the warrant of the Court of Bankruptcy indorsed by the Sheriff of Edinburgh, Blyth presented a bill of suspension and interdict, narrating the circumstances already mentioned, and stating that he had a right of lien over Maberly's funds in his hands, to the amount of £4424. He contended, 1st, that he could not be compelled to give up the funds over which his own lien extended; 2d, that the English warrant only authorized an entry of the house of Maberly, and did not reach the dwelling-house of Blyth, though he was Maberly's agent, and therefore any of Maberly's property contained in Blyth's house could only be recovered by the ordinary process of law; and, 3d, that there were subsisting interdicts, granted both by the Court of Session and by the Sheriff, against his parting with the greater proportion of the funds, until the issue of the processes in which the interdicts were obtained; and that judicial consignation had been made in the processes with the two Scottish banks. He therefore craved the Court to interdict the assignees "from entering the premises of the complainer, or attempting to seize or carry away or inventory any monies, goods, or effects in his custody or keeping within the said premises," or at least to interdict as aforesaid, until he should raise a multiplepoinding. He raised a process of multiple-poinding, calling all the parties.

Maberly's assignees lodged answers, stating, that they were willing to allow effect, in the meantime, to Blyth's lien, reserving its validity for after discussion; and they admitted that the English warrant could not reach the funds judicially consigned in the question with the two banks. But they pleaded, 1st, That the balance of funds in Blyth's hands, was clearly the property of Maberly, and being so, his assignees were entitled to obtain possession of it, whether it was found in the agent's office, or in a safe in his house, to which he had carried it in the usual course of business; and, 2d, That the interdicts were merely granted to the effect of preserving the rights of all parties entire, which would still be done though the funds were given up to the custody of the assignees; but if

No. 381. there was a conflict of jurisdiction, that of the English Court of Bankruptcy must prevail.

July 10, 1832. Blyth, &c. v. Maberly's Assignees. The Lord Ordinary reported the bill and answers to the Second Division of the Court, who, in consequence of the proceedings previously instituted in the First Division, remitted the bill of suspension to that Division.

On the 22d of May, Maberly's assignees presented a petition to the First Division, stating, that by means of the English warrant, backed by the Sheriffs of Edinburgh, Lanark, &c., they had been enabled to take possession of all the books, papers, and effects in Mr Maberly's banking-offices in Edinburgh, Glasgow, &c.; but that there still remained a considerable part of the funds of the bankrupt in the possession of Blyth, which they were as yet prevented from obtaining, in consequence of the interdicts imposed on him. They repeated the pleas stated in their answers to Blyth's bill of suspension, and prayed warrant of service on Blyth, the two banks, and Watson, and the others holding interdicts, and an order on Blyth "to pay over the said bank-notes, and other monies, amounting as aforesaid, after giving effect in the meantime to Blyth's claim of retention, to £2377."

Answers were lodged by Blyth, by the Commercial and National Banks, and by Watson and others. Blyth pleaded chiefly, that, in point of form, it was incompetent to ordain him to pay over this fund in the face of existing interdicts, without having these processes brought up from the Sheriff Court, and discussed; and especially, without there being a special prayer in the petition to have the interdicts recalled. He also insisted, that the bills of suspension and interdict at the instance of the two banks, passed by the Second Division, must first be discussed before the petition could be granted. The banks maintained the same plea, and also that the petition proceeded upon the assumption of the disputed funds being the property of Maberly, which was the very fact about which parties were at issue; and as it was only Maberly's property to which the warrant of seizure could apply, it was impossible to allow the warrant to be carried into effect, until the issue of the several processes of interdict determined the question of property.

Watson and others insisted in pleas already referred to, and farther, that after the bankruptcy in London, Maberly had ceased to do business, or to be able to execute his contracts; that the funds were delivered to his agents in ignorance and error, and consequently that the property was not lawfully passed to Maberly, and the notes as much redemandable as if Maberly himself had taken them up directly, in place of doing so through the medium of his agent.

When the cause was considered by the First Division on the 16th of June, the Court, "in respect of the dependence of the other relative actions before the Second Division, superseded advising and determining this case at present." On the 19th, the assignees presented a note, stating,

that the only processes in the Second Division were more relative to the questions with the banks; and that, independently of them, and the funds they involved, there was a sum of £1919, regarding which they prayed the judgment of the Court.

Against the competency of the process of multiplepoinding raised by Blyth, the assignees put in objections, as defences, and pleaded, that it was unnecessary, as every question raised under it could be decided under the actions already in dependence.

The two banks afterwards lodged a minute withdrawing opposition to the petition by the assignees, and also withdrawing the processes of suspension and interdict raised at their instance, "under reservation of all claims competent to the said banks, to be afterwards disposed of in the proper courts."

The multiplepoinding raised by Blyth being reported by the Lord Ordinary, that process, and also the petition by the assignees, and Blyth's bill of suspension and interdict, were advised together.

LORD PRESIDENT.—Had there been a Scottish sequestration, we should have remitted the multiplepoinding to it, and so we may dispose of the multiplepoinding, to the effect of having the questions it involves tried in the Court of Bankruptcy in England. I have considerable doubt as to the right of property in the funds in dispute; but the lawful possession of these funds is clearly with Maberly. It has been found, that money paid in for a specific purpose, must be so applied without being mixed up with the general estate on a bankruptcy occurring. But such a question involves a claim of preference merely, not of property; and I think the existence of such a claim ought not to bar the assignees from obtaining possession of the disputed funds, leaving the preference to be tried in England.

LORD BALGRAY.—The question is, whether the process is in such a shape as to allow us to decide who shall have possession of these funds. The commission in England carried the whole property of the bankrupt, and warrant has been issued to take possession of his whole property. Are these funds, therefore, in the lawful possession of Maberly or his agent? If so, we must grant authority to the assignees to possess themselves of the funds. I think they were lawfully in Maberly's possession. They were payments made to him or his agent in the course of trade. Blyth, or any of his agents, might have paid them away again, and it would have been a perfectly good payment to all intents. The office of Blyth was the office of Maberly; and the business of Maberly as a banker was carried on upon the system of his taking money in Scotland, and giving merely his personal obligation to pay a corresponding sum in London. In this view, I am satisfied that the assignees should obtain possession of the funds, and that the parties claiming preferences must seek them in the English Court of Bankruptcy.

LORD CRAIGIE.—I do not see the case in the same light. The question appears to me to be, whether the disputed funds were Maberly's property or not. Interdicts have been obtained in our Courts, by parties alleging the property of these funds to be theirs. I think we cannot refrain from determining, in the Courts of Scotland, whether these funds be the property of Maberly, before we allow Maberly's assignees to carry them to England. Suppose that Maberly had been a

No. 381.
July 10, 1832.
Blyth, &c. v.
Maberly's As-
signees.

No. 381. pawnbroker, and had received the title-deeds of a Scottish estate in pledge, could we
 July 10, 1832.
 Blyth, &c. v. Maberly's As-
 signs. order these to be de plano given up, and carried to England? The whole matter turns on the point, whether these funds were Maberly's property or not; and I can not think they ever became his property; for, nothing done by Maberly himself, or through the medium of an agent, could confer on him a right to the bank-notes given to him or his agent after his bankruptcy.

LORD GILLIES.—I cannot see that the question involves much difficulty, unless by mixing two things which are perfectly distinct in themselves. I mean, payment and deposit. The money in dispute was not deposited with Maberly's agents, but paid to them. The Scottish notes paid in to them might, with perfect propriety, have paid away in any transaction the very next hour. These notes were not to be sent to London; that was not the obligation undertaken by the bank. These notes could not by law be even used or issued in England. A payment was made, in consideration of which, Maberly was personally liable to pay in English notes, or in any other lawful form. Besides, he was liable for interest upon the money so paid in. Taking this view, I have no doubt the assignees are entitled to the possession of the funds in dispute.

The Court accordingly pronounced these interlocutors:—

On the petition of Maberly's assignees, "having advised the petition, &c., and minute for the Commercial and National Banks of Scotland, in respect that the question raised by the various applications for interdict by the several parties mentioned in this petition, is not strictly or legally a question of vindication of property, but a question of preference on funds legitimately in the possession of James Blyth, agent and manager for the bankrupt, and which will be most properly discussed and determined under the proceedings in bankruptcy in England, decern and ordain the said James Blyth to pay and deliver to the petitioners, the assignees of the estate and effects of the said John Maberly, or their mandatories, the whole bank-notes, and other monies and effects in his hands, as agent for the said John Maberly, after deducting in the meantime the sum of £4424, 12s., for which he claims a right of retention, and reserve to all parties their respective rights and claims of preference to be insisted on in the form of proceeding in England: find the said James Blyth entitled to the expenses incurred by him in defending the fund, and reserve his claim for the same (as it shall be taxed by the auditor) in the final accounting between him and the assignees."

In the process of suspension at Blyth's instance, "pass the bill, and continue the interdict to the extent of £4424, 12s., and quoad ultra refuse the bill, and recal the interdict, reserving all questions of expenses."

In the multiplepoinding, "having advised this summons, with the defences for John Maberly's assignees, in respect of the interlocutors pronounced this day in the suspension and interdict at the instance of the said James Blyth against the said assignees, and on the petition for the said assignees against the said James Blyth and others, dismiss this process as unnecessary, and decern."

Watson and Others' Authorities.—Eden (Bankt. Law, 69); 1 Bell (245, 247); Archibald on Bankruptcy, 120; 1 Bell (270, 271.)

ANDERSON and TOD, W.S.—INGLIS and DONALD, W.S.—J. A. CAMPBELL, W.S.—GOULD and PONTON, W.S.—D. FISHER, S.S.C.—J. DUNCAN, W.S.—W. MILLER, S.S.C.—J. STUART, S.S.C.—Agents.

JOHN TAIT, Pursuer.—Milne.
GEORGE TAIT and Others, Defendants.—G. G. Bell.

No. 382.

July 10, 1832.
 Tait v. Tait, &c.

Process—Summons.—Circumstances in which a summons, concluding for payment of a legacy, and for count and reckoning as to the residuary estate of a testator, was dismissed as irregular and informal.

JOHN TAIT raised a summons against George Tait and Others, his July 10, 1832. brothers and sisters, subsuming that their father had executed a deed of settlement, dated the day : that the settlement was in favour of the testator's wife, under burden of a legacy of £200, to the pursuer, besides a variety of legacies to others of the family, and provisions out of the residuary estate, if Mrs Tait should die intestate, all of these being payable after the death of Mrs Tait; that Stewart and others were named executors; that the testator died in 1815, and his wife died intestate in 1826; that George Tait and others had intromitted with the funds of their father and mother, and incurred a passive title; that the pursuer had often demanded payment of his legacy of £200 from them, and a count and reckoning as to the residuary estate, and payment of his proportion thereof, yet they refused to make payment, or to count and reckon, and also refused "to exhibit or produce the said deed of settlement itself." He therefore concluded, that George Tait and others, and also the testator's executors, if they had acted under the settlement, should be ordained to pay his legacy of £200, &c.; and "to exhibit and produce a full state of accounts of their intromissions, to hold just count and reckoning with the pursuer, and to pay him his share of the overplus of the executry funds remaining after payment of the legacies," &c.

The defenders denied the existence of the alleged deed of settlement, and pleaded *inter alia*, as their first preliminary defence, that the libel was irregular and informal. "The summons was neither of exhibition, nor of count and reckoning. Neither was it properly libelled, so as to comprehend conclusions both for exhibition and count and reckoning; Moreover, it contained an alternative conclusion, but without any corresponding subsumption against the alleged executors, who, nevertheless, were not cited."

The Lord Ordinary "sustained the first preliminary defence, dismissed the action, and decerned; found expenses due," &c.

The pursuer reclaimed, but the Court adhered.

No. 383.

CUMING'S TRUSTEES, Raisers.—*D. F. Hope—Speirs.*HONOURABLE MRS L. CUMING, Claimant.—*Rutherford—McNeill.*

July 10, 1832.

Cuming's

Trustees v. Mrs L. Cuming.

Clause—Trust—Entail.—A trustee directed his trustees to denude of the residuary estate, “with such conditions that the heirs shall not dispose of the same, nor alter the succession thereof, either gratuitously or onerously;” and that, failing certain heirs-male, the same shall solely pertain to the eldest heir-female through the whole course of succession, who, as well as the heir-male, shall bear the name and arms of “Cuming;”—held, that the deed denuding the trustees “must contain a clause enjoining the heirs to bear the name and arms of Cuming, and that heirs-female shall succeed without division, clauses prohibiting alienation, and alteration of the order of succession, either gratuitously or onerously, all fenced with proper irritant and resolute clauses applicable thereto, but no other prohibitory clauses.”

July 10, 1832. By trust-disposition and settlement, the late Mr Cuming made the following provision :

1st DIVISION. Ld. Corehouse. due of my said estates and effects, for the use and behoof of George Cuming,

B. my grandson, only son of the said deceased Thomas Cuming, and the heirs of the body of the said George Cuming, in such way and manner as may seem most expedient to them, till he or they may arrive at majority, when they are to denude thereof in his or their favours, with such conditions, that they shall not dispose of the same, nor alter the succession thereof, either gratuitously or onerously, as to the said trustees may seem proper, and failing of the said George Cuming,” &c., “then such residue is to pertain to the daughters of the said Thomas Cuming equally among them.”

Mr Cuming afterwards made this addition to his settlement :—“ I do hereby declare, that, failing heirs-male of my son's body, and the succession opening to heirs-female of his body, that then, in place of the said residue of my estate and effects pertaining to the daughters of the said Thomas Cuming, my son, equally among them, as provided by the fore-said disposition, the same shall solely pertain to the eldest heirs-female of the said Thomas Cuming and their issue, the eldest heir-female, through the whole course of succession, succeeding always without division, and secluding heirs-portioners; and they, as well as the heir-male, bearing and using the name and arms of Cuming, and with these, and the other conditions expressed in the preceding disposition, the before-mentioned trustees are accordingly to denude upon such heir attaining to the age of majority, in such form of settlement, and under such clauses and conditions, for carrying my intentions into execution effectually, according to the law of Scotland, as to them may seem most proper, and as I could have done myself, hereby putting them, in that respect, in my own place, and with the same powers that belong to me.”

After the succession to the residue had opened to an heir-female of Thomas Cuming, (the Honourable Mrs L. Cuming,) in terms of these pro-

visions, the trustees invested the greater part of the residuary estate in No. 383. the purchase of lands, and raised a process of multiplepoinding and ex-
 July 10, 1832.
 oneration. In this process they produced a deed of conveyance of the Cuming's
 lands in favour of Mrs Cuming, executed in the form of a strict entail,
 Trustees v. Mrs
 L. Cuming.
 and containing the whole prohibitions against debt, &c., duly fenced,
 which are common in such a deed. Mrs Cuming, as a claimant in the
 multiplepoinding, objected to this, and contended that the trustees were
 bound to denude in her favour, free from any restrictions except those
 expressly required by the clauses already quoted. The Lord Ordinary
 ordered minutes to the Inner House, "with reference to the terms and
 conditions on which the trustees are bound or entitled to denude of the
 residue of the trust-estate."

Pleaded by Cuming's trustees—

They had no wish except to give effect to the true intentions of Mr Cuming ; but they were bound to give full effect to that intention, and the claimant, especially as not being *alioqui successurus*, was not entitled to object to the execution of such deed as was necessary for this purpose. It was declared that the eldest heir-female should succeed without division ; that such heir, as well as heirs-male, should bear the name and arms of Cuming ; and that the trustees were to denude of the residuary estate, "with such conditions, that they (the heirs) should not dispose of the same, nor alter the succession thereof, either gratuitously or onerously, as to the said trustees might seem proper;" "and under such clauses and conditions, for carrying the trustee's intentions into execution effectually, according to the law of Scotland, as to them may seem most proper." The obvious wish of Mr Cuming was to secure the estate permanently to a fixed line of succession ; he had directed the trustees to make such a deed as would prevent any heir from either disposing of the estate, or altering the succession ; according to the common import of such language, he meant to deprive the heirs of all power to defeat his wish by any deeds, either *inter vivos*, or *mortis causa* ; and his obvious intention could not receive effect except by their executing a deed of strict entail.

Pleaded by the Hon. Mrs L. Cuming—

The intention of Mr Cuming, so far as expressed, directed the trustees to denude, by a deed prohibiting an heir to dispose of the estate, or to alter the succession, destining the estate to the eldest of heirs-female, and obliging every heir to bear the name and arms of Cuming. No other prohibitions or restrictions were required by him ; and therefore the trustees were neither bound nor entitled to insert any other.

THE COURT found "that the deed of entail to be executed by the raisers, must contain a clause enjoining the institute and substitutes to bear and use the name and arms of Cuming, and that heirs-female shall succeed without division ; clauses prohibiting alienation, and alteration of the order of succession, either gratuitously or onerously, all fenced with

No. 383. proper irritant and resolutive clauses applicable thereto, but no other
July 10, 1832. prohibitory clauses ;" and remitted to the Lord Ordinary to adjust such
 deed.

Brown v. Ure.

M'Neil v.
Lockhart.

ALEX. MONYPENNY, W.S.—Wm. HOME, W.S.—Agents.

No. 384.

A. BROWN and Co.—*Skene—Innes.*
ROBERT URE.—*Monteith.*

Expenses.—Fee for opinion of counsel as to propriety of raising an action, sustained as a good charge against the opposite party; likewise a fee to senior as well as junior counsel, to advise whether it was safe to close the record in an advocation on the Inferior Court record, with additional pleas; as also the charge for a memorial to counsel for the Inner House advising, when the debate in the Outer House had been conducted without a memorial.

July 10, 1832. IN this case the opinion of counsel had been taken before the action was
2d DIVISION. raised. A record had been prepared in the Inferior Court, and when brought here by advocation, this was agreed to be held as the record, additional pleas being added; but before agreeing to close in this shape, the process was laid before senior and junior counsel for their advice, whether it was safe to do so. The cause was debated before the Lord Ordinary without any memorial to counsel, but a memorial was prepared for their use at the advising in the Inner House. A decision having been pronounced in favour of Brown and Co., with expenses, they gave in an account to the auditor, who struck off, inter alia, the fee to counsel for his opinion as to raising the action, the fee to junior counsel at advising the record, and a charge for the memorial preparatory to the Inner House advising. At moving the auditor's report, it was objected for Brown and Co. that these were fair and proper charges, which ought to be sustained; and that as to the fee for opinion of counsel before raising the action, the First Division had held in Osborn v. Brown, May 25, 1832 (ante, p. 578), that it was a proper charge.

THE COURT sustained the objections, and allowed all the three charges.

No. 385.

CAPTAIN MALCOLM M'NEILL, Pursuer.—*Speirs.*
NORMAN LOCKHART, Defender.—*Miller.*

Process—Mandatory.—Trust-deed for creditors as to heritage alone, not a sufficient mandate to carry on an action for payment of an ordinary personal debt raised by the trustor who had gone abroad.

July 10, 1832.

2d DIVISION.
Ld. Medwyn.
T.

CAPTAIN M'NEILL having served heir to his deceased brother, Hector Frederick M'Neill of Gallochily, raised an action against Lockhart and Swan, W.S., who had been his brother's agents, concluding for count and reckoning, and payment of the balance due on their intromissions with his

funds. Defences were lodged for Norman Lockhart, a partner of the firm; and thereafter Captain M'Neill having left this country for America, Mr Charles Ferrier, accountant, Edinburgh, claimed to be sisted, qua trustee, as his mandatory in the action. The ground on which he rested his claim to be so sisted, was a trust-deed for behoof of certain creditors therein mentioned, in favour of Mr Ferrier, or such person as his creditors might name, whereby he disposer in trust his whole heritable property (but no property of any other description), with power to sell, manage, &c., and in particular, "with power to the said Charles Ferrier, or other trustee or trustees, to be assumed as aforesaid, either to compound, transact and agree, or to submit and transfer any questions, disputes, debates or differences, that may arise betwixt them and any other person or persons, touching the execution of this trust-right, whether with relation to my titles to the lands and others hereby disposer, the debts due to or by me, or any other thing, of and concerning the premises in any manner of way, which transactions or submissions with the decrees-arbitral, one or more to follow thereon, are hereby declared valid and sufficient, to all intents and purposes whatsoever; as also, with power to him to sue and defend in all actions, and to do every other thing that shall be found necessary for effectually securing my said creditors, and effecting the payment of their debts."

The Lord Ordinary having sisted Mr Ferrier "qua trustee for the pursuer as his mandatory in this process," Lockhart reclaimed, and contended that the trust-deed did not afford him a title to be so sisted in the present action.

THE COURT altered the Lord Ordinary's interlocutor, found that the trust-deed was not a sufficient mandate to entitle the trustee to be sisted, and remitted to stay procedure till a sufficient mandate should be produced.

CUNNINGHAM AND WALKER, W.S.—LOCKHART, HUNTER, AND WHITEHEAD, W.S.—Agents.

JOHN SMITH, Pursuer.—*Robertson—Marshall.*

No. 386.

WM. CHRISTIAN ROBERTSON, Defender.—*J. Paterson.*

Jury Trial—Process—Reparation.—A motion for a new trial, on the ground that excessive damages had been awarded, refused.

At a Jury trial on the 18th of June,* a verdict was returned in favour of Smith, finding damages due to the amount of £240. The defender moved for a new trial, on the ground that the damages were excessive. After hearing the defender's counsel, the Lord President, who had pre-

* See *Jury Sittings, postea*, p. 829.

No. 386. sided at the trial, recapitulated the leading facts of the case, and stated his opinion that the motion ought to be refused.

July 11, 1832. The other Judges concurred, and the motion was refused.

Smith v. Hogg,

C. SPENCE, S. S. C.—A. PETERKIN—Agents.

No. 387.

REV. GEORGE SMITH, Pursuer.—D. F. Hope—Cowan.

Mrs Hogg and Husband, Defenders.—Brown.

Et e contra.

Process—Expenses—Jury Trial.—After a reduction of a promissory-note was conjoined with a counter action for payment of the note, and a record was closed, and notice of trial given of two issues; 1st, whether the note was genuine; and 2d, whether the grantor was liable for its contents; and the first issue was given up by the pursuer of the reduction—trial postponed, and a new plea allowed to be stated by him, “on payment of the expenses incurred by the defendant, so far as not necessary and available for the farther proceedings in the action for payment.”

July 11, 1832. ON the 5th of May 1829, the late Mrs Freer raised a reduction of a promissory-note for £1000, purporting to be signed with her name, and granted in favour of Mrs Hogg. The note was payable on demand, and bore to be for value. The reasons of reduction were, 1st, forgery; and 2d, that if the name were genuine, the signature had been fraudulently impetrated, through facility on her part, and in ignorance of the nature of the transaction. Mrs Hogg and her husband lodged defences. In October 1829, Mrs Freer died, leaving the Rev. George Smith her executor, against whom the action of reduction was transferred. In June 1830, Mrs Hogg and her husband raised a summons against Mr Smith, concluding for payment of the £1000, being the contents of the note. Mr Smith lodged defences, narrating the circumstances, from which he inferred that the note, if signed by Mrs Freer, must have been granted not only without value, but in ignorance of the nature of the transaction, or at least in the belief that it was revocable at any time during her life; and pleaded, 1st, that Mrs Hogg was not entitled to the usual privileges of a bona fide and onerous holder of bills, but was bound to prove *habili modo*, that the note was granted for value, and constituted a valid obligation; 2d, that the note was void, as not genuine; 3d, that it was legally void, no value having been given for it; and 4th, that neither a donation *inter vivos*, or *mortis causa*, could be validly constituted by a promissory-note.

The processes were conjoined, and a record was made up, in the course of which Mrs Hogg produced a letter, said to have been addressed to her by Mrs Freer, at the time of granting the note in her favour. The letter requested Mrs Hogg “to keep the note beside her, and that she will take no step to recover payment of the same during my (Mrs Freer’s) lifetime, as this would lessen my yearly income too much by the loss of the

interest of the money." In the record, Mr Smith stated, *inter alia*, that No. 387. if the note was signed by Mrs Freer, it was never meant to constitute a valid obligation against her. He also stated, in answer to the averment that Mrs Freer had addressed the letter above quoted to Mrs Hogg, that, if she signed it, it must have been in ignorance, "or with the view of qualifying the obligation which she apparently came under, by signing the promissory-note, and for the purpose of converting it into a donation mortis causa, or legacy revocable at pleasure."

The record was closed, and the following issues were adjusted, "Whether the promissory-note for £1000, sought to be reduced, is not the promissory-note of Mrs Freer? Or whether Mr Smith, her executor, is indebted to the defender Mrs Hogg, in the sum of £1000, contained in the said promissory-note."

Notice of trial at the Perth circuit was given by Mrs Hogg and her husband, after which Mr Smith gave notice of a motion to postpone the trial, "and to allow him to amend the record by the addition of a new plea in law, if the statements therein made be not considered sufficient to raise the question of law, that the promissory-note sought to be reduced was revocable, and was de facto revoked by the original action of reduction at Mrs Freer's instance having been raised; or otherwise that Mr Smith may be enabled to argue such plea in law, under an action of declarator about to be raised by him for that purpose."

The Dean of Faculty, for Mr Smith, intimated that he was willing to give up the first issue, but that he wished to add the plea to the record, in terms of the notice already quoted, that the promissory-note was not only revocable, but had been actually revoked. He also moved for the postponement of the trial.

Brown, for Mrs Hogg, objected to any new plea being now added; it was precisely equivalent to the addition of a new reason of reduction, and it was too late to do this, even upon the condition of paying all previous expenses.

LORD GILLIES.—If this were merely an action of reduction, I do not see how the objection now stated could be obviated. But there is another action by Mrs Hogg for payment of the contents of the note, against which Mr Smith stated defences, and I do not think he is barred from adding a new plea in aid of these defences, even at this stage of the cause, on payment of expenses. The proposed plea, from its nature, seems properly to belong to the defences against the action for payment, rather than to the reduction of the note. I think the motion by Mr Smith should be granted.

The other Judges concurred: and a minute being lodged, in which "the Dean of Faculty for Mr Smith stated, that he consents to a judgment against him upon the first issue, and to his being liable in the expenses incurred by the defender in the reduction, so far as not necessary and available for the further proceedings in the action for payment, and craved the Court thereupon to postpone the trial, and allow him to put the new pleas (stated in his notice) upon record,"

July 11, 1832.
Smith v. Hogg.

- No. 387. “ The Lords, in terms of the prefixed admission, find that the promissory-note for £1000, sought to be reduced, is the promissory-note of the late Mrs Helen Freer of Woodlands : Postpone the trial, and allow the additional plea in law to be stated, on payment of the expenses, in terms of the admission, of which allow an account to be given in,” &c.
- July 11, 1832.
Learmonth v. Trotter.
Dudgeon v. Forbes.
- GAIRDNER and ROBERTSON, W.S.—ANDERSON and TUD, W.S.—Agents.

No. 388. JOHN LEARMONT, Suspender.—*More.*
GEORGE TROTTER, Respondent.—*D. F. Hope—H. J. Robertson.*

Interdict—Circumstances in which an interdict against the alleged violation of a contract refused.

July 11, 1832. MR LEARMONT, superior of the feus in Rutland Street, presented a bill of suspension and interdict against Mr Trotter, builder, alleging that Ld. Moncrieff. he was violating the contract under which he held one of the building feus, Bill-Chamber. by deviating from a plan and elevation to which he was bound to conform. D.

On considering answers, the Lord Ordinary, holding that Trotter was violating the express obligations of the contract, passed the bill, and granted the interdict.

Trotter reclaimed, and the Court in so far dissented from the Lord Ordinary, as to recall the interdict ; but their Lordships passed the bill, and observed that if Trotter proceeded with his operations, it was *suo periculo*.

M'RITCHIE, BAYLEY, and HENDERSON, W.S.—J. SHAND, W.S.—Agents.

No. 389. ARCHIBALD DUDGEON, Petitioner.—*M'Dougall.*
REV. WILLIAM FORBES, Respondent.—*Shene.*

Proof to lie in retentis.—Circumstances in which the Court refused to grant warrant for taking the testimony of two aged witnesses, in an action of damages for alleged slanderous words said to have been addressed by a clergyman from the pulpit, in presence of the congregation.

July 11, 1832. DUDGEON raised an action of damages against the Rev. William Forbes, minister of Tarbet, for alleged slanderous expressions averred to have been used by him from the pulpit, in presence of the congregation, and presented a petition, praying for a commission to take the depositions of two aged witnesses, to lie in retentis. A condescendence of the facts proposed to be proved by them having been required, was accordingly given in. It contained, besides the averment as to the alleged slander, a variety of charges regarding Mr Forbes's management of the poor's-fund, and his conduct and character in other respects. Against granting the prayer of this petition it was objected, that as the words spoken had been addressed to the whole congregation, there could be no *penuria testium or risk of*

2d DIVISION.
T.

loss of evidence, so as to require two very old, and in all likelihood very deaf persons, to be fixed on to have their depositions taken; and that, from the condescendence, it was obvious that the true object of the application was to have an opportunity of making charges against Mr Forbes, ^{July 11, 1832.} <sub>Manson, &c.
v. Clyne.</sub>

The Court refused the petition.

<sup>Munro v.
Munro.</sup>

R. ROY, W.S.—

—Agents.

Mitchell v. His Creditors.

A. MANSON and A. W. GOLDIE, W.S., Petitioners.—Keay—Maitland. No. 389.
DAVID CLYNE, S.S.C., Respondent.—Boswell.

Process.—A petition having been allowed to be seen for so many days, but without the interlocutor specially bearing an order “*to answer*”—held, that the party against whom it was directed ought to have lodged answers if he any had, and delay to put in answers refused.

PETITION by Manson, and Goldie his agent, for interim execution ^{July 11, 1832.} pending appeal of the judgment mentioned ante, IX. 853. On being presented, an interlocutor was pronounced, allowing it “*to be seen*” for <sup>2d Division.
T.</sup> eight days. No answers were given in, but, on its being put out for advising, Clyne craved time to answer, contending that the interlocutor allowing it to be “*seen*,” did not imply that it was to be “*answered*,” and that he had not committed any neglect in not answering it.

The Court, considering that the object of such interlocutor was to allow the opposite party to answer if he saw cause, refused Clyne’s application for delay, and granted execution on caution in common form.

GOLDIE and PONTON, W.S.—D. CLYNE, S.S.C.—Agents.

HUGH MUNRO, Petitioner.—Miller.
NICOL MUNRO, Respondent.—M’Neill.

No. 391.

Inhibition, recal of.—INHIBITION on the dependence of actions con- ^{July 11, 1832.} cluding for about £800, being chiefly for business accounts, recalled on ^{2d Division.} caution for £500, the auditor having taxed off nearly £300 of the accounts sued upon.

J. and W. FERLIER, W.S.—R. M’KENZIE, W.S.—Agents.

DAVID MITCHELL, Pursuer.—More.
HIS CREDITORS, Defenders.—Robertson.

No. 392.

Cessio Bonorum—Benefit of cessio refused to a party who, a year or two before his bankruptcy, had taken the titles to certain feus, on which he had erected several houses, in name of his son (a minor), and his brother.

No. 392. THE pursuer, Mitchell, having acquired certain feus, and erected houses thereon, in the course of the years 1826-8, took the titles, not in his own name, but in those of his brother, and of his son, a minor. Towards the end of 1831, he was incarcerated for debt, and having applied for aliment under the act of grace, his application was refused, in consequence of the declarations emitted by him, from which it appeared that the feus to which he had taken the titles in name of his brother and son, had been his own property, and that the houses had been erected with his own funds. He thereafter brought a process of cessio, and offered to grant a conveyance of any interest he might have in the feus, but not to obtain a conveyance by the brother and son; and he pleaded, that having been eight months in prison, that was sufficient punishment for his conduct.

The Court refused the benefit of cessio, *hoc statu.*

J. M'LAURIN, W.S.—JAS. STUART, S.S.C.—Agents.

No. 393. MRS MARGARET Gow, Suspender.—*Sol.-Gen. Cockburn.*
R. D. NAPIER, Charger.—*D. F. Hope—Handyside.*

Process—Bill Chamber.—The Court will not interfere with the discretion exercised by the Clerk of the Bills, in judging of the sufficiency of caution.

July 11, 1832. MRS Gow having presented a bill of suspension of a decree of removing, obtained against her by Napier, her landlord, it was allowed to be seen on caution. Caution was tendered, but on considering objections to its sufficiency, the Clerk refused to receive it, and thereafter the Lord Ordinary refused the bill, in respect no sufficient caution had been found. Mrs Gow reclaimed, and prayed the Court to find that the caution offered was sufficient. The Court, however, refused to interfere with the determination of the Clerk as to this matter; Mrs Gow then offering to find satisfactory caution, a remit was made to allow her ten days to do so.

W. MERCEZ, W.S.—KIRK and DICKSON, W.S.—Agents.

ROBERT FINDLAY, Petitioner.—*Rutherford—Ivory.*
DONALDSON'S TRUSTEES, Respondents.—*D. F. Hope—Shene—Russell.*

No. 394.

July 11, 1832.
2d Division.

T.

Findlay v. Donaldson's Trustees.
Miller M'Kay and Co. v. Robertson.

Bankrupt—Sequestration.—Application by Findlay, a sequestered bankrupt, for his discharge, opposed on the allegation of frauds committed by him in the course of his business. The Court, however, on the report of an accountant, being satisfied that the charges of fraud were not well founded, and there being the requisite concurrence, granted the discharge.

GIRSON-CRAIGS, WARDLAW, and DALEEL, W.S.—A. SCOTT, W.S.—Agents.

THOMAS MILLER M'KAY and Co., Suspenders.—Jameson.
LAURENCE ROBERTSON (for Royal Bank), Charger.—Keay—Rutherford.

No. 395.

Bill of Exchange.—Circumstances in which the Court required caution on passing a bill of suspension of a charge on a bill of exchange, although the bill charged on was ex facie vitiated in the date.

ROBERTSON, cashier at Glasgow for the Royal Bank, gave a charge July 11, 1832, to Thomas Miller M'Kay and Co., merchants there, as indorsers of a promissory-note for £500, granted to them by one Honeyman, and thereafter discounted with the Royal Bank. They presented a bill of suspension, averring that the note, which was payable two months after date, and bore date "14th" February, had been granted to them by Honeyman for value on the "6th" February, which date it originally bore; that in this state it was blank indorsed by them, and sent for discount to the Royal Bank Office, Glasgow; that Robertson, the charger, declined to discount it, and returned it to them; that thereupon they gave it back to Honeyman, who paid them the amount in cash; that Honeyman subsequently, without their knowledge, altered the date from the "6th" to the "14th," subjoining to his original signature as follows: "Accepted from the 14th of February, at two months, due the 17th of April. F. Honeyman;" and then sent it to the Bank for discount; that it was discounted accordingly, but that Honeyman had become bankrupt before it fell due, considerably in their debt. They therefore pleaded, that the bill was null at common law, as altered in a material point without their concurrence, and also null under the stamp acts, as having been made a new instrument after being issued.

Robertson admitted the alteration in the date, but he averred, in point of fact, that the note was an accommodation by Honeyman to the suspenders; that after discount was first refused, it was placed in his hands to effect its negotiation; that he, in again presenting it for discount, acted as their

No. 395. agent, and that the Bank were not aware that it had been sent by him, and not by the indorsers themselves, whose name alone was on the back of it, and that the alteration was made with their consent; and he contended, in point of law, that if the bill were an accommodation bill, it had no existence as a negotiable instrument till issued by being discounted with the Bank, and consequently that no objection lay on the stamp laws, which only applied to alterations made after the bill was issued; and that in the circumstances it was in no way objectionable at common law.

Miller M'Key and Co. v. Robertson. The Lord Ordinary passed the bill, but on caution only, adding the subjoined note.*

The suspender reclaimed in so far as they were required to find caution, and contended, that as the bill was ex facie vitiated, and could only be supported, if capable of support at all, by proof to be adduced by the charger, they ought not to be compelled to find caution.

LORD JUSTICE-CLERK.—I would have had no hesitation in saying the bill should be passed without caution, if nothing had appeared on the bill but the vitiation. We have here, however, a verification by the acceptor, that he accepted in the

* * * Note.—The Lord Ordinary has no hesitation as to the necessity of passing this bill. His only doubt has been, whether caution ought to be required or not. For it is plain that, in the admitted state of the bill, the two questions must arise, whether, in fact, the alterations were made with the consent of the complainers; and whether, in point of law, if they were, diligence is competent on this document under the stamp laws? If all the statements in the answers could be assumed, the case might be brought near to that of *Downes v. Richards*, referred to in the answers. But it is clear that the onus probandi lies on the chargera. Ex facie, and confessedly, the bill is altered in the date and day of payment, and so markedly altered, that the change could not be overlooked. That it was an accommodation bill—that the complainers were informed of the alteration, and consented to it—that Honeyman was an agent for them—that they were in his debt, &c., are all statements at present resting on the averment of the chargers. Yet, before they can bring it even near to the case of *Downes*, they must prove these facts. If they were proved, there would be still this specialty, that the bill was actually offered for discount, and held by the charger for a time; and that, whether they knew or not, they must be held to have known that it was the same bill, which was afterwards presented to them in an altered state, besides the just doubt expressed by Mr Thomson as to the probability of there being an intention, by the decision in the case of *Downes*, to alter the principle held decidedly by Lord Ellenborough in the case of *Calvert v. Roberta*.

"On the whole, the Lord Ordinary thinks the case of importance, in point of law. He has passed the bill only on caution, chiefly for this reason, that the document is a promissory-note, and that, if the complainers really got it as a payment for value, they would not have returned it with their indorsation uncancelled. That circumstance makes for the idea of accommodation; yet there may be explanation on the merits. For, taking it as a payment with two months to run, they might give the accommodation to Honeyman, in returning the bill for value, of leaving their indorsement to him as an onerous indorsee for his use, in the interval, though himself boast as acceptor. It does not follow that they are bound by an altered bill, which they did not indorse, and may not have authorized."

shape in which it now is, of a particular date; and that evidence appearing on the face of the bill, I think the proper and safe course is to require caution. No. 395.

The other Judges concurring,

The COURT refused the reclaiming note.

CAMPBELL and M'DOWALL, S.S.C.—W. WILSON, Agents.

July 11, 1832.
Miller M'Kay
and Co. v. Ro-
bertson.

Archibald v.
Bridges.

WILLIAM ARCHIBALD, Pursuer.—*Skene—Robertson.*

No. 396.

JAMES BRIDGES, W.S. Defender.—*D. F. Hope—Whigham.*

Clause—Statute.—The valuation in the cess-books of Edinburgh being in Scots money, held that the qualification for persons under the Edinburgh Improvement Act, of the ownership of tenements valued in the cess-books at £.50, being expressed generally, must be understood to mean money Scots, and not money sterling.—2. No disqualification from acting as a juror, that sequestration has been awarded against a party under the bankrupt act, but no trustee appointed—And 3. A clerical error in the entry in the cess-books of the name of a party not held to disqualify or invalidate the verdict.

By an act passed in the 7th and 8th of Geo. IV. “for carrying into effect certain improvements within the city of Edinburgh,” the commissioners appointed by the act are empowered to acquire property in the line of the improvements, and if they cannot agree with the owners as to the price, the value is directed to be estimated by a jury of fifteen, to be balloted for out of “forty-five substantial and disinterested persons, proprietors of tenements within the city of Edinburgh, valued in the cess-books of the said city to the extent of fifty pounds, or upwards.”

2d Division.
Ld. Moncrieff.
T.

The valuation in the city cess-books is in pounds Scots alone.

The commissioners requiring certain property belonging to the pursuer Archibald, and being unable to agree with him as to the price, forty-five jurors, on their application, were summoned by the Sheriff, out of whom a jury of fifteen was empanelled to estimate the value of the property, without objection on either part as to the qualification of the jurors. A verdict was thereafter returned, finding Archibald entitled to £1900 as the value of his property, but he being dissatisfied therewith, brought against Bridges, W.S. clerk to the commissioners, a summons of reduction of the verdict, on the grounds,—

1. That the amount at which the tenements belonging to several of the jurors were rated in the cess-books, though above £50 “Scots,” was considerably under £50 “sterling” in value, whereas the qualification required by the act, must be understood to be £50 “sterling,” and not the trifling sum of £50 “Scots;”
2. That one of the jurors, named Henderson, was a sequestered bankrupt; and,
3. That another of them, Gibson, was not entered in the cess-books at

No. 396. July 11, 1832.
Archibald v.
Bridges.

all ; but it was admitted, that although his name had been erroneously entered in the books "Dickson," he was truly the party intended, and was proprietor of tenements there valued at a sum above the £50.

To these grounds of reduction, it was answered generally, that having gone to issue before the jury without objecting to the qualification of the jurors, Archibald was barred from now insisting in the objections ; and specially,

1. That the valuation in the cess-books being in Scots money, the act referring thereto must be held to have intended the same denomination.
2. That no confirmation of a trustee on Henderson's estate had taken place at the date of the trial, and that the mere award of sequestration did not divest him ; and
3. That the clerical error in the cess-books could not disqualify Gibson, who was admitted to be the party intended, and to be actually possessed of the requisite qualification.

The Lord Ordinary sustained the defences, and assailed, adding the subjoined note.*

The COURT adhered.

TH. AND J. LOTHIAN, S.S.C.—JAS. BRIDGES, W. S. Agents.

* "NOTE.—1. The Lord Ordinary is of opinion, that the terms of the act of Parliament, requiring that the jurymen shall be 'proprietors of tenements within the city of Edinburgh, valued in the cess-books of the said city to the extent of fifty pounds, or upwards,' cannot be construed as importing a valuation of fifty pounds in sterling money, seeing that these cess-books contain no valuation whatever in sterling money. If it was intended to be so, there is an error in the act. But in a reduction, to annul a verdict bona fide taken and obtained, the Lord Ordinary must construe the qualification as referring to the only kind of valuation which is expressed in the books in which it is to be found. He is not at all convinced, however, that it was intended that the estimate should be by sterling money. The valuation in the city-cess books is not to be taken as the actual value of the fee of the property ; it is but a proportional estimate for a particular purpose. But the Lord Ordinary sees, from the lists of the jurymen returned in seven cases tried under this act in 1829 and 1830, produced under his order, that, except in one instance, there were in all the lists persons who had not a valuation equivalent to £.50 sterling, viz. £.600 Scots ; and in one instance there were 20 in a list of 51, who had not that qualification. 2. He is of opinion that the special objections to Henderson and Gibson are not well founded. As to Henderson, he confessedly stood rated in the cess-books with a sufficient valuation. A sequestration had been awarded against him ; but the trustee had not been confirmed, nor was the bankrupt divested by any disposition. The Lord Ordinary doubts much the competency of entering into any such matter where the rating is clear : and he has no idea that the word substantial has any legal force distinct from the rating to which it refers : it is demonstrative merely, not taxative. As to Gibson, the solid answer to the objection is, that he was clearly the person cited, returned, and sworn ; and notwithstanding the mistake of name in the cess-books, he was also clearly the proprietor of the subjects rated, and the person meant to be there ap-

MATTHIAS ATTWOOD and OTHERS, Pursuers.—D. F. Hope—Hamilton. No. 397.
 THOMAS KINNEAR and SONS, Defendants.—Keay—Walker.

July 11, 1832.
 Attwood, &c.
 v. Kinnear.

Agent and Principal—Reputed Ownership—Possession—Retention.—Stockbrokers, who carried on business on their own account as wine-merchants, on the employment of a third party, purchased stock, which was paid for out of the funds of the employer, but was allowed for some time to remain untransferred in the names of the sellers, under the control of the stockbrokers; and the brokers caused transfers to be executed by the original sellers, in favour of bankers, in security of the stockbrokers' promissory-note, discounted to them by the bankers—Held in a question between the bankers and the true owners of the stock, after the bankruptcy of the brokers, that the bankers were entitled to retain the stock in security of their advances.

ATTWOOD and OTHERS, directors of the British Gas Light Company July 11, 1832.
 of London, in June 1825, employed Lyall and Cargill, stockbrokers in 2d Division.
 Edinburgh, (who also carried on the trade of wine-merchants,) to purchase Ld. Moncreiff.
 certain shares of the stock of the Leith Gas Company. Lyall and Car-
 gill accordingly, in the course of that month, purchased 166 shares from
 different individuals, to whom they paid the prices with funds transmitted
 by Attwood, &c., the names of the purchasers, however, not being com- R.

fied, *constat de persona*, which is all that the act requires. But, 3. supposing that all or any of these objections were thought to be well founded, the Lord Ordinary is strongly inclined to think that the pursuer is barred from stating them, by having joined issue in the trial without objection, and taken the chance of a verdict in his favour; and that they do not, in such circumstances, form a ground for setting aside the verdict given. In regard to the particular objections to Henderson and Gibson, he thinks this perfectly clear. But even as to the more general objection of disqualification, he entertains the same opinion. It is true that the jurisdiction is entirely statutory, though the Lord Ordinary cannot assent to a view maintained before him, that the Sheriff is not a judge presiding judicially in the whole trial. But though the jurisdiction is statutory, it does not follow that, after a jury is sworn, issue joined, evidence led, a verdict given, and the entire record completed, it is competent to go back on every alleged error or omission in the proceedings. The statutory nature of the jurisdiction rather leads to greater strictness in excluding such enquiries. The trial has been had, as a trial under the statute, and *omnia presumuntur rite et solemniter acta*. The question is as to the title of the party, who was concurring in the whole proceedings, and taking benefit by them, to open them up and enquire into such grounds of objection as those here stated. The case of moral disqualifications, such as infamy or minority, is essentially different, as involving not merely objections to be stated, but plain nullity, from the nature of the act to be performed. But here the jury was balloted from the list openly returned by the Sheriff, which was all that could be done. If the Sheriff had fallen into error either of fact or construction, was not this a thing which either was, or might have been known to the party, the *cess-books* being open to all parties having interest; and if he trusted to the Sheriff's accuracy, can he dispute it after the verdict? The Lord Ordinary thinks not. Would a prisoner, or the Lord Advocate, be listened to in the Justiciary Court, if, after verdict, he were to allege that one of the persons who sat on the assize as a special jurymen, had not the qualification?"

No. 397. municated to the sellers. To 110 of these shares transferences were taken to diverse partners, as trustees for behoof of the British Gas Company, while the remaining fifty-six were allowed to remain untransferred in the names of the sellers. In October 1826, Lyall and Cargill wrote to the secretary of the British Gas Company in these terms : " Sir, As many of the shares of the Leith Gas Company's stock purchased by us for behoof of the British Gas Company, have never been transferred, and as we have never got instructions into what names they are to be transferred, we beg that you will give us instructions at your convenience. We remain," &c. To this communication, Lyall and Cargill received from the secretary the following answer. " Gentlemen—Your favour of the 13th inst. came duly to hand, and I am instructed to enquire of you, what is the present price for Leith Gas shares, and what prospect you think there is of this Company shortly obtaining for them a price equal to that paid by them ? As it is probable they would be shortly disposed of, if to be done without loss, the Directors think it would be scarce worth while incurring the expense of a double transference, provided they are now in the names of persons you consider of undoubted responsibility ; but should you be under the least fear on that head, they beg you will have such of them entered to the name of Matthias Attwood, Esq. M.P., of Grace-Church Street, in the City of London. As property of this kind has somewhat improved of late, they hope your report of the Leith Gas concern may be favourable." In return, Lyall and Cargill mentioned that the stock was at present unsaleable, and that the names in which it stood were respectable. The fifty-six shares were accordingly allowed to remain untransferred.

In April 1827, Lyall and Cargill applied to the defenders Kinnear and Sons, bankers in Edinburgh, (with whom they were in the habit of doing business,) to discount a promissory-note of theirs for £600, and offered in security a transfer of 56 shares of the Leith Gas Stock. This was agreed to by Kinnear and Sons, who discounted the note, and received in return from Lyall and Cargill regular transfers in the form provided by the act of Parliament establishing the Leith Gas Company, of the 56 shares above mentioned, executed by the several parties of whom they had been bought in 1825, and in whose names they had still continued to stand. These transfers narrated the price originally paid in 1825, as now received from Kinnear and Sons, to whom the sellers assigned, ex facie absolutely, the shares then sold by them ;* Kinnear and Sons, at the same time, granting to Lyall and Cargill the following acknowledgment : " You

* The following is a copy of one of the transferences : " I, W. M. merchant in Leith, in consideration of the sum of £90 sterling paid to me by Thomas Kinnear and Sons, bankers of Edinburgh, do hereby convey, sell, assign, and transfer to the said Thomas Kinnear and Sons of Edinburgh, the sum of £100 sterling capital stock of and in the Leith Gas Light Company, being five shares in the said undertaking.

have this day delivered to us transferences of 56 shares of Leith Gas Light No. 397. Company's stock, which we hold as security for the ultimate payment of your promissory-note to us for £600." This note was afterwards renewed with an addition of £200, and a second renewal was also accepted; but before this fell due, Lyall and Cargill became bankrupt. Thereupon Attwood, and the other Directors of the British Gas Light Company, raised an action against Kinnear and Sons, to have it declared that the 56 shares of Leith Gas stock, transferred as above stated, belonged to them, and to have Kinnear and Sons ordained to restore them, or make payment of the value. In defence, Kinnear and Sons pleaded, that having taken the transferences from Lyall and Cargill, the ostensible owners, in bona fide, and in ignorance that the shares were not the property of these parties, they were entitled to retain them in security of their advances made thereon.

The Lord Ordinary ordered Cases.

Pleaded for Attwood, &c.—

Lyall and Cargill were stockbrokers by profession, and were known to Kinnear and Sons as such. The stock transferred did not stand in their own names, so that Kinnear and Sons had no ground to believe that it was their property, but, on the contrary, must have understood that the control possessed by them over it could only be in their professional character of stockbrokers. Lyall and Cargill were thus in no respect the ostensible owners, and Kinnear and Sons were not entitled to deal with them on that footing, but solely on the footing of their being agents or factors; and, at all events, the circumstances were such as should have put Kinnear and Sons on their enquiry. Although factors may sell, they cannot impledge effectually the property of their principals, unless they have been allowed to assume the character of owners, so as to deceive those with whom they dealt. Here they had not the character of owners, but must have been understood to be factors or agents; and as such, Kinnear and Sons were not warranted to take transferences in security, and these accordingly cannot exclude the true owners.

Pleaded for Kinnear and Sons—

It is not pretended that Kinnear and Sons were actually in the knowledge that the shares in question did not belong to Lyall and Cargill; but it is merely said that they should have suspected this, and that the circumstances were such as to have put them on their enquiry. But it is not disputed that Lyall and Cargill had the complete control of these

to hold to the said Thomas Kinnear and Sons of Edinburgh, their executors, administrators, and assigns, subject to the same rules, orders, and restrictions, and on the same conditions that I held the same immediately before the execution hereof; and we, the said Thomas Kinnear and Sons, do hereby agree to take and accept the said capital stock, or five shares, subject to the same rules, orders, and restrictions, and conditions. In witness whereof," &c.

No. 397. shares; they might have taken the transfers to themselves, and then pledged or sold them; or they had the power, which they exercised, to take the transfers to any third parties whatever. Having thus the absolute disposal and control, they were undoubtedly the ostensible owners of the stock, and every party was entitled to deal with them as such; nor could the fact of their being stockbrokers lead to a different conclusion, because they might, nevertheless, have had stock of their own; and, besides, they were not exclusively stockbrokers, but were also wine-merchants, and there was nothing to put parties dealing with them as owners of this stock on their enquiry, or to prevent their relying on its being their own property.

—
July 11, 1832.
Attwood, &c.
v. Kinnears.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:—" In respect that the shares of stock in question were purchased by the company of Lyall and Cargill; that the prices were paid by them to the venders, though with funds furnished by the pursuers; and that, after such payment made, the venders of the said shares were under a legal obligation to deliver proper and sufficient transferences thereof to the said Messrs Lyall and Cargill, or to any third party, according to their order, unless they had been duly interpellated from doing so by the pursuers as the real, though latent, owners; in respect that the transferences executed and delivered in favour of the defenders were received and held by the said defenders in security of advances bona fide made by them to the said Messrs Lyall and Cargill; and in respect that it is not averred, or offered to be proved, that the defenders, at the time when they discounted the bills and received the transferences in security, were in the knowledge of the fact that the said Messrs Lyall and Cargill, in the purchases of the said shares of stock, were acting solely as the agents or brokers of the pursuers —sustains the defences, assoilzies the defenders, and decerns; finds expenses due, and remits the account, when lodged, to the auditor to be taxed."

* " NOTE.—It appears to the Lord Ordinary, that the terms of the deeds of transference, setting forth that the prices had been paid by the defenders, do not afford any sound argument to the pursuers. It is only the common case which occurs in every assignation of a personal right in security, where the title has remained personal till after the assignation, and there is no falsehood in the narrative. The receiver of the security has only paid the price by his author, instead of paying it himself. It is not offered to be proved that even the holders of the stock knew that the pursuers were the real purchasers. But as to the knowledge of the defenders, there is nothing approaching to an averment. Although, therefore, the title stood on the personal obligation of the venders, the Lord Ordinary thinks that Lyall and Cargill, by the power given them to make the concluded purchase in their own names, were just as much reputed and ostensible owners, as if the shares had been actually transferred into their names, in which case, the very Act of Parliament quoted proceeds on the assumption that the sale by them to a party acting in bona fide must be effectual. He is, however, of opinion, that the case is far from being free from difficulty."

Attwood, &c. reclaimed, and senior counsel were thereafter heard in No. 397.
presence.

July 11, 1832.
Attwood, &c.
v. Kinnear.

LORD JUSTICE-CLERK.—I see no reason to alter the Lord Ordinary's interlocutor. The facts must be kept in view. This London company chose to acquire a quantity of this stock, giving orders to Messrs Lyall and Cargill, who were stockbrokers, and also wine-merchants, to purchase it. They purchased and paid the price with the money of the London company, and took transfers of a certain part to trustees; but fifty-six shares are allowed to remain in the name of the sellers, under an obligation to transfer to the parties pointed out by Lyall and Cargill. These having remained for more than a year, Lyall and Cargill apply to the London house, who say they are to sell soon. It was still allowed to lie over, while the whole power of transferring remained with Lyall and Cargill. These gentlemen ask advances from Kinnear and Sons, and they offer in security a transference of the fifty-six shares. The bankers agree to make the advance, and they get transferences from the original sellers, in the form required by Act of Parliament. All this is done, no doubt, behind the backs of the London company. There is, however, no proof or relevant allegation that the defenders were at all participant in the fraud; on the contrary, they were in the most perfect bona fide. It is said the transference bears a false narrative, but I am satisfied there is nothing in that. It is just in the ordinary form that it must bear, and the money was paid by the party to whom it was transferred. Then comes the question, on whom is the loss to fall? It was pressed on us that the character of stockbrokers was sufficient of itself to have barred Kinnear and Sons entering into such a transaction. Now, I cannot think so. But, besides, they were wine-merchants also; and at any rate, I entertain great doubts as to whether stockbrokers, as such, can transfer. In London, the power of attorney is given to the bankers of the party, and not to the broker, and it is no part of his character to have the uncontrolled power of transferring stock, or to have command of it. It is nothing extraordinary to suppose that they, as wine-merchants, should have stock of their own. There is nothing, therefore, in the character of stockbrokers *per se*; and on the general principle, here are persons placed in such a situation, that they have complete control of stock, and the party so placing them in that situation must bear the loss, not the bona fide party relying on it.

LORDS GLENLEE and MEADOWBANK concurred.

LORD CRINGLETIE.—The case is far from clear. If there had been an absolute transfer, I would have thought it good. It is the business of a broker to sell, but not to pledge. The law merchant is the law of Scotland as of England. In England, by the common law, an agent or broker cannot pledge; and it is so acknowledged in 6 Geo. IV. c. 94, making certain alterations on the former law. There may be a doubt if that act applies to shares in banks, &c.; and if it does not, the old law remains unaltered. If the act does apply, then see what it does. It only applies to rights standing in the agent's own name, and allows him to pledge, but only to the extent of the interest possessed by himself. I think, however, that the act does not apply to any thing but merchandise, and that the common law remains as to stock. Here there was no need of having a power of attorney because the people having the stock themselves transferred. But were Kinnear and Sons entitled to take this transference as a pledge? This is the doubt I have. There is no suspicion of fraud on the part of Kinnear and Sons; but that does not alter the law. They received stock from stockbrokers who had not the stock in their own name. It is

No. 397. clear, therefore, that they were acting merely as stockbrokers, and yet Kinnear and Sons take transfers, bearing that they paid the full price. Now that is not the fact as set forth. Each share was £90, and only £53 was advanced on each by Kinnear and Sons. The narrative, therefore, is not true; and in that situation they must be held to have known that Lyall and Cargill were acting as brokers, and in that character they could not pledge. It is a case of great difficulty, but it rather appears to me that the pursuers are in the right.

July 11, 1832.
Thorburn v.
Pringle, &c.

THE COURT adhered.

CAMPBELL and MACK, W.S.—MACKENZIE and SHARPE, W.S.—Agents.

No. 398. JAMES THORBURN, Suspender.—J. Anderson.
PRINGLE and CALDWELL, Chargers.—Pyper.

Obligation—Jus Quæsumum Tertio—Property.—Two parties feued adjoining building stances under articles of roup, by which each feuar was bound to bear half the expense of the mutual gables; one of them erected a house on his stance, and the other thereafter gave up his feu, which the superior accepted—Held that he was not thereby relieved from the obligation, in a question with the adjoining feuar, of paying one-half of the gable which had been erected by him.

July 11, 1832. In 1825, the Governors of Heriot's Hospital exposed certain lots of building ground in a street in the suburbs of Edinburgh, called Perth Street, to be feued by public roup, under articles which, inter alia, contained the following provisions as to mutual gables:—"The exposers are not to be bound to pay for mutual gables for any of the lots or areas to be exposed, but the purchasers shall have power to add to their lots 15 inches for the purpose of each mutual gable, and shall be entitled to claim the expense of building the half of said gable from the purchaser of the adjoining lots,—that is, half of the whole expense of gable and chimney stalks, as the same shall be ascertained by a measurement and valuation by the said Thomas Bonar, or his successors in office, and to be paid within one month after such lots are feued, and shall bear interest thereafter till paid."

2d Division.
Bil. Chamber.
Ld. Moncreiff.
T.

The suspender, Thorburn, and the chargers, Pringle and Caldwell, feued adjoining stances in this street, and Pringle and Caldwell having erected a house on their stance, claimed from Thorburn his half of the expense of the mutual gable, which was completed by them in July 1829. Thorburn having delayed a settlement of this claim, Pringle and Caldwell brought an action for payment, in which Thorburn gave in defences, but after replies had been lodged for Pringle and Caldwell, he failed to put in duplies, which had been ordered, and allowed judgment to pass against him. Pending these proceedings, an arrangement was in progress between Thorburn and the Governors of Heriot's Hospital, for an

exchange of his feu in Perth Street for a stane on the Calton Hill. No. 398. This was effected in June 1831, some time after the date of the judgment above mentioned, and thereupon a minute was entered into between Thorburn and the Treasurer of the Hospital, whereby Thorburn, on the one hand, renounced his feu in Perth Street, and the Treasurer, on the other, discharged him of all bygone feu-duties, "and all other claims which can be made against the said James Thorburn, in relation to the said feu by the said Governors." Thereafter Thorburn having been charged by Pringle and Caldwell on the Sheriff's decree, for payment of the half of the mutual gable, presented a bill of suspension, on the ground that his liability depended solely on the circumstance of his being an adjoining feuar, and that having relinquished his feu to the Hospital, who had accepted his resignation of it, and discharged him of all his obligations, he could no longer be called upon to relieve Pringle and Caldwell of any part of the expense of their gable.

To this it was answered—

That by the articles of roup, there was jus quæsitus tertio between all the feuars; that the Governors could not discharge the obligation thus come under by each feuar to his neighbour, and indeed had not attempted to do so in their agreement with Thorburn, which only discharged all claims on the part of the Hospital; and consequently, whatever right of relief he might have against them, he was undoubtedly bound to implement his obligations to the adjoining feuars.

The Lord Ordinary pronounced the following interlocutor:—"In respect that, by the terms of the articles of roup under which the complainant took his feu in Perth Street, there was jus quæsitus tertio in regard to all the other feuars in that street, which the Governors of the Hospital, as superiors, had no power to discharge; and farther, in respect that the transaction for the surrender or exchange of the feu, does not by its correct terms bear any such discharge: Refuses the bill, finds expenses due, &c., without prejudice to any claim of relief that may be competent to the complainant in ultimately settling with the Governors of Heriot's Hospital, and to their answers to any such claim as accords."

Thorburn reclaimed; but the Court adhered.

J. LIVINGSTON, W.S.—A. STEVENSON, S.S.C.—Agents.

No. 399. ALEXANDER KEITH, Pursuer.—Keay—Rutherford.

July 11, 1832. ALEXANDER SMART, Defender.—Sol.-Gen. Cockburn—H. J. Robertson.

Keith v.
Smart.

Process—Jury Court—Bill of Exceptions.—Not competent to except in general terms against a judge's charge, that it did not contain sufficient information in point of law, but necessary to specify what law was erroneously omitted to be stated.

July 11, 1832. BILL of exceptions to the charge of the Judge, in the case mentioned ante, p. 514, which see. The bill set forth the whole evidence given, not in the ordinary technical form, but verbatim copied from the Judge's notes, and then recited the charge and exception as follows:—“ And the said Lord President did then and there declare and deliver his opinion to the jury aforesaid: ‘ That it was not indispensably necessary for the pursuer to prove the absolute insolvency of the company under this issue, and that such is not its true meaning; but that it was, whether there was by the defender a fraudulent concealment as to the credit and solvency of the company, of facts which it was material for a purchaser to be made aware of.’ And with this opinion, upon the construction of the issue, which had been rendered necessary by the argument maintained for the defender, the Lord Justice-Clerk left the case to the jury upon the evidence which had been laid before them. And the jury aforesaid then and there gave their verdict for the pursuer upon both the said issues, with this explanation, that there was no false or fraudulent representation. Whereupon the said counsel for the said defender did tender their exception to the said direction of the Lord President as to the construction of the issue, and as not containing sufficient information with regard to the law which it behoved the jury to apply to the evidence.”

Before the counsel for the pursuer commenced his argument in support of the exception,

THE LORD CHIEF COMMISSIONER, with concurrence of the Court, stated, that the bill was not correctly drawn in point of form, and that it must be understood, that although the Court went on to hear the argument, the party should have the bill corrected before judgment was actually pronounced.

Rutherford then proceeded with his argument, and was going into the evidence with the view of maintaining that there was a want of proper direction in the charge as applied to the evidence, when he was stopped by the Court.

LORD CHIEF COMMISSIONER.—This is only an exception to the Judge's charge, not a motion for a new trial. So far as the evidence bears on the question, so as to illustrate the meaning of the issue to which the charge excepted to alone applies, it may be competent to found on it; but so far as this is done to raise objections to the charge, either as to omission of proper directions, or wrong direction as to the facts, it is incompetent, the only question being as to the question of law specially taken in the bill. A party may, no doubt, have an exception to non-statement as well as to wrong statement of law, but then there must be a specification as to

what has been omitted. There is no such specification here, and the vague general statement in the bill, that the charge did not contain "sufficient information with regard to the law which it behoved the jury to apply to the evidence," is not a competent exception, nor can it entitle the party to found on every omission in direction which he may now choose to allege. It is not enough to say generally, as is done here, that the Judge did not state the law which he ought to have done.

No. 399.

July 11, 1832.
Keith v.
Smart.Matheson v.
Mackinnon.

LORD JUSTICE-CLERK.—The only point of which I was requested to take a note, whereon to found an exception, was as to the construction of the issue, and I was not called upon to state any law to the jury with reference to any thing else.

LORD CHIEF COMMISSIONER.—It is clear there is no exception to any particular law but that set forth specifically, and if we were to allow the counsel to proceed as he proposes, this instrument would be most mischievous.

The other Judges concurred.

Rutherford.—Then, if that is the opinion of the Court, I will not trouble your Lordships with any argument.

THE COURT thereupon agreed that the exception must be disallowed, but delayed pronouncing judgment till the bill should be corrected in point of form. This having been done under the superintendence of the Lord Chief Commissioner, the Court disallowed the exception.

JAMES ARNOTT, W.S.—FOTHERINGHAM AND LINDSAY, W.S.—Agents.

JURY SITTINGS.*

DONALD MATHESON, Pursuer.—*Sol.-Gen. Cockburn—Macdougall.*

No. 400.

JOHN MACKINNON, Defender.—*D. F. Hope—M'Neill.*

Reparation—Slander—Master and Servant.—Circumstances in which a tutor claiming damages for wrongous dismissal and alleged slander—the Jury found for the defender.

MATHESON, a student of divinity, raised an action of damages against the Rev. John Mackinnon, alleging, that he had been engaged by Mac- kinnon to act as tutor to his children for twelve months from and after the 21st of July 1829, at a salary of £20, besides board, washing, &c.; that

Jury Court.
Lds. President
and Cringletie.

* See page 497 to page 514, for the Jury Sittings reported in this volume. It was omitted to mark them at the head of the pages.

No. 400. he entered to Mackinnon's employment, but that after much ill-treatment, he had been dismissed, on the 22d January 1830, without cause assigned, and without payment of any part of his salary, which, as well as a certificate of character, had since been refused him. He further alleged, that Mackinnon had, on various occasions thereafter, falsely, maliciously, and calumniously said and written to different persons (whom he named), that the pursuer had been guilty of immoral and improper conduct, and that in consequence of these communications, his alleged immoral character had become the subject of conversation at a meeting of the Presbytery of Lochcarron, and of the provincial Synod of Glenelg; and that both the wrongful dismissal, and the false and malicious statements, were unwarranted, injurious to his character and prospects, and an outrage on his feelings. He therefore concluded for salary, board wages, and solatium.

Mackinnon admitted the engagement, the dismissal, and the refusal of the salary and certificate, but stated in defence, that he was justified in dismissing the pursuer in consequence of his gross misconduct, and that although he had informed others of this, yet he had done so only in answer to enquiries, or in performance of his duty; and he averred that the facts which he had so stated were true. He made a tender of £10, as the proportion of salary corresponding to the period prior to his dismissal.

The averments on which the action and defence were rested, were more fully set forth in the record, and the following issues were sent to trial:—

“ It being admitted that, in the month of July 1829, the pursuer was engaged as tutor in the family of the defender for a year, at a salary of £20, together with board and lodging :

“ 1. Whether, on or about the 22d January 1830, the defender wrongfully dismissed the pursuer from the said employment, to the loss, injury, and damage of the pursuer ?

“ 2. Whether, on or about the 6th day of April 1830, the defender did write and transmit, or cause to be written and transmitted to the Reverend Hector Maclean, minister of Lochalsh, a letter, containing the following words, or words to the following effect, according to the meaning herein-after set forth, viz.:—‘ Kilbride, 6th April 1830.—DEAR SIR, I do not think Matheson’ (meaning the pursuer), ‘ with all his effrontery, can produce such a certificate as you’ (meaning the said Hector Maclean), ‘ have given. He lately sent an express for his salary, and a certificate’ (meaning a certificate of the pursuer’s moral character), ‘ both of which I refused, and at the same time wrote him that he must have been well aware that his conduct, while teaching in my family, did not entitle him to either. If he prosecutes me, I suspect he will come off but second best, as I shall have no difficulty in proving that he’ (meaning the pursuer) ‘ neglected his charge, and debased the morals of my children, as far as his example could do so. Mr Charles Downie’ (meaning the Reverend Charles Downie, minister of Contin) ‘ has indirectly requested that I would give

June 4, 1832.
Matheson v.
Mackinnon.

Matheson' (meaning the pursuer) 'a certificate, but I cannot conscientiously agree to do so, as independent of his neglect of his charge while here, his insolence to myself was beyond any thing I ever experienced. If he again applies to you' (meaning the said Hector Maclean), 'you can confront him with the following verse, which he wrote upon the slate that one of my little girls was working a question on, and which he immediately handed to the boys' (meaning the sons of the defender), 'for their perusal :

No. 400.
June 4, 1832.
Matheson v.
Mackinnon.

‘ Rair a chunnic mi m’bruadar
Tearlach ruadh a bhi lai ruim
Gur ann air a bha ghruiig
Bho na bha mhunan ga fhagail.’

(The said lines or verse being in the English language of the following, or a similar meaning and effect.)*

‘ I am not sure but I may write the different Professors of Divinity at Glasgow and Edinburgh, if he,’ (meaning the pursuer), ‘ procures a certificate from any member of your presbytery’ (meaning the Presbytery of Lochcarron), ‘ as it is not unlikely he may apply to some of them in consequence of your refusal. I intended to be ere now at Lochalsh, but I cannot go now until the hurry of the spring is over. I am, dear Sir, yours very truly,’ (Signed) ‘ Jno. Mackinnon.’ And whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the injury and damage of the pursuer ?

“ 3. Whether, in the months of May or June 1830, the defender did write and transmit, or cause to be written or transmitted, to Donald Macrae, residing at Auchtertyre of Lochalsh, a letter, falsely and calumniously accusing the pursuer of having neglected his duty as a teacher in the defender’s family, and as having debased the morals of the defender’s children, in so far as the pursuer’s example could influence them, or containing false and calumnious accusations to that effect, to the loss, injury, and damage of the pursuer ?

“ 4. Whether, on or about the day of May 1830, at Broadford, in the Isle of Skye, and in the presence and hearing of Alexander Downie, student of divinity, the defender did falsely and calumniously say that the pursuer was the greatest liar and blackguard in Scotland, and was lost to every feeling of propriety, and had grossly debased the morals of his (the defender’s) children, and that he, the defender, would spend £50, £80, or £150, to keep the pursuer out of the Church of Scotland, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer ?

* A translation was then given, but as the words are grossly indecent they are not printed. The main object of reporting the issues at full length, is to enable the profession to avail themselves of them as styles or precedents in similar or analogous cases.

No. 400.

June 4, 1832.
Matheson v.
Mackinnon.

" 5. Whether, in the months of August, September, or October 1830, and in presence and hearing of Dr Farquhar Mackinnon, residing at Kyleakin, in the said island, the defender did falsely and calumniously say, that he, the defender, had dismissed the pursuer in consequence of improper conduct as a teacher in the defender's family : That he was therefore resolved to pay the pursuer no salary for the period he had served in that capacity, but to thwart the pursuer so far as he, the defender, possibly could : That the pursuer had been guilty of composing and committing to writing obscene verses, where the children under his charge had access to peruse them ; and that the pursuer had further been in the use of indulging in improper practices in the school, and of making a jest of the same in presence of the children, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer ?

" OR,

" Whether, in violation of his duty as tutor aforesaid, the pursuer, during his residence in the defender's family, did recite indecent verses or compositions in the hearing of his pupils, or other members of the defender's family, or did commit to writing indecent verses or compositions, and did show the same to his pupils, or other members of the defender's family, or did place or dispose of the same, so that his pupils, or other members of the defender's family, had opportunity of seeing the same ; or did make use of indecent expressions, or exhibit indecorous or unbecoming gestures or deportment, in presence of his pupils, or other members of the defender's family, or did fail to superintend the morals and conduct of the young persons committed to his charge, or did treat them, or any of them, with excessive cruelty ?"

After the pursuer concluded his proof, in the course of which the defender elicited by cross-examination several of the facts on which he relied in defence, the Dean of Faculty, for the defender, asked the Jury whether they were ready to find for the defender, or whether he must proceed to address them in support of the defence ? After a short consultation in the jury-box, the chancellor answered that they were not unanimous. The Dean then addressed them, and called his first witness, when the Jury intimated that they were now ready to find for the defender. Verdict accordingly.

J. M'KENZIE, W.S.—M. N. MACDONALD, W.S.—Agents.

JOHN SMITH, Pursuer.—Robertson—Marshall.

No. 401.

MRS CHRISTIAN ROBERTSON and TRUSTEE, Defenders.—J. Paterson.

June 18, 1832.
Smith v. Robertson, &c.

Landlord and Tenant—Reparation—Proof.—1. Circumstances in which a tenant, whose landlord refused him access to his farm, after having granted him a minute of tack for twelve years, was found entitled to damages. 2. During the dependence of the action, the landlord having executed a voluntary trust-conveyance of his estates, and the trustee being made a co-defender by a supplementary action, and having corresponded with the tenant's agent relative to a compromise—held, that he was inadmissible as a witness for the defence. 3. A clerk in the Sheriff-clerk's office being asked whether he knew the tenant's crop and stocking to have been sold by a former landlord—question not allowed, it being objected that, if the tenant had been sequestered, the judicial proceedings in the sequestration, and judicial roup, should have been produced.

SMITH raised an action against Mrs Christian Robertson, alleging that June 18, 1832, she had granted him a minute of tack of the lands of Ingsay, in Orkney, for twelve years, from Martinmas 1829; that he was to pay £16, 16s. and twelve geese, yearly in advance, besides public burdens; that in June 1829, relying on the agreement, he had removed himself, his eight children, his household furniture, his cattle, carts, &c., from a distance of about twenty miles, to the vicinity of the farm of Ingsay; that he had made expensive preparations of dung for manure, peats for fuel, bear and oats for seed and fodder; that Mrs Robertson had wrongously denied him access to the farm at the term of entry; that he and his family were left to spend the winter in a ruinous hut, and his cattle were unprovided with shelter, and his whole arrangements for labouring the farm were defeated, and he was kept out of the enjoyment of a beneficial lease: He concluded that Mrs Robertson should be decerned to implement her contract, by giving him possession of his farm, besides paying £100 of damages, or failing to give him possession, that she should pay him £300 of damages, for the injury sustained by him through her breach of contract.

Mrs Robertson pleaded in defence, inter alia, that the payment of the first year's rent was to be made per advance, under the condition of the contract being null in case of failure; that Smith had failed to tender payment on the term-day of Martinmas, and that, when a law agent afterwards made a tender of the rent, on the part of Smith, on 24th November, she considered herself justified in refusing it, and holding the contract at an end, especially as she had learnt, in the interim, that Smith had lately been rouped out for arrears of rent by his former landlord.

The question, whether the minute of tack was still obligatory on Mrs Robertson was first discussed, and a judgment of the Lord Ordinary was pronounced against Mrs Robertson, which was adhered to by the Inner House, on June 16, 1831.*

No. 401. The following issue was then adjusted for trial:

June 18, 1832.
Smith v. Robertson, &c.

"It being admitted that on the 16th day of April 1829, the defender let to the pursuer the farm of Ingsay, in Orkney, as then possessed by Magnus Isbister, in terms of the missive of tack, No. 4. of process, and the Lord Ordinary having pronounced the following interlocutor, which was adhered to by the First Division of the Court of Session, viz. '9th March 1831.—Lord Corehouse. Act. Marshall. Alt. J. A. Murray.—The Lord Ordinary having considered the closed record, and heard counsel for the parties: Finds the missive of tack obligatory: Finds that a tender of the rent for the first year was made, debito tempore, by the pursuer;—in respect whereof, and that the defender does not offer to prove by the writ or oath of the pursuer her averment that he intimated, previous to the term of entry, that he was unable to pay the rent,—Finds, in terms of the first conclusions of the libel, that the defender is bound to put the pursuer in possession of the farm in question, on or before the 9th of April next, reserving all claim of damages on account of the pursuer not being previously put in possession;—and failing her doing so, finds damages due, and reserves consideration in which way the same are to be ascertained, and decerns.'

"It being also admitted that the pursuer was not put in possession of the said farm on or before the said 9th day of April 1831.

"What loss and damage has the pursuer suffered by not being put in possession of the said farm, in terms of the said missive of tack?"

Before the trial, a trust-conveyance of her estate was executed by Mrs Robertson in favour of one Lawrence, a writer, and a supplementary action was raised against him by Smith, which was conjoined with the original action against Mrs Robertson.

At the trial, it was intimated that all access to the farm was still withheld from Smith, and that his claim of damages was to be made on that footing. He led a proof of the extent and condition of the farm—the quantity of grain it could produce, and the number of cattle it could rear—the value of grain and cattle there—the annual cost of the rent and public burdens—the preparations he had made in providing seed, hay, potatoes, manure, fuel, &c., and carrying his family, furniture, &c., to the farm—the ruinous condition of the hut into which he and his family were obliged to go for the winter, in consequence of being refused access to Ingsay—the want of accommodation for his cattle, and the death of one of them, &c. He also adduced a proprietor in Orkney to prove the scarcity of such farms as Ingsay, and the fact that they were much in request.

Mr Lawrence, the trustee, was then tendered on the part of Mrs Robertson, to whom the pursuer objected as being a co-defender, and having corresponded with his agent with a view to a compromise, which Lawrence stated he had done.

J. Paterson, for defenders.—The witness is a mere trustee for creditors; he has no personal interest, and incurs no personal responsibility in relation to the issue of this action. No. 401.

Robertson, for pursuer.—He is himself a co-defender; it is his duty to defend June 18, 1832.
Smith v. Robertson, &c.

against the action; he is inadmissible.

LORD PRESIDENT.—I think the witness inadmissible.

Kay v. Rodger.

The witness was accordingly withdrawn.

The defenders then adduced one Walls, who stated that he was a clerk in the Sheriff-clerk's office in Orkney in 1829.

J. Paterson, for defenders.—Are you aware that Smith's crop and stocking were sold by his landlord?

Robertson objected.—If the defenders mean to prove that any judicial sequestration and sale of Smith's farm stock had taken place, this should be done by producing an extract of the judicial proceedings.

The question was disallowed, and the witness was withdrawn.

THE LORD PRESIDENT then charged the jury. Verdict for the pursuer, damages £240.*

C. SPENCE, S.S.C.—A. PETERKIN,—Agents.

JAMES KAY, Pursuer.—*Sol.-Gen. Cockburn.*
JOHN RODGER, Defender.—*Robertson—A. M'Neill.*

No. 402.

Citation—Proof.—1. Circumstances in which the jury found, that a party had been cited as a party to an action in 1797. 2. Circumstances in which, question raised, whether a proof that a party was not personally cited could competently be adduced, without first producing the execution, and also the messenger and witnesses, if alive. 3. A certified extract from the books of the War Office being produced, and the handwriting and signature being proved—held inadmissible, the clerk who made and certified the excerpts not being produced to depone to their accuracy, and not having been examined on commission to that effect. 4. Observed, that in weighing a conflicting parole proof of a date occurring above 30 years ago, most reliance is due to those witnesses who connect the date, either with some remarkable incident in their own experience, or with some event, the precise date of which is proved aliunde.

KAY raised an action of reduction of a decree in absence, obtained against him by Rodger's author, Robb, from the Magistrates of Glasgow, on the 20th January 1797, at which period Kay was a quarter-master in the Fife-shire Fencible Cavalry. The decree was for payment of an acceptance for £32. Kay alleged, inter alia, that the execution of citation was false, “in so far as it is therein stated that the citation was given to him ‘personally.’ The execution is dated the 29th of December 1796, at which period the pursuer was on duty with his regiment in England.” He also

June 25, 1832.
Jury Court.
Lds. President
and Mackenzie.

* A new trial afterwards refused. See ante, p. 807.

No. 402. alleged that he had no domicile then in Glasgow, and was not amenable to the Magistrates' jurisdiction.

June 25, 1832.

Kay v. Rodger. Rodger insisted that the execution was correct, and unimpeachable.

The following issue was sent to trial: "It being admitted, that, on the 8th day of April 1791, the pursuer accepted a bill of exchange for the sum of £32 sterling, drawn by William Robb, and that the said bill was indorsed by the drawer to James Robb;—

"It being also admitted, that, on the 20th day of January 1797, decree was pronounced by the Magistrates of Glasgow, ordaining the pursuer to pay the said sum of £32, with the interest thereon, amounting to £ ; and that, on the 4th day of March 1808, the said bill and decree were assigned to the defender;—

"Whether the pursuer was not duly cited as a party in the said action?"

At the trial, *Robertson, for Rodger*, objected to parole evidence being received until the execution should be put into process, and the messenger and witnesses either adduced or proved to be dead. In support of his objection, he argued, *inter alia*, that until the date of the execution, and the terms of it, were proved by production of the instrument, it was impossible to adduce relevant evidence in impeachment of it, by merely proving that in December 1796, Kay was in England.

Solicitor-General, for Kay, then called for the revised condescendence and answers, and put them in. He read articles 2d and 3d, and contended that these contained admissions of Rodger, both as to the date of the citation, and as to the fact of its being alleged to have been "personally" given; but if these things were proved by the admission of the party, then it was enough to reduce the execution, if Kay were proved to have been in England at the time.

THE COURT intimated that they were not prepared *hoc statu* to debar Kay from leading his proof. He accordingly proceeded to call witnesses, chiefly men who had served in the Fifeshire Fencible Cavalry, to prove that he was at Sheffield in the whole month of December 1796, and was not in Glasgow sooner than the middle of January 1797.

He then tendered a certified extract from the books of the War Office, for the purpose of proving where the regiment and its detachments were stationed at the time in question. In order to prove that the handwriting and the signature of the certificate of the extract were by the proper clerks in the War Office, a witness was adduced who had occasion to correspond officially with the office, and knew the handwriting and signature.

Robertson, for Rodger, objected.—The books themselves were the best evidence; or extracts made from the books by the party who keeps them, and who is produced in Court to swear to their accuracy. Even admitting the signature of the certificate to be genuine, still it is a statement not made upon oath.

Solicitor-General, for Kay.—The certificate is a common official document, and in the usual form.

LORD PRESIDENT.—The party who signs the certificate might have been examined on commission, and his oath might have been taken, subject to cross-interrogatory, as to the accuracy of the extract. But as this has not been done, and he is not produced, the certificate must be rejected.

Another writing was rejected on similar grounds, and the case for the pursuer was closed. No. 402.

June 25, 1832.
Kay v. Rodger.

On the part of Rodger, evidence was adduced to fix the date of Kay being in Glasgow, by establishing that he was there at or about the date of the execution of a notorious criminal at Glasgow, in January 1797. This was done by the clerk of the Court of Justiciary, who produced the record of that Court, containing the verdict and sentence; by the clerk of the jail of Glasgow, who exhibited the jail-books of that date, recording the execution; and by witnesses who had been enlisted by Kay in Glasgow, in the end of December 1796, and beginning of January 1797, and who remembered the criminal's execution to have been posterior to their enlistment. One of the witnesses stated, that he had marked the date of his enlistment upon a leaf of his Bible, which he cut out on hearing of this process, and carried so long in his pocket, that it was considerably defaced. He had therefore made a fair copy of it, which he produced in Court.

THE LORD PRESIDENT, in charging the Jury, observed that there was a conflict of testimony as to dates, between the pursuer's witnesses and the defender's; but that there was no appearance of wilful misrepresentation on either side; that it was the duty of the Jury, in these circumstances, to rest chiefly on the evidence of those witnesses, who, in condescending upon a date, connected it, either with some memorable incident in their own experience, such as the period of their enlistment, or with some remarkable incident like the criminal's execution, the day of which was incontrovertibly fixed aliunde. His Lordship added, that in *dubio*, the Jury must presume in favour of the accuracy of the messenger's execution.

VERDICT for the defender.

A. HAMILTON, W.S.—C. FISHER, S.S.C.—Agents.

JAMES HUNTER, Pursuer.—*Sol.-Gen. Cockburn—Speirs.*
THOMAS DODDS, Defender.—*D. F. Hope—G. G. Bell.*

No. 403.

Proof—Prescription—Property—Community.—In a process of division of a commonalty, where an issue was sent to a Jury, whether lands had been possessed as common property for forty years—held, 1. That it was competent to ask a herd upon the common, what directions he received from his master as to the boundaries of the common, though the master was not proved to be dead, and was not called. 2. That a deposition, although taken without objection under a commission of perambulation was inadmissible, in respect that the witness was a feuar, and as such interested. 3. That a minute of an ex parte riding of the marches was not receivable, being merely the averment of party; and, 4. That as the question which emerged on the trial was one of law, the jury were bound to find according to the direction of the Court.

No. 403. MR HUNTER of Thurston, in 1818, raised a summons of division of the commonalty of Oldhamstocks. A commission of perambulation, &c. July 12, 1832. the commonalty of Oldhamstocks. A commission of perambulation, &c. Lds. President was granted, and a proof was led before the commissioners; but a question arose with one of the conterminous heritors, Mr Dodds of Stottencleugh, whether a portion of land, which Hunter claimed as commonalty, was not a part of the proper estate of Stottencleugh. In reference to this question, the following issue was sent to trial: "It being admitted that the pursuer is proprietor of the farm of Oldhamstocks, and others, adjoining to and in the neighbourhood of the commonalty of Oldhamstocks, and that the defender is proprietor of the lands of Stottencleugh, adjoining to the said commonalty on the north-west;—

Hunter v.
Dodds.

"It being also admitted, that for forty years and upwards, the pursuer, and the other neighbouring proprietors, have possessed, as common property, the portion of land bounded by a line beginning at the top of Widehope; thence by the upper or southmost old road, till it reaches the market-road from Dunse to Haddington, called the Edge-road, at the top of the Langcrib; thence in a south-east direction along the side of the said road from Dunse to Haddington, till it reaches the march of that part of the commonalty of Chirnside allotted in the division of that commonalty, and now belonging to Sir James Hall of Dunglass, Bart., near Broadie's-fauld; thence in a north-east direction to the water of the Eye at the foot of Partencleugh and Illiecleugh; thence up the East Dod to the East Cairn on the top of the Dod; thence down the East Dod to the Cairn on the north side of the Dod-well; and thence eastward to an old dike and ditch on the south-west side of Hetherigges Acre, belonging to James Hunter of Thurston, and along the said dike and ditch to the north-west corner of the said Heatherigge Acre; and from thence in a straight line eastward to the Herriot-water, near the Herriot-well; and from thence by the Herriot-burn to an old fold; from thence crossing the Herriot-burn along Chirnside Law northward, and along an old furrow till it reaches Williecleugh or Whitleycleugh in a straight line; and thence along an old dike, called Brewdike, till it reaches the common loan at the Brewslack; and thence along a road in a westerly direction, by the sources or heads of the Sistercleugh and Crawcleugh burns; and from thence to the westward, to a point to the south-west at the head of Widehope, where the road from Powshields and Oldhamstocks joins the Edge-road from Haddington;—

"Whether all, or any part of the land, bounded by the said line from Brewslack to the point where the said road from Oldhamstocks joins the said road from Haddington; thence in a north-easterly direction along the lower road to Oldhamstocks to the head of Yernup; thence along Yernupcleugh by the foot of Crawcleugh, Reddalecleugh, Sistercleugh, and Pyettsslack, to the foot of Mossycleugh; thence in a southerly direction up Mossycleugh, till it reaches Brewslack aforesaid,—has, for forty years

and upwards, prior to the 28th day of May 1818, been possessed by the No. 403.
said proprietors, as common property?"

At the trial, the pursuer adduced several parties who had been herds on the common, in order to prove its boundaries. One of these had been the herd of one Denholm, formerly tenant in Stottencleugh.

July 12, 1832.
Hunter v.
Dodds.

Speirs, for Pursuer, asked this witness if Denholm gave him any directions as to the boundaries of the common?

Dean of Faculty, for Defender, objected. It was not proved that Denholm was dead; and, if alive, he ought to be called to prove his own directions.

LORD PRESIDENT.—I think the question competent. This man may prove what directions Denholm gave to him, and he acted upon.

In examining another herd,

Speirs, for Pursuer, asked, Was the march at Yernup one of the marches of the common?

LORD PRESIDENT.—It is better to put the question in another shape, and ask the witness "what were the marches of the common in that quarter," without saying any thing which may suggest the march at Yernup as the answer.

On beginning to read the deposition of one of the witnesses, who was designed "fener in Oldhamstocks,"

The Dean of Faculty objected, that the witness had an interest in the division of the commony, and that his evidence was inadmissible.

Speirs.—This objection comes now too late. The defender was a party to the proof led before the commissioners of perambulation in this process; this deposition was taken before them, without objection by the defender; years have since elapsed, and evidence may have been lost to the pursuer, which he would have thought it necessary to lay before the commissioners, had not this deposition been received as unobjectionable. But being so received in this process, it must be admissible now.

Dean of Faculty.—The whole proof led before these commissioners cannot be put in here, per aversionem, and without regard to the question whether it was regularly or irregularly taken. No proof can be laid before the jury, except such proof as is competent to go before a jury; and the deposition of a witness who is open to the objection of interest, is incompetent.

LORD PRESIDENT.—I think the deposition inadmissible. Had the party been brought here, and had the objection of interest been taken, he could not have been admitted to depone. For the same reason, his deposition, when liable to the same objection, is inadmissible.

The pursuer then tendered a minute of riding the marches, at a former period, by Hunter and others.

Dean of Faculty objected to its being received, as it was a mere ex parte proceeding, of which the defender had never got any notice, and to which he was no party.

No. 403. *Solicitor-General, for Pursuer.*—This minute was put in evidence before the commissioners.

July 12, 1832. *Clyne v. Earl of Kinnoull.* **LORD PRESIDENT.**—Whatever might be the effect of it as among the other parties whose interests were before the commissioners, it cannot be looked on, in this case, in any other light than as the mere averment of a party.

Dean of Faculty, for Defender, addressed the Court, and observed that he considered the question arising out of the trial to be one of law, in which the jury were bound to take the direction of the Court; that if the Court also considered this to be the nature of the case, he would lead no proof for the defender, being quite convinced, that he could satisfy the Court there was no such possession for 40 years, proved by the pursuer, as could suffice to take the land in question from the defender, and throw it in to the common; but from the terms of the issue, the defender was entitled to a verdict, unless the proof amounted to this.

LORD PRESIDENT.—There is no cause for the Dean addressing the Court. Lord Cringletie entirely concurs with me in thinking that there is just a legal question here, whether the possession which has been proved, gives a prescriptive right to the pursuer; and we coincide in opinion that the proof falls completely short of this.

His Lordship then charged the jury to this effect.

VERDICT for the defender.

HUNTER, CAMPBELL, and CATHCART, W.S.—

—Agents.

DAVID CLYNE, Pursuer.—*Rutherford—Robertson.*
EARL OF KINNOULL, Defender.—*D. F. Hope—A. Murray.*

Public Officer—Circumstances in which a claim by an interim Lyon-Depute against the Lord Lyon for extra duties, was remitted to a jury, and a verdict returned, finding a sum due to the depute.

July 14, 1832. IN 1830, Clyne raised an action against the Earl of Kinnoull, Lord Lyon King-at-arms for Scotland, as being addebted to him in the sum of £270, “being the balance due upon a general account for cash disbursements, business-charges, Lyon-Clerk’s dues, and commission on collecting messenger’s annuities, advanced and incurred by the pursuer to the defender,” conform to account produced.

Lord Kinnoull denied employment, agreement, or undertaking, or that he was owing the sums claimed.

The following issue was sent to trial, “Whether the defender employed the pursuer to perform all or any part of the business charged for in the account, No. 8 of process, and the accounts therein included, commencing the 2d of January 1819, and ending the 22d of April 1824;—or promised, agreed, or undertook to pay for the same? And whether the defender is indebted and resting owing to the pursuer, in the principal

sum of £270, 8s. 4½d, with interest as libelled, or any part thereof, on No. 404. account of said business?"

July 14, 1832.
Clyne v. Earl
of Kinnoull.

VERDICT for the pursuer £212.*

D. CLYNE, S.S.C.—R. RUTHERFORD, W.S.—Agents.

* The trial involved several points of considerable interest; but as it would require an outline of some of the productions at the trial to be given, and a minute detail of the other evidence to bring them out fully and correctly—and as they do not afford any rule of precedent regarding jury practice—the Reporters prefer noticing some of these points in a note.

It appeared that Clyne had held the interim appointment of Lyon-Depute, during the pleasure of Lord Kinnoull, from the 21st of January to the 6th of April, 1819, of which last date he was superseded by Mr Tait. Clyne had held a similar appointment as Lyon-Clerk, from the 3d of February 1819, to the 4th of April 1823, when he was superseded by Mr Hay. In neither case was any cause assigned for his removal. The office of Lyon-Clerk was of much more patrimonial value than the office of Lyon-Depute.

At the trial, various items of the account were admitted by Lord Kinnoull. Among those which his lordship contested were the following:—

1. Parliamentary commissioners of enquiry into the duties and emoluments of the officers of Courts of Justice in Scotland, had required returns on this subject from the Lyon Court. The Lord Lyon, Lord Kinnoull, required Clyne to make one report for the commissioners, and one for his private information. Clyne, after the recall of his appointment in 1823, charged the expense of making up these reports against Lord Kinnoull, as the preparation of them was an extra-duty, involving great labour, and which should not be exacted gratuitously from an officer holding a mere interim appointment. Lord Kinnoull, on the other hand, contended that both reports fell properly within the official duty of Clyne as Lyon-Clerk, and that there was no ground for claim against his lordship as head of the Court. Lord Kinnoull founded on various specialties, such as the subsequent adjustment of accounts, without mention of this claim, &c., in support of the defence, which he rested chiefly on the general principle already mentioned.

2. Mr Clyne's official commission had required a stamp of £37. It appeared that the stamp of the commission of Mr Hume, his predecessor, whose appointment was permanent, had been borne equally by Lord Kinnoull and him. Clyne contended, that, as his commission was merely interim, and had been recalled without cause assigned, he was not bound to bear the expense of the stamp. Lord Kinnoull instructed that the emoluments of the office were considerable, having, in particular, yielded £668 from the 2d of January 1819 to August 1820; and pleaded that it was a burden lying properly on Clyne alone to bear the expense of a lucrative commission gratuitously conferred on him.

3. Clyne claimed a sum of £10, in name of Lyon-Clerk's dues, on warrants issued for the purpose of compelling messengers to find responsible cautioners. Mr Tait, Lyon-Depute, who was examined, deposed that he did not consider the Lord Lyon to be liable for such dues; and that he had on one occasion suggested to the Lord Lyon the propriety of setting aside an annual sum to defray the outlay of prosecuting messengers, because the Lord Lyon was responsible for their having solvent cautioners, and, so long as the outlay of prosecuting them was not reimbursed to the officers of the Lyon Court, there was a hazard of the duty being neglected. In these

No. 405. MRS ANN BUCHAN, Pursuer.—*Sol.-Gen. Cockburn—Cunninghame—*

July 14, 1832.
Buchan v.
Harper.

JAMES HARPER, Defender.—*D. F. Hope—Buchanan.*

Proof—Testament.—In an action to establish a letter containing several bequests as part of the will of a party deceased, the defender waived on the first trial an objection to the admissibility as a witness of one of the legatees, his counsel stating in Court that it was the defender's intention to pay the legacy to that individual. On a second trial the objection being insisted on, the Court held that the interest was not removed by the declaration on the former trial.

July 16, 1832. NEW trial in the case mentioned ante, 486, which see. The only difference on the present trial was, that, on the one hand, several witnesses not examined on the former trial were adduced on the part of the pursuer, to prove the genuineness of the subscription of the deceased Mrs Matheson to the letter which formed the subject of the trial; while, on the other hand, the defender insisted on an objection to the admissibility of Agnes Finnie, a witness formerly examined, who had a legacy bequeathed to her by the letter in question, which objection had been waived on

circumstances, Clyne contended that he was entitled to debit the Lord Lyon with these dues, as the prosecutions were substantially for his Lordship's protection; to which Lord Kinnoull replied, that the claim was contrary to the constant practice and understanding of the Lyon Court, and that the Clerk had no right to dues upon such prosecutions.

The Lord President, in charging the jury, observed, as to the first point, that it belonged to the official duty of any Clerk of Court, appointed *ad vitam aut culpam*, to furnish returns relative to the duties and emoluments of the officers of the Court, when such returns were required by Parliament, and that no claim lay against the head of such Court for having required the Clerk to make such returns. But, in the case of an interim appointment, which was revocable at pleasure, and had been eventually revoked without cause assigned, it became a question for the jury to consider, if any severe and extraordinary labour was devolved on the party while holding such appointment, whether he might not have a claim against the head of the Court when his appointment was recalled by that party. The jury were, therefore, to consider the whole circumstances connected with the appointment and recall, and say whether the expense of the reports was due by the defender, Lord Kinnoull.

As to the second point, his Lordship considered it a fair subject for the determination of the jury, whether Lord Kinnoull was, in the circumstances, liable for the stamp on Clyne's commission. Had the commission been revoked causelessly in a few weeks or days after it was granted, it seemed unreasonable to leave the expense of it upon Clyne. But this case was very different, as the office had been held by Clyne for four years. It was for the jury to decide whether they would allow this item of the account against Lord Kinnoull.

As to the third point, his Lordship called the attention of the jury to the evidence of Mr Tait, to the effect that the Lord Lyon was not held liable for the dues claimed; and left the cause with the jury.

the former trial, it being at the time stated by the defender's counsel, that No. 405. it was the defender's intention to pay that legacy.

In answer to the objection it was mentioned for the pursuer, that the ^{July 16, 1832.} Schuurmans, defender having judicially declared that he intended to pay the legacy, &c. v. Ste-
phen, &c.
all interest in the issue of this action on the part of the proposed witness was thereby done away, she being now assured of her legacy, whatever might be the result of the present case.

To this it was replied, that the announcement of intention on the part of the defender, did not infer any obligation on him, but that he was still at liberty to follow it out, or to refuse the legacy, as he pleased; and that the proposed witness having thus no legal claim for it, had an undoubted interest to have this established by a decision in this action against the defender.

The Court sustained the objection, and refused to admit the witness.

The jury again found for the pursuer.

G. J. URE, W.S.—GORDON and BARLOW, W.S.—Agents.

GERRIT SCHUURMANS and SON, Pursuers.—D. F. Hope—Robertson—No. 406.
Penney.

WILLIAM STEPHEN and SONS, Defendants.—Skene—Moir.

Sale—Process—Proof.—1. Circumstances in which merchants at Aberdeen having ordered a cargo of timber from merchants at Rotterdam, Rotterdam was held to be the port of delivery, and the measurement and price to be regulated by the practice of it. 2. Under an issue whether Aberdeen or Rotterdam was the port of delivery, a witness desired by the Court to read the letter ordering the timber, and say if the port of delivery was Aberdeen or Rotterdam. 3. An agent having received written instructions relative to a transaction, and, after completing it, having returned them to the party who gave them, and by whom they were eventually lost—that party not allowed to examine the agent as to their tenor. 4. Observed that the condescendence and answers, being part of the record in the Court of Session, may be referred to at a jury trial, without being specially put in.

SCHUURMANS and SON, merchants in Rotterdam, raised an action ^{July 18, 1832} against Stephen and Sons, merchants in Aberdeen, for payment of £356, ^{Lds. President} 17s. 1d., being the contents of a bill drawn by them, as the price of a ^{a and Gillies.} quantity of wood furnished to Stephen and Sons, agreeably to an order by them on the 24th of May, 1825.

The pursuers afterwards restricted their claim to £354, 6s. 2d., in consequence of finding that there had been a short delivery of ten pieces of wood, valued at £2, 10s. 1d.

In defence, Stephen and Sons admitted that they had given the order, but denied that they had received the quantity which they had ordered.

The following issue was sent to trial :—“ It being admitted, that on

No. 406. the 24th day of May 1825, the defenders ordered from the pursuers forty or fifty loads of timber :—

July 18, 1832.
Schuurmans,
&c. v. Ste-
phens, &c.

“ Whether the pursuers furnished the defenders with the quantity of wood mentioned in the invoice, No. 3 of process, under deduction of ten pieces of wood, amounting in value to £2, 10s. 11d.; and whether the defenders are indebted, and resting owing to the pursuers in the sum of £356, 17s. 1 d., or any part thereof, with interest thereon from the 8th day of November 1825, as the price of the timber furnished.”

* From the evidence at the trial, the facts appeared to be these :—In November 1824, the defenders sent an order to the pursuers for two loads of oak knees. The order was transmitted through the pursuers' agent in this country. The pursuers were general commission merchants, and they executed the order by purchasing the wood from a Dutch house. On the 14th of December, they sent their “ Invoice of two loads oak knees, shipped by Gerrit Schuurmans and Son, by order, and on account and risk of Messrs Stephen and Sons of Aberdeen, on board the William and Ann, W. Jack, master, for Aberdeen, 15 oak knees, containing 107 English cubic feet, at 22 st. per cubic foot,” &c.

A charge was made of 2 per cent for commission. Of the same date the pursuers wrote to the defenders, intimating that they had drawn for the price, £10, 11s. 9d., at four months, and added, “ We hope the quality of these knees will engage you to send a vessel for a cargo,” &c. The wood, thus invoiced, was measured at Rotterdam by calliper measure, being the measure always used there. It is a mode of measurement which cannot give a perfectly accurate result, except when the timber is in square logs; in proportion as the trunk of wood approaches to a spherical form, the calliper measure deviates from accuracy, by indicating a greater amount than the true solid contents of the wood. In very round wood the deviation sometimes amounts to fully 30 per cent. In the instance of the wood thus sent, the timber was of a pretty square shape, so that the calliper measure gave a near approximation to the truth.

In dealings among wood-merchants at Aberdeen, and many other British ports, timber is sold by the string measure, which gives greater accuracy than the calliper. But the Custom-house levies duty on imported wood by the calliper measure, allowing a deduction occasionally when the logs are very round.

* The Lord President observed, before the pursuer's counsel addressed the jury, that in the opinion of the Lord Chief Commissioner, as well as his own, the duty of a counsel, in opening his case, was only to give such a statement as should explain the nature of the cause to the jury, along with a mere outline of the evidence, so as to enable them to appreciate its whole bearing from the first. Where these ends were attained, in an opening speech, it would be useful in the business of the Court, and generally most beneficial to the pursuer, if nothing more was attempted by his counsel, either in the way of detail or amplification.

On the 31st of March 1825, the defenders wrote to the agent for No. 406. the pursuers, " We request you will write to Rotterdam, and let us know immediately the very lowest terms your friends there will supply us with a cargo of sound oak timber—to allow us to pick the timber when there," &c. July 18, 1832.
&c. v. Schourmans
peus, &c.

" P.S. Mr Berry (the agent) will please make enquiry what time of the year the timber is most plentiful, and what are the port charges at Rotterdam for a vessel of 100 to 200 tons."

The pursuers wrote to their agent on the 9th of April, that " immediately on receipt of Stephen and Sons' letter, we applied to our friends in the timber line, &c. The prices, at present, as below, &c. We also annex a note of port charges. You may assure Messrs S., that if they will trust their order to us, we will execute it on the very best terms the market will admit of." Along with this letter was sent, inter alia, a price-current of timber, stating the cost of oak knees, &c., per cubic foot, English measure.

On the 24th of May 1825, the defenders wrote to the pursuers, " Our mutual friend Mr Berry having called on us repeatedly respecting our taking a cargo of timber from your place, and as he informs us that you can at present supply us, we now send out James Alexander, one of our carpenters, to select what may suit us, and have to request you may get a vessel engaged on the most favourable terms possible, to bring from 45 to 52 loads here, for us, as a sample at present. As it is of a certain size and dimensions we want, we trust you will have no objections to grant us such, as what may be of a different description may suit other purchasers better than us; as also to grant James Alexander whatever money he may require, and such power and assistance in selecting the timber as may be requisite. We only further request and depend that you will do the best for us, in granting the timber on as favourable terms as possible; and should the quality and dimensions answer, and the price be sufficiently low, we have no doubt we can give you very large orders in future, and that such may be an extensive opening to you to this place to deal with others."

The pursuers again executed this order, by obtaining the timber from a Dutch house. That house measured the quantity of wood, by calliper measure, and gave a note of it to the pursuers, who on the 5th of July wrote to the defenders, " We have now the pleasure to wait upon you with the specification and invoice of the cargo of timber purchased by Jas. Alexander, on your account, and shipped per de Vrouw Ellina, amounting to £4175. 4.—for which sum we have taken the liberty to draw upon you at 4 m. date, to our own order for £356, 17s. 1d. sterling, which, at 39, makes the above sum. We hope this shipment will turn out to your satisfaction, and encourage your farther orders, to which every attention will be paid. The vessel dropped down our river a day or two since, and Mr A. went as passenger by her."

No. 406.

July 18, 1832.
Schuurmans,
&c. v. Ste-
phens, &c.

An invoice of the timber was sent as " purchased by James Alexander, by order of Messrs W. Stephen and Sons, and shipped on their account and risk, per de Vrouw Ellina." The invoice specified the thickness, the breadth, and the length, of each log of timber, as the data from which its solid contents were indicated. These data implied the use of the calliper measure, as, when string measure is used, the actual girth of the log is given, in place of the breadth and thickness of it. The pursuers charged a commission of 2 per cent as before. The freight of the vessel was paid by the defenders.

Some days after receiving the invoice, the cargo arrived. The defenders began to use it, but becoming suspicious of a deficiency, they had it measured by a sworn measurer. The result was, that the invoiced contents of cubic feet, exceeded the true contents by 847 feet, a difference corresponding to about £90 of the price of the wood, supposing that wood sold by calliper measure were to be at the same rate in the market per cubic foot, as the same wood when sold by the more accurate measure of the string. They represented the extent of this deficiency at the Custom-house, and received back £49 out of the duty of £200, which they had previously paid. They refused to accept the bill drawn by the pursuers, and insisted on a deduction from the price corresponding to the deficiency of the timber. The pursuers answered that they had ordered the timber from a house of respectability who had furnished it, and measured it fairly by calliper, the universal measure in Holland; that as the defenders freighted the vessel from Rotterdam, and had sent out a servant to purchase the timber, Rotterdam was the port of delivery, and the measure employed there, if fairly used, must be that according to which the wood was bargained for and should be paid; that, as the excess of feet indicated by calliper measure was well known, the wood, when sold by that measure, bore a smaller rate per cubic foot in the market, than it would do if sold by string measure; and that the defenders, knowing, or being bound to know, these circumstances, were liable for the full price charged.

The defenders answered, that, by the words of the contract, they were to be charged at a certain rate per English cubic foot; that mercantile usage might be allowed to explain an ambiguous contract, but not to alter one which was unambiguous; that no usage at Rotterdam, therefore, could render them liable to pay for a number of English cubic feet of wood as furnished to them, which was never supplied to them; and that they were liable only for the amount of wood which they actually received. They also contended, that as the contract was made in this country with the agent of the pursuers, Aberdeen was the port of delivery; that Alexander was sent merely to examine the quality of the wood which might be shipped, and had no other function; that the string measure was always used at Aberdeen among merchants; and that, on this account, it was that measure alone which could be referred to.

The question thus came to be, mainly, whether Rotterdam or Aberdeen was to be held the port of delivery. No. 406.

July 18, 1832.
Schuurmans,
&c. v. Ste-
phens, &c.

A witness, who was a timber-merchant in Leith, stated that he would expect wood to be measured by the string measure, if the port of delivery were Leith, but calliper measure, if the port of delivery were Rotterdam.

LORD GILLIES.—Let the witness read the letter of the defenders, on the 24th of May 1825, and say whether he would understand the port of delivery to be Rotterdam or Aberdeen.

He then read the letter, and stated that he considered Rotterdam to be the port of delivery.

The same procedure was followed in examining another witness, an importer of timber, who also stated, on reading the letter, that the order of the defenders imported the delivery to be at Rotterdam.

In leading the pursuers' evidence, the Dean of Faculty put in the condescendence and answers.

LORD PRESIDENT.—As the Jury Court is now incorporated with the Court of Session, I hold that the record is already in Court, and may be referred to by both parties. It was different formerly, when the Jury Court was a distinct Court; but, since the incorporation of the Jury Court with the Court of Session, I think the whole record of the Court of Session is equally the record of the Court when holding a Jury trial.

LORD GILLIES.—I am of the same opinion; but perhaps it might be expedient, in reference to the general practice previously, to declare this by an Act of Sedenrunt.

In leading evidence for the defenders, James Alexander, the carpenter sent to Holland, was called. It had previously been instructed by the pursuers, that, when Alexander was sent to Holland, he received a written letter of instructions from Mr Stephen; that, on his return, he had re-delivered this to Stephen; and that Stephen could not now produce the letter. It had also been proved that he was present when the wood was measured in Holland.

Alexander was proceeding to depone that he was sent for the purpose of selecting the timber, and not for measuring it—

Dean of Faculty, for Pursuers, objected to the purport of the instructions being proved by parole, after these instructions had been reduced to a written form, and the paper of instructions had been traced back into the hands of the defenders, who were bound to produce it, and who could not tender the inferior substitute of parole proof in lieu of it.

Skene, for Defenders.—The paper of instructions has been lost, and without fraud. In such a case the defenders are not barred from all other proof of the directions which Alexander received on going to Holland, and how far he acted in compliance with these directions. Even if an objection can be taken at all on the ground referred to by the Dean, it is prematurely taken at present.

Skene then asked the witness, "Had he any authority to measure the wood?" and intimated that he meant to follow up this with the question, whether he did, in point of fact, attend to its measurement?

No. 406. *Dean of Faculty.*—Then I object to the examination on the grounds already stated.

July 18, 1832.

Nimmo v.
Stuart, &c.

THE COURT sustained the objection.

Shene excepted. He then proceeded to examine the witness as to the *res gesta*, in Holland, at the measurement of the wood, so far as he was concerned therewith.

After the defenders had closed their evidence,

THE LORD PRESIDENT intimated that it appeared to be unnecessary for the pursuers' counsel to reply, and then proceeded to charge the Jury. His Lordship observed, that there seemed to have been a mutual misapprehension by the pursuers and defenders, as to the measurement of the wood; but Lord Gillies concurred with him in opinion, that, under the contract, Rotterdam was the port of delivery. With that instruction to them, it did not appear necessary to go over the evidence. His Lordship therefore left the case in the hands of the jury with that direction, unless they requested further information from the Court.

Shene excepted to the direction, that Rotterdam was the port of delivery.

VERDICT for the pursuers.

HOPKIRK and IMLACK, W.S.—J. KNOX, S.S.C.—Agents.

No. 407.

ELIZABETH NIMMO, Pursuer.—*Robertson—M'Neil.*

JAMES STUART and Others, Defenders.—*Sol.-Gen. Cockburn—Maitland.*

Reparation—Public Officer—Stat. 3 Geo. IV. c. 78.—Circumstances in which a verdict was found for the defenders in an action of damages against the Superintendent of Police, and against several Police-officers, and against the Commissioners of Police, as liable for the officers in their employment, accused of culpable negligence and wilful oppression in the execution of their duty.

July 18, 1832.

Lord Justice-
Clerk.

ELIZABETH NIMMO, broker in Edinburgh, raised an action of damages against James Stuart, Superintendent of Police, and procurator-fiscal in the Police Court; and against Donald Williamson and others, police officers; and against John Thomson, clerk to the Commissioners of Police, as representing the commissioners, under 3 Geo. IV. c. 78, § 30. She set forth, that, on 23d November 1830, Stuart had presented a complaint against her as a resetter of some stolen shirts, and craving warrant to search her house and repositories, and to apprehend her person; that a warrant was granted “to search her dwelling-house and repositories for the shirts stolen, and, if found, to take them into custody, and to make open doors and lockfast places, if necessary, for executing this warrant, and to apprehend and bring into Court Mrs Nimmo for examination, and to cite witnesses for both parties;” that her house and shop were searched, without any stolen articles being discovered; that Williamson and the other police-officers, while searching, frequently attempted,

by promises and threats, to induce her to confess her guilt; that the search was conducted in a reckless, abusive, and insulting manner, the officers not only acting with culpable negligence, occasioning real injury to the pursuer, but also with wilful oppression; that she herself was afterwards carried off, near midnight, to the police-office, where, without examination, she was thrown by the orders of Stuart, the superintendent, or some person under him, who acted with wilful oppression or culpable negligence, into one of the criminal cells, which was cold, unwholesome, and unfurnished, and was situated below the police-office, and she was locked up there for a night, though bail was offered; that next morning she was removed up stairs to a better cell, and brought before the Sheriff, who, on hearing the evidence against her, continued the diet till next day; that she was then taken back to her cell, and confined till night, when one Aikman offered £10 bail for her, which was accepted, and she was set free, after having been for twenty-four hours separated from her children, to their mutual distress, and during which time her shop had necessarily been shut up; that on 25th November she appeared again before the Sheriff, who continued the diet till Saturday the 27th November, on which day she again compeared, when the Sheriff, on the motion of the complainer, deserted the diet pro loco et tempore. She farther alleged, that these proceedings were commenced and carried on from the most culpable negligence, and from wilful oppression, occasioning real injury to her, on the part of Stuart, the superintendent, who had no ground whatever for suspecting her to be guilty of the crime with which he charged her; that Stuart, and the subordinate officers concerned in apprehending and incarcerating her, and in particular Williamson, &c., acted not only in a culpably negligent, but in a wilfully oppressive manner against her in searching her house; that although, from the terms of the complaint and warrant, her person was not to be seized unless the stolen goods were found in her custody, and none were found, yet she was apprehended and imprisoned, and her apprehension and confinement were culpably negligent, and wilfully oppressive, on the part of Stuart and the officers. She therefore concluded against the defenders, conjunctly and severally, for £500 of damages.

Stuart and others stated in defence, that two boys, who had stolen the shirts on 22d November, pointed out Nimmo's house in Blair Street, as the place where they had disposed of them; in consequence of which the complaint and warrant set forth in the summons had been prepared, and a search was made, in a cautious and proper manner: that the goods were not found, but, from the strength of the presumptions against her, and being afterwards identified by the boys as the person who had received the shirts from them, the officers were sent back to apprehend her in terms of the warrant: that whilst in confinement she was humanely treated: that the bail offered for her during the night of her con-

July 18, 1832.
Nimmo v.
Stuart, &c.

No. 407. finement was refused by the officer on duty, in the honest exercise of the discretionary power given to him by 3 Geo. IV. c. 78, § 112: and that every allegation of irregularity of procedure was false. The defenders therefore pleaded that the proceedings libelled on were not, on the part of all or any of them, either culpably negligent or wilfully oppressive, but were conform to 3 Geo. IV. c. 78; that there was probable cause for the proceedings of Stuart the Superintendent; and that Williamson and the other police-officers committed none of the wrongful acts alleged; but, even if they had, neither the Superintendent, nor the Commissioners of Police, were responsible for the delicts of the inferior officers in their employment.

The following issues were sent to trial:—

“ It being admitted, that the defender, James Stuart, is Superintendent of the Edinburgh Police, and John Thomson is clerk to, and represents the Commissioners of the Edinburgh Police Establishment :

“ 1. Whether, at Edinburgh, on or about the 23d and 24th days of November 1830, or either of them, the said defender, James Stuart, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, applied for and obtained a warrant (of which No. 4 of process is a copy) to search the house and apprehend the person of the pursuer,—to the loss, injury, and damage of the pursuer ?

“ 2. Whether, at the time and place aforesaid, the said defender, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, wrongfully searched the said house, or wrongfully caused the said house to be searched,—to the loss, injury, and damage of the pursuer ?

“ 3. Whether, at the time and place aforesaid, the said defender, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, wrongfully apprehended and detained the person of the pursuer, or wrongfully caused her to be apprehended and detained, or wrongfully detained her, or wrongfully caused her to be detained,—to the loss, injury, and damage of the pursuer ?

“ 4. Whether, at the time and place aforesaid, the defenders Donald Williamson, Charles Stuart, and James M'Nicol, or any of them, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, wrongfully searched the said house,—to the loss, injury, and damage of the pursuer ?

“ 5. Whether, at the time and place aforesaid, the defenders, Donald Williamson, Charles Stuart, and James M'Nicol, or any of them, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, wrongfully apprehended the person of the pursuer,—to the loss, injury, and damage of the pursuer ?”

At the trial, the pursuer called a witness to speak to the manner in

July 18, 1832.
Nimmo v.
Stuart, &c.

which the search in her house had been conducted, at which he said he No. 407.
had casually been present; another witness, who had been turnkey in the July 18, 1832.
police-office, to speak to the condition of the cell in which she was confined Nimmo v.
on the night of her apprehension; other parties who had offered bail for Stuart, &c.
her, which was refused, or who had witnessed the distress of her family;
or who had dealt with her in business, and spoke to her character, and
the nature of the trade she carried on. An elder was also called to prove
that she was a communicant, and a person of respectability. Various por-
tions of the record were also put in.

The defenders put in several complaints which had been lodged in the
police-office against her, with the relative procedure thereon, prior to
November 1830. To one of these, purporting to be a conviction, it was
objected that it bore on the face of it, that the witnesses were not ex-
amined upon oath. The defenders answered, that they did not put it in as
a legal conviction, but as a matter which must justly have influenced the
minds of the officers of police, and that it bore relevantly on the question
of probable cause. The Court received it.

The defenders also led evidence with a view to prove that the boys
who stole the shirts had accused Mrs Nimmo as a resetter; that her be-
haviour had been suspicious, when she was questioned regarding some
articles found in her house during the search; that she had been de-
tained under regular procedure; that her cell was warmer than the
others, and that her confinement below was at her own request; that the
party who refused bail on the first night of her confinement, could not
accept it under the circumstances, and did not esteem the bail sufficient;
and that the officers had behaved humanely to Mrs Nimmo's family. Mr
Tait, Sheriff-substitute, was called to prove, inter alia, that according to
the system of the office, the repeated continuation of the diet against Mrs
Nimmo, indicated that the case against her was marked with circum-
stances of unusual suspicion.

VERDICT for the defenders on all the issues.

E. LOGAN, W.S.—M'KENZIE and M'FARLANE, W.S.—Agents.

No. 408. MRS E. RALSTON, or ALISON, Pursuer.—*Shene—Robertson—Brown.*
JOHN ROWAT, Defender.—*D. F. Hope—Sol.-Gen. Cockburn—M'Neill.*

July 18, 1832.

Ralston v.
Rowat.

Proof—Fraud—Process.—1. Circumstances in which, under issues, in a reduction of a deed on the grounds of forgery, fraud, and death-bed, the Jury found for the defender. 2. Circumstances in which a witness was held inadmissible to give evidence for a party pursuing a reduction on the head of death-bed, the witness conceiving himself to be a nearer heir to the deceased than the pursuer was, and having taken various steps with a view to prove his claim, but without having hitherto been able to prove it. Observed, that the condescendence and answers, being part of the record in the Court of Session, may be referred to by all parties at a Jury Trial, without requiring to be specially put in by either party at the trial.

July 18, 1832. THE pursuer, as one of the heirs-portioners served and retoured to the late John Allan of Ellsrickle, raised an action of reduction of a general disposition of Allan's estate, executed shortly before his death, in favour of John Rowat, alleging that it was not his deed. The reasons of reduction were, that the signature was a forgery; that the deed was executed on death-bed; and that it was impetrated by fraud and circumvention from the deceased, who was incapable of comprehending its purport.

The defenders denied these allegations.

The following issues were sent to trial:—

“ Whether the disposition and deed of settlement, No. 7 of process, dated 19th August 1829, sought to be reduced, is not the deed of the late John Allan of Ellsrickle? ”

“ Whether on the said 19th day of August 1829, the date of the said deed, the said John Allan was on death-bed? ”

Before any parole evidence was adduced, the pursuer put in the defences.

The Dean of Faculty stated to the Court the opinion expressed, on the previous day, by Lords President and Gillies, in the case of Schuurmans and Son,¹ to the effect that since the union of the Jury Court with the Court of Session, the whole record of the Court of Session, including the condescendence and answers, remains part of the record of the Court in which the jury trial is held, and does not require to be specially put in at the trial, but may be referred to by all parties without this. Such an opinion, if all the Judges concurred in it, would conduce much to the convenience of all parties practising before the Jury Court.

LORD JUSTICE-CLERK.—I concur in the opinion expressed by the Judges yesterday. I think that, since the incorporation of the Jury Court with the Court of Session, the condescendence and answers are part of the record of this Court at

¹ See ante, p. 839.

any trial before a jury. They seem to be as much so as the summons and defences, which are held to be before us, though not specially put in. The whole of the proper record in the cause may be referred to at the trial, without being specially put in.

No. 408.
July 18, 1832.
Ralston v.
Rowat.

LORD MACKENZIE concurred.

The pursuer then intimated that she gave up the last reason of reduction, founded on the fraud of the defender, and the incapacity of Allan to understand the deed. She then proceeded to examine several witnesses in support of the allegation that the signature at the deed was forged. These consisted of persons who had had occasion to know Allan's handwriting, by having been at one time his agents, or his correspondents on business. After they had examined the signature,* and stated whether they thought it genuine, there were exhibited to them by the defender, at cross-examination, a variety of signatures of the name John Allan, of different dates, to ascertain their knowledge of the signature of the deceased; an instrumental witness was also called, but he deponed to the authenticity of the signature which he saw affixed to the deed. The pursuer then gave up the reason of reduction on the head of forgery, and proceeded to the reason *ex capite lecti*.

The pursuer called Dr Buchanan, who was examined in *initialibus*, and stated, that he had got a charge from the defender to enter heir to Allan, and convey in his favour; that he had not obeyed the charge, but he wrote a letter to his agent in Glasgow, in December 1829, stating his intention to bring the deed under challenge as heir-at-law, and in reference to the charge, he had intimated a reservation of his right to do so; that his claim of relationship to the deceased was through a brother, while that of the pursuer was through a sister; so that, if his claim was instructed, his right to the heritage was preferable to that of the pursuer.

Being cross-examined, he stated, that it was through a daughter of John Allan, writer in Glasgow in 1725, that he laid claim to relationship with the grantor of the deed; that he had found a difficulty in proving John Allan's marriage, without which his claim was barred; that he had made some exertions to recover evidence of this marriage, and searched some records for that purpose, but that he had not used every research which was practicable; that he had put one advertisement in the newspapers on this subject, but still the difficulty was unremoved; that he had no connexion with this lawsuit, and had contributed nothing towards it; that he had not resolved on bringing a challenge of the deed, and had been doing little in regard to the matter for about twelve months.

The Dean of Faculty, for the defender, objected that Dr Buchanan was inadmissible on account of the interest which he had, and believed himself to have, in reducing the deed *ex capite lecti*.

Robertson, for the pursuer, contended that the witness was admissible. The pursuer was served and retoured heir-portioner. Dr Buchanan might think he could prove himself a nearer heir, but even he confessed this to be impracticable,

* Some of the witnesses were allowed to produce letters received by them from the deceased; and to examine the signatures of the letters, comparing them with that at the deed, and stating the points of dissimilarity which appeared to them to exist. No objection was taken.

No. 408. unless he could prove a marriage nearly a century ago, which he had hitherto tried in vain to do ; but, besides, though Dr Buchanan should consider that to be the only difficulty in his way, there might in truth be many others unknown to him, so as to leave him not merely an uninstructed claim, but one which was merely visionary. He had no interest in the present suit, for it carried nothing in his favour, and he could not use the verdict as evidence for him on a future trial, if he should raise a reduction ; and the pursuer had a right to his evidence, whatever notion he might entertain of the claims which it was in his power to rear up. Besides, from the peculiar nature of the interest imputed to Dr Buchanan, it was equally adverse to the party adducing him, and to the opposite party.

Dean of Faculty, to Dr Buchanan.—Do you withdraw your claim as heir-at-law ?

Dr Buchanan.—Certainly not. I conceive myself to be a nearer heir than the pursuer.

Dean of Faculty.—I adhere to my objection to the admissibility of the witness. If he be the nearest heir, as he conceives himself to be, the present reduction is truly an action for his behoof, since the pursuer can only acquire the estate in order to surrender it to him, when legally called on to do so. The belief on the mind of the witness of the existence of interest on his part, gives the bias to his mind as much as the real existence of that interest could do, and it is established that such belief renders him inadmissible.

LORDS JUSTICE-CLERK and MACKENZIE severally intimated, that they considered the witness to be inadmissible. Their Lordships were understood to rest their opinion on the ground of interest.

The pursuer intimated that she would now lead no farther evidence, but took an exception to the judgment, excluding the evidence of Dr Buchanan.

VERDICT for the defendant.*

MOWBRAY and HOWDEN, W.S.—J. WEMYSS, W.S.—Agents.

No. 409. JAMES DOUGLAS MACK, Pursuer.—D. F. Hope—Robertson—Russell.
JAMES CLELAND, Defender.—Skene—Maitland—G. G. Bell.

Partnership—Proof.—Circumstances in which the jury found that a pursuer was not a partner with the defender.

July 19, 1832. MACK raised an action, setting forth, that on the application of Cleland he had agreed to become his partner in a grain concern at Limerick ; that there had been no written contract of copartnery, nor any final agreement concerning the distribution of the profits ; but that there had been a copartnery commencing in November 1817, and that he was entitled to one half of the profits from that period down to September 1822, or to such

* A similar action, at the instance of another heir-portioneer, named Robert Pardon, was immediately after disposed of by a similar verdict.

other period as the Court should fix as the termination of his interest in No. 409.
the concern.

Cleland denied the partnership, and stated that Mack had merely been
in his employment for a time as a clerk. July 19, 1832.
Forbes, &c. v.
Leys, &c.

The following issue was sent to trial :—

“ Whether, from the month of November 1817, until the month of September 1822, or during any part of the said period, the pursuer and defender, as copartners, carried on business as corn-merchants at Limerick.”

Before the trial commenced, Mack restricted his claim as a partner to the year 1820 in place of 1822. In support of this he led documentary evidence, being chiefly correspondence, and a few bills.

The defender also put in documentary evidence, and called clerks of the concern, to whom Mack had stated that he was no partner, (and from one of whom he had received salary as a clerk,) and who proved that Mack had never, in any instance, acted as a partner, but always as a clerk.

The Dean of Faculty then gave up the case on the part of the pursuer.

VERDICT for the defender.

MACK and WOTHKARPOON, W.S.—W. DOUGLAS, W.S.—Agents.

LORD FORBES and Others, Pursuers.—D. F. Hope—Skene—Anderson. No. 410.
LEYS, MASON, and Co. Defenders.—Sol.-Gen. Cockburn—Lumsden.

Reparation—River.—Circumstances in which a canal, and a dam-dike across a river, were found to be to the injury and damage of upper heritors on the river.

THE judgment in this case, mentioned ante, IX. 933, allowing the July 19, 1832. exception taken to the Judge's charge on the former trial, having been affirmed in the House of Lords,* and it being thereby determined that the question put in issue was, whether the dam-dikes of the defenders were to the injury and damage of the pursuers, unrestricted by the consideration of the existence of other dikes, the issues were again sent to a jury. They were as follows:—

“ It being admitted that, in the years 1792 and 1793, the defenders, Leys, Mason, and Co., cut a canal on the north side of the river Don, for the purpose of conveying water from the said river to Grandholme Haugh, where the bleachfield and manufactory of the defenders are situated, and that in the year 1805, the defenders formed a dam-dike across the said river, for the purpose of conveying water into the said canal :

“ Primo, Whether the said canal, cut as aforesaid, is to the injury and

Lds. Justice
Clerk and
Mackenzie.

* Ante, IX. Appendix, No. 32.

No. 410. damage of the pursuers, or of any, and which of them, as proprietors of salmon-fishings in the said river?

July 19, 1832. Forbes, &c. v. Ley, &c.; " Secundo, Whether the said dam-dike, formed as aforesaid, is to the injury and damage of the pursuers, or of any, and which of them, as proprietors of salmon-fishings in the said river?"

OR,

" Tertio, Whether the whole or any, and which of the pursuers, or their predecessors and authors, or their commissioners, trustees, or agents, duly authorized, acquiesced in the formation or continuance of the said canal?"

AND,

" Quarto, Whether the whole, or any, and which of the pursuers, or their predecessors or authors, or their commissioners, trustees, or agents, duly authorized, acquiesced in the erection or continuance of the said dam-dike?"

The first two issues were taken up separately, and in support of their case under them, the pursuers adduced several civil engineers, some of whom had made plans of the defender's dam-dike and canal, and of a dam-dike and works next above theirs on the stream, and also of a cruiive-dike below. The engineers were examined with a view to prove, that the works of the defenders were injurious to the stream and to the fishing, in the actual state of the river, and that they would be so, if the other dikes were duly regulated or removed. Several fishers were then adduced, for the purpose of proving the decline of the fishings, and the injury sustained by them from the defender's works. Some written evidence was put in, including a lease of the fishings by the upper heritors, in favour of the lower heritors, at a former period before the decay of the fishings.

The defenders put in evidence receipts for the shares of rent under that lease, drawn by the pursuers respectively, in order to show that their patrimonial interest was extremely small. They then adduced several civil engineers, with a view to prove that their dike and canal did not injure the stream or fishing, in the present condition of the other dikes on the stream, and would not do so if the other dikes were regulated or removed. They also adduced fishermen, to prove the decay of the salmon-fishings below the defenders' works, as well as above them; and to show that the stake-nets at the mouth of the river were the true cause of this decay, and that it had been experienced equally on other neighbouring rivers.

VERDICT for the pursuers on the two issues under trial.*

CRAVENSTOUN and ANDERSON, W.S.—P. CROOKS, W.S.—D. FISHER, S.S.C.—Agents.

* Next day, before proceeding to try the remaining issues, the parties made a minute of agreement, and the second trial was given up.

ROBERT BALFOUR, Pursuer.—*Shene—Buchanan.*
ARCHIBALD LYLE, Defender.—*D. F. Hope—More.*

No. 411.

July 21, 1832.
Balfour v. Lyle.

Process—Stamp—Public Officer—Proof.—1. Under an issue whether A knew the fact of an assignation, the Court directed the jury, that knowledge by A's agent or trustee was not A's knowledge within the sense of the issue, and that it was the fact of A's individual knowledge which they were to try. 2. A notarial instrument of intimation of an assignation of subrents in 1820 was extended on paper inadequately stamped, and after several years a new instrument was extended on paper properly stamped—held, that both were admissible, the first being a memorandum which supplied such materials to the notary as enabled him to extend the second, and the second being duly stamped. 3. A notarial instrument is admissible, though the notary is not called to support it. 4. Although letters had passed through the post-office, and were recovered under a diligence from the person to whom they were addressed, yet it seems that if a party wish to prove to the jury the fact of their having reached that person, it must be proved otherwise than by diligence.

THE pursuer raised an action, setting forth, that in 1814, Graham of July 23, 1832. Gartmore let the lands of Drum to George Dunlop, W.S., for 19 years, ^{Lds. Mackenzie} from Martinmas 1813, and Whitsunday 1814, at a rent of £70, 4s. 10d.; and Medwyn. that in January 1815, Dunlop subset the lands to George Graham for 19 years, (his entry bearing also to be Martinmas 1813, and Whitsunday 1814,) at a rent of £180; that in May 1815, Dunlop sold and assigned the subtack for the remaining years of the lease, to the extent of £100 sterling of yearly surplus rent, to Thomas Balfour, with absolute warrandice of the assignation and the surplus rent; that in December 1816, Thomas Balfour conveyed the subtack and surplus rent to the pursuer; that the assignation to Thomas Balfour, and his conveyance to the pursuer, were both intimated to Graham, the tenant, in March 1820; that Dunlop, acting as factor for Gartmore in levying his rents, proposed to the pursuer that he, Dunlop, should levy the surplus rent along with the original rent, and that the pursuer should draw a bill half-yearly on him for the surplus rent, which was done, and the bills were honoured till Martinmas 1826, prior to which, Dunlop had become bankrupt; that, in the meanwhile, the property of the lands of Drum had been conveyed by Gartmore to Lyle the defender, and that in 1822, George Graham, the subtenant, had renounced his right to the farm of Drum in favour of Lyle, and had removed from it, and that Lyle was now in possession. The pursuer therefore concluded to have it declared, that Lyle, by adopting these proceedings without his knowledge, became virtually the assignee, and in place of Graham the subtenant, so far as the pursuer was concerned, and was liable in payment to him of the surplus rent of £100, as if he were the pursuer's subtenant for the remainder of the sublease.

Lyle stated in defence, that he had acquired the lands for an onerous and equivalent value, and he knew nothing of the assignation in favour of the pursuer; that on entering into possession, he found George Graham

No. 411. occupying the lands as tenant; and that on obtaining Graham's renunciation of his right in 1822, he knew nothing of the assignation.

July 23, 1832.

Balfour v. Lyle. In reply, the pursuer averred that Lyle was in the knowledge of the assignation at the time when he obtained the renunciation from Graham. The Court directed an issue in the following terms to be tried by a jury.

"Whether or not Archibald Lyle, defender, when he accepted a renunciation by George Graham of the lease of the lands of Drum, knew the fact of the transference and assignation of £100 due under the sub-tack of these lands, to Robert Balfour, pursuer?"

At the trial, it appeared that the lands of Drum had formed part of an entailed estate, and a circuitous procedure had been resorted to, in order to enable Lyle to buy them.¹ Gartmore held the lands of Garchel unentailed; these were conveyed to three several trustees, in three parcels. The entailed lands of Drum, in three corresponding portions, were then excambed with each of these parcels, the whole lands of Drum having been too large to admit of the statutory excambion in one piece. The trustees, on thus acquiring the several portions of Drum, conveyed them to Lyle. One of these trustees was a Mr Galbraith, a writer in Stirling, who had been the ordinary agent of Lyle from 1815 to 1827, or 1828, and the ordinary agent of Gartmore from 1816 to 1826. The pursuer led evidence for the purpose of showing that Galbraith was the agent and trustee of Lyle in this transaction, which occurred in 1820, and that he was then in the knowledge of the pursuer's assignation to the sub-tack; or at least, that he was so prior to the renunciation by Graham, the sub-tenant, in Lyle's favour in 1822.

In support of this, the pursuer tendered several letters addressed to Galbraith by Lyle or Dunlop, which had been dispatched through the post-office.

Dean of Faculty, for defender, objected to these letters being received, unless they were proved to have actually passed to the hands of Galbraith, who was now in attendance, and might be called to prove the fact.

Shene, for pursuer, stated that he did not wish to call him, and was not obliged to do so. These letters were recovered under a diligence against havers. The whole record of the cause was in Court, and might be referred to by both parties. That record bore the granting of a diligence; the commissioner under the diligence marked the letters as recovered under it, and these letters were got from Galbraith as a haver. The pursuer was not bound to call Galbraith again, in order to prove that these letters had passed into his possession, and been received by him.

Dean of Faculty, for defender.—The diligence was merely granted to recover the documents, and put them in process. When they were so recovered, the object of the diligence was satisfied; the party had got them, and was in a condition to judge whether they would be available to him at the trial. But in order to make these letters admissible in this case, it must be proved that they had passed into

* See M'Kechnie, July 11, 1821, ante, I. 116.

the hands of Galbraith. That was a matter of fact; and if it was to be proved, No. 411. Galbraith must be called to prove it, for the commission and diligence could not be used to that effect.

LORD MACKENZIE was understood to observe that there was no diligence before the Court: and that without a proof by witnesses, the correspondence was not proved to have reached Galbraith.

The defender then intimated that he would depart from his objection, as he himself wished to call Galbraith.

The pursuer afterwards tendered a notarial instrument of intimation of the assignation to Graham, the subtenant in 1820; to which it was objected, that, being written upon an inadequate stamp, it could not be received. The pursuer then tendered another instrument, more recently extended upon an appropriate stamp.

Dean of Faculty objected.—The first instrument could not be read in Court, and must be laid out of view. The second was only extended after an interval of several years; but it was invalid, if made up without the notary's having a protocol for his warrant; and the notary was even punishable, by act of sederunt, for extending some instruments, unless he could produce his protocol as his authority. Besides, the notary should have been called, as the statement in the instrument was a mere attestation of a witness not upon oath.

Skene, for pursuer.—Though an interval occurred between the extending of a notarial instrument and the date of the facts which it set forth, yet, if there be sufficient materials extant to secure the notary against error, the instrument is perfectly valid. Few notaries kept protocols; and it has been held that the mere noting on a bill is a sufficient warrant to extend an instrument of protest after the lapse of years. This second instrument of intimation being therefore unobjectionable on account of the mere lapse of time, if sufficient materials for extending it could be shown to exist, the first instrument became admissible to the effect of showing that such materials did exist.—The instrument being the notary's attestation, on his oath of office, was receivable as evidence of its averments without calling the notary.

LORD MACKENZIE.—I think the objections taken ought to be repelled, though the question is not free from difficulty. The presence of the notary to support the instrument with his oath does not appear to be necessary, as the deed is a known instrument, and part of the titles of a party, by the law of Scotland. I should also incline to hold that we ought to presume there was a protocol, or at least equivalent evidence of the res gesta: but it is not left to presumption in this instance, as the first instrument appears to be receivable as a written memorandum, made by the notary at the time, and sufficient, subsequently, to warrant the extending of the second instrument. It is unstamped, and it is not received as a legal instrument in itself: but the stamp on the second instrument entitles the Court to receive the first, to the effect now mentioned.

LORD MEDWYN concurred.

Both writs were then put in.

The Dean of Faculty excepted to the judgment allowing them to be received. He addressed the jury for the defender, and, in commenting upon the evidence which had been led to prove that Galbraith was the agent of Lyle, both in the acquisition of Drum, and in regard to George Graham's renunciation of his sublease, he contended, first, that no knowledge of Balfour's right was brought home

July 23, 1832.
Balfour v. Lyle.

No. 411. to Lyle himself; second, that Galbraith was solely the agent and trustee of Gartmore, in the transaction by which Lyle had acquired the lands of Drum; and also, July 23, 1832. that the other two parties, through whom Drum was ex cambed for Garchel, Balfour v. Lyle. and conveyed to Lyle, were solely trustees for Gartmore; and, third, that, under the terms of the issue, which was strictly of a special nature, it was not enough to bring home to any of these three parties, even to Galbraith, a knowledge of Balfour's right, but that, unless such knowledge were brought directly home, as matter of fact, to Archibald Lyle himself, the jury must find for the defendant.

Galbraith was then called, from whose evidence it appeared, that he had occasion, in 1820, to know of an annual sum being due to Balfour out of the lands of Drum; and that he had also occasion to know Graham to have been a subtenant, and not a principal tenant.

Skene addressed the jury in reply, and contended, 1st, That the facts and circumstances brought home directly to Lyle himself the knowledge of Balfour's right, when he accepted George Graham's renunciation; 2d, That Galbraith was the agent and trustee of Lyle, in the acquisition of the lands of Drum in 1820, and his agent in regard to George Graham's renunciation in 1822; and that his two associates in conveying Drum to Lyle, were also trustees of Lyle in that transaction: and, 3d, That all the three, and particularly Galbraith, were in the knowledge of Balfour's right, at least as early as 1820, and that the knowledge of any of Lyle's confidential agents or trustees, was the knowledge of Lyle himself within the meaning of the issue. If enough of information was received by Lyle or his agent to put them on their guard as to Balfour's right, or to put them on their enquiry as to it, it would be held good notice in a court of equity in England, and ought to be held good notice here. He therefore requested the Court to direct the jury, that, if it was proved that Lyle, or any person acting confidentially with and for him, knew of Balfour's right, when Lyle accepted George Graham's renunciation, it was enough to entitle the pursuer to a verdict.

LORD MACKENZIE, in charging the jury, called their attention to the precise words of the issue, which was of a special nature, to determine the fact, "whether or not Archibald Lyle, when he accepted, &c. knew the fact of the transference, &c. to Robert Balfour." After stating that it lay with Balfour to prove knowledge against Lyle, and pointing out the bearing of the evidence on the question of Lyle's individual consciousness of the fact of the transference, his Lordship observed, that Galbraith and his two associates, in disentailing the lands of Drum, and conveying them to Lyle, appeared to have been the trustees both of Gartmore and Lyle: that Galbraith, Lyle's ordinary agent, knew of an annual sum being payable to Balfour out of Drum, as early as 1820, and he also knew that George Graham held a suback, and not a principal lease: and that it had been contended by the pursuer, that the knowledge of Lyle's agent and trustee, was Lyle's own knowledge. within the meaning of the issue. In order to make way for this plea, it would have been requisite for the pursuer to prove that the knowledge of these facts by Galbraith was obtained by him qua agent for Lyle; and it was doubtful whether he had so obtained it. But even if he had done so, the knowledge of Galbraith was not the knowledge of Lyle within the terms of the issue. It was a circumstance highly deserving of the jury's attention, in so far as it tended, along with the other circumstances of the case, to bring home knowledge, as a matter of fact, to Lyle himself.

But it was not available to the pursuer, to the effect of the knowledge of Galbraith, or any agent, being, in law, and in the sense of this issue, the knowledge of Lyle.*

The jury returned this verdict : " Find it not proven that Archibald Lyle, defender, at the time he accepted a renunciation by George Graham of the lease of the lands of Drum, knew the fact of the transference and assignation of £.100, due under the sub-tack of those lands to Robert Balfour, pursuer."

July 25, 1832.
Steele v. Oliver & Boyd.

J. PEDDIE, W.S.—E. M' MILLAN, S.S.C.—Agents.

ANDREW STEELE,—Pursuer,—
OLIVER and BOYD,—Defenders,—Robertson.

No. 412.

Property—Servitude.—Terms of issues sent to a jury, under a declarator of property, and of the servitude of eaves-drop.

STEELE raised an action of declarator against Oliver and Boyd, printers, July 25, 1832. alleging that he was infest in certain premises near the Cowgate-port of Edinburgh ; that this infestment proceeded on a disposition containing also a right to a dwelling-house in the first story above the shops in Easton's lands, &c. ; that in the description of these premises in the infestment of John Adam, the author of Steele, the property was described as in a clause quoted in the summons ; that he had the undoubted right and title to the property so described, but that Oliver and Boyd, for about six years by-past, had assumed a right to part of the property, by hindering him from rebuilding the walls of one of the houses described, and putting on the roof—and by pretending right to and encroaching upon the wester gable of Easton's wester tenement, which partly belonged to the pursuer—and by pretending right to the house at the east side of the area called formerly the Pot-house. He therefore concluded to have it found, that he had either by virtue of his titles, or by prescription, or by servitude, the only good right to the property described. He farther concluded, that the defenders should be decerned to take away all buildings or "to-falls" attached to these houses : and to take down the wall built by them, or their predecessors, on the fouudation walls of Easton's decayed tenement, which was an encroachment which any one having interest therein was entitled to prevent : and to pay him £500 in name of

Ld. Mackenzie.

* An exception was taken to the direction, " that in the sense of this issue, it was incompetent to argue that, in law, communication to an agent or trustee for the party, is communication to the party himself, though, in fact, it might be admitted as presumptive evidence that the agent made, or might have made, the communication to his employer ; but that actual proof of knowledge in the defender himself, whether derived from such communication or otherwise, was necessary under the special terms of the issue."

- No. 412. damages, loss of rents, and other expenses incurred by him in consequence of their obstructing him in the use of his property.

July 23, 1832.
Steele v. Oliver & Boyd.

Oliver and Boyd stated in defence, that they had no interest as to any of the conclusions, except as to the walls, which they claimed as their property, and to which they maintained they had a good title, fortified by sufficient possession, free of any servitude or other claim by the pursuer.

The following issues were sent to trial :—

“ It being admitted, that in the space between the High Street and the Cowgate of Edinburgh, and feet west from the Cowgate-port of the same, there is a causewayed line running in an east and west direction, bounded on the south by a wall ; and that from the west end of the said lane, there is another lane or entry in a southerly direction, leading to the said Cowgate, bounded by a wall on the east.

1. “ Whether, for forty years and upwards, or for time immemorial, the pursuer, and his predecessors and authors, have possessed, as his or their exclusive property, feet, or any part thereof, of the wall bounding the south side of the causewayed lane aforesaid ?

2. “ Whether, for forty years and upwards, or for time immemorial, the pursuer, and his predecessors and authors, have possessed, as their exclusive property, 23 feet, or any part thereof, of the north end of the wall bounding the east side of the aforesaid lane or entry, leading, in a southerly direction, to the Cowgate ?

3. “ Whether, for forty years and upwards, or for time immemorial, the roof or roofs of a house or houses, the property of the pursuer, and his predecessors and authors, has, or have rested on, and the eaves of the said houses projected 9 inches, or any part thereof, over the said wall or walls, and thrown the eaves-drop from the said roof or roofs, into the said lane, and the said lane and entry, or either of them ?

4. “ Whether, in the month of 1806, or about that time, the defenders, or their predecessors or authors, wrongfully erected, or caused to be erected, 27 feet, or any part thereof, of the wall adjoining to, and running south from the 23 feet of wall aforesaid, on the east side of the lane or entry leading to the Cowgate, on the foundation of a wall, the joint property of the pursuer and others ? ”

VERDICT for the defenders on all the issues, with the exception of a house in the first and third issue, as to which the jury found for the pursuer.

H. MACQUEEN, W. S.—D. FISHER, S. S. C. Agents.

APPENDIX.

BARCLAY and Others v. MAGISTRATES and COUNSELLORS of MONTROSE.*

Burgh Royal—Ballot.—Election of Magistrates and Counsellors by ballot illegal.

THE Provost and Counsellors of the burgh of Montrose, having at one ~~June 7, 1817.~~ of the annual elections been chosen by ballot, and not by open vote, Barclay and others, members of the council, presented a petition and complaint to have the whole election declared void. In answer, it was contended, 1. That the complainers were barred by having suggested this mode of voting the year before, and not having objected to it on the occasion of the election challenged. 2. That there was nothing illegal in taking the vote by ballot; and 3. That the members of council, constituting a quorum of the whole council, which consists of nineteen, were not chosen by ballot, and therefore, at all events, that the whole election should not be voided, but only that of the Provost and Counsellors so chosen.

LORD JUSTICE-CLERK.—As to the personal exception against the complainers, I cannot say it appears to be well founded. Even if true that the complainers had originally suggested the ballot at a former election, (not complained of,) which is however denied, I should not hold that it barred the complaint, as any constituent number of a town-council may complain of wrongs done at the annual election; and it is not disputed, that, on account of bribery, corruption, or fraud, any person may complain, though he had been even connected in the illegal proceedings. I can as little think that acquiescence in the proceedings complained of, and no protest having been taken, can be held to bar the complaint, and I do not think there is any sufficient evidence of conspiracy to disfranchise the burgh, that can be listened to. The same thing might, indeed, be said as to every one of the

* From the note-book of the Right Honourable the Lord Justice-Clerk. Referred to in the case of Watson v. Glasgow Commissioners of Police, ante, 481.

June 7, 1817. complaints that have led to reduction and disfranchisement. Then as to the merits, how far it is a legal mode of burgh election to refrain from openly voting, and resort to the use of a secret ballot, by which it must be held that the votes of individuals are concealed from each other, for it is absurd to talk of an open ballot, where red and white balls are put into a box. I confess, it appears to me, that by the law applicable to burgh elections, as established by the authority of statutes, usage, and the principles of the constitution of the royal burghs, there is no foundation on which a ballot cannot be sanctioned. The whole language of the statutes, from the act 1469, c. 69, downwards, clearly indicates that election by open voting is the legal mode of choosing magistrates and counsellors. This is manifest from every word of Mr Wight, in his Treatise on Election, where the law speaks of votes being tendered. Does this mean that a red or white ball was attempted to be thrust into a box? Or in sustaining the votes of counsellors given at the foot of the council-room stair, as was done in the case of Inverkeithing in 1745, does this contemplate the possibility of the election being made by ballot within? But the principle of requiring such elections to be made openly by plurality of voices, must be obvious to every one. The evils of corrupt practices in burgh elections are proverbial, and their frequency is distinctly noticed by Mr Wight, and many elections have been set aside on the score of fraudulent devices to defeat the freedom of election. Now it must be obvious, that the contrivance of a secret ballot, by which the counsellors are excluded from the knowledge how their neighbours vote, seems admirably calculated to conceal the most corrupt and illegal practices. Besides, there is one most obvious objection, which is not noticed in the papers, it being, in fact, necessary to vest the result of the whole election in the common clerk. He, it is presumed, examines the boxes, and declares the result, and we are told forsooth that in this case the clerk has preserved a memorandum of the number on each election. Now, is there any sense or principle in committing such a delicate duty to a clerk? The corruption of such an individual is not an impossibility; and it is quite possible to figure cases, in which, when individuals have withheld their balls, the want of them may be supplied by his assistance. In short, if the use of ballot was to be resorted to in burgh elections, the most flagrant and scandalous evils would be the consequence. It is no satisfactory answer to say, that any member may insist on the votes being declared and taken down on any particular stage of the election, because this is a total departure from the use of ballot, and is just an acknowledgment of its being contrary to the principles of such an election. In every question as to the choice of Magistrates, for whom leets are required by the set of the burgh, the individuals may be set against each other, and voted for accordingly. In like manner, as to individual counsellors, the same mode of voting may be insisted upon, but this is lost by the balloting system. In all such elections, the having power to object to each individual, as given either by stating the alleged disqualification, or otherwise, is an inherent principle. But I must own, that it is incomprehensible how this can be secured, when it is industriously concealed how each counsellor gives his suffrage. On the whole, I have no doubt of the illegality of the proceedings complained of, and the only question is as to its effect. I had some hesitation in cutting down the whole election; 1. Because the ballot was not adopted quoad the Old Provost, three Bailies, Dean of Guild, and Master of Hospitals, who must by the set be new counsellors, nor in fact as to the new Dean of Guild and Trades' Counsellors, who are chosen elsewhere, and only received by the council. Now, these ten constituted a quorum of the whole; and if a quorum is elected, the council

Barclay, &c. v.
Magistrates,
&c. of Mon-
tree.

cannot be voided in toto. It is also de facto averred, but in opposition to the record in the minutes, which state they were chosen by ballot, that the three Bailies were chosen by open votes. It deserves consideration, therefore, whether more Magistrates, enquiry is competent on this last point, or if the minutes must be held decisive. But, considering that the minutes are ex facie unexceptionable, I think we must hold by them. But if the Magistrates were in reality not duly elected, Wight, p. 351, lays it down that the whole election must fall to the ground, because there can be no council without a magistracy; and the question would be, whether the election of the Provost and remaining counsellors only ought to be set aside. This there is hardly a possibility of maintaining according to the above authority of Mr Wight and I am therefore for reducing the election in toto.

LORD CRAIGIE.—I agree entirely in the opinion given.

LORD GLENLEE.—I do not think it is possible to entertain a doubt on the opinion on the point of law given from the chair. If ballot was a good law to be introduced, which I doubt much of, it could not be introduced by the burgh itself, or even the convention. I agree as to the dangers pointed out, as it is obvious that a person may take bribes from both sides with impunity, under the system of secrecy; and I think a clerk acquainted with legerdemain might have a great effect on the election. I agree also in thinking the personal objections cannot be sustained.

THE COURT accordingly sustained the complaint, and reduced the whole election.

JUDGMENTS OF THE HOUSE OF LORDS.

1832.

No. 1.—BALMER v. HOGARTH.

Landlord and Tenant—Contract—Actio quanti minoria.—A tenant having raised a summons of reduction of a lease, on the ground that the extent of the farm had been fraudulently represented as greater than it truly was, and concluding for deduction from the rent, (which was a lump sum,) at so much for each acre deficient; and an issue having been sent to a jury, whether the representation as to the extent had been ‘false and fraudulent,’ and a verdict having been obtained that it had been ‘false,’ (to the extent of 7 acres out of 333,) but not ‘fraudulent.’—Held,

- (1.) That even if this verdict afforded ground of reduction, it must be total, and could not infer a mere deduction of rent; but,
- (2.) That the ground of deduction set forth in the summons being fraud, and not error in essentialibus; and fraud having been negatived by the verdict, there were no grounds for reduction under the summons.—VIII. 715.

Judgment superseded—the parties having, on the recommendation of the Lord Chancellor, referred the point in dispute to their counsel.

THE LORD CHANCELLOR observed, that the issues were incorrectly framed, inasmuch as the questions of ‘false’ and ‘fraudulent’ ought to have been put separately—that the summons was so framed as to support a conclusion, on the ground of ‘false’ representation merely—that the error to the extent of seven acres out of 333, was not sufficient to annul the contract—that when the landlord previously brought an action for implement of the lease, the Court should then have sent an issue to a jury, to have ascertained the extent of the error, without requi-

ring a reduction to be brought, and only allowed him implement to the extent of the bargain actually made. His Lordship, therefore, was inclined to have restricted the lease in this action of reduction; but finding some difficulties from the objection that this would sanction the actio quanti minoria, he recommended a settlement on this footing.

The cause was accordingly referred to the counsel, who directed an abatement of rent proportioned to the deficiency.

No. 2.—M'KENZIE v. ROSE.—May 14.

Trout Fishing—Salmon Fishing—(1.) The proprietor of lands adjacent to a river is entitled to fish for trout, ex adverso of his lands, as a privilege inherent in his right of property, and that whether he have exercised it for forty years or not, and consequently is not obliged to support his right by proof of possession. (2.) The right must be so exercised as not to injure the salmon-fishing of another proprietor.—VIII. 81.—*Affirmed.*

No. 3.—GRANT v. BAILLIE.—June 25.

Bankrupt—Sequestration.—Competent to sequester the estate of a party, as falling under the bankrupt statute, in virtue of debt contracted prior to his entering into trade, and although he had for several years ceased to be a trader.—VIII. 778.—*Affirmed.*

The House of Lords required the attendance of the Judges at the argument, and submitted to them this question,—‘A, not a trader, becomes indebted to B to the amount of £100. A afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader, he commits an act of bankruptcy—Can B support a commission against him upon his debt and that act of bankruptcy?’

LORD CHIEF JUSTICE TINDALL delivered the unanimous opinion of the Judges, 'that a commission may be supported by B upon the debt and act of bankruptcy above supposed.'

THE LORD CHANCELLOR moved the affirmance, but without costs, as being the first judgment on the point either in England or Scotland.

No. 4.—M' MILLAN v. CAMPBELL.—June 28.

Trust—Entail—Writ.—A trust-disposition of an estate for behoof of creditors, with powers of sale, subject to an obligation on the trustee to reconvey the remainder (if any), although followed by infestation, does not divest the trustee of his radical right to the lands; and therefore held, that although a reconveyance by the trustee was informal, yet the trustee could, in virtue of his radical right, execute an effectual entail by procuratory of resignation. 2. Opinion expressed by the Lord Ordinary, (1.) That an instrument of resignation, referring to a procuratory as dated 25th March last, and the word 'last' being written on an erasure, was no evidence that a procuratory, dated March 24, 1808, was ever executed; and, (2.) that the discrepancy in the day of the month would alone have been fatal. —IX. 551.

—Affirmed.

LORD WYNFORD moved the affirmance, on the grounds stated in the note of the Lord Ordinary (Lord Moncreiff. See IX. 554.)

No. 5.—EWING v. EARL and COUNTESS of STRATHMORE.—June 28.

Bill of Exchange—Agent and Client.—Held, that a party sued for payment of acceptances found in his deceased agent's repositories, is not entitled to have the process stayed till the issue of an accounting, on vague allegations of intromissions, he admitting in his correspondence that the agent had made great advances on his behalf. 2. That the presumption that bills retired with a general receipt were paid with the funds of the proper obligant, may be redargued by the terms of his own correspondence. —IV. 310.

Affirmed, ex parte, except in so far as decree was given against the Countess of Strathmore, on obligations come under her after her marriage, a point not adverted to, nor pleaded in the Court below.

No. 6.—DUKE of HAMILTON v. AIKMAN.—July 5.

Servitude.—1. The proprietor of a house and garden in a burgh of barony, claiming a servitude of taking sand and gravel from the bank of a river, as subsisting in favour of him and the other proprietors in the burgh, not bound, in order to support his action, to plead a right of commonalty in the bank;—and, 2. Entitled, in order to establish it, to found on the possession of other proprietors in the same situation, as well as the possession by himself, his predecessors and authors; and also entitled to plead, that a party opposing him has no right whatever in the bank. —VIII. 943.

Affirmed, so far as it was found that the party claiming the servitude was not bound to plead a right of common property in the bank, and was entitled to plead that the party opposing him had no right of property therein; but Reversed, in so far as the judgments complained of allowed an issue to try a general right of taking gravel, without reference to the use of the tenement belonging to him, and in so far as they permitted him generally to have an issue as to the possession by proprietors of houses 'similarly' situated, and that the cause be Remitted with a declaration that he was entitled to insist in the action only in one or other of the characters, viz. as one of the inhabitants of the burgh, or as owner of certain houses and lands.

No. 7.—CRANSTOUN v. BONTINE.—July 5.

Bankrupt—Stat. 1696, c. 5.—Held, that a disposition granted and infestation taken within sixty days of the bankruptcy of the grantor, in implement of missives of sale executed several months previously, were not reducible under the act 1696, c. 5. —VIII. 425.

Affirmed.

LORD WYNFORD, in moving the affirmance, stated, that he concurred with the Court below in holding that the statute 1698 struck at voluntary deeds, only such as the grantor was not under a previous obligation to execute; but he would not propose allowing costs, as the Lord Ordinary and one of the

Judges in the Inner House had differed from the interlocutor. His Lordship further expressed a wish that the Judges would, by conference before judgment, endeavour to avoid the frequent difference of opinion which occurred in the Court of Session.

No. 8.—DUKE OF ARGYLE v. M'ALLESTER.—July 12.

Thirlage.—The tenants of certain farms, some of whom were taken bound in their leases to carry their grain to any mill to which the same ‘are or shall be thirled,’ and to pay ‘accustomed multures,’ having from time immemorial resorted to a particular mill, both when it was the property of their landlord, and after he had conveyed it away, ‘cum multuris,’ &c., found—

- (1.) That a title by progress from the landlord to the mill in question, *cum multuris*, &c., was relevant, without any special clause of astriction, to sustain a claim of thirlage, founded on immemorial usage, against the landlord and his tenants in farms alleged to be so astricted.
- (2.) That the thirlage was sufficiently established against the landlord and his tenants by proof of immemorial usage of those tenants to carry their corns there, with occasional performance of mill services and payment of abstracted multures, although no decree had been obtained against the landlord, and he had taken some of the tenants bound in their leases to pay certain multures to himself. —IX. 763.

Reversed in part, with a declaration, that the appellant was liable in thirlage only on grindable corns.

LORD WYNFORD observed, that although he concurred with the Judges of the Court of Session, that there was sufficient evidence of a servitude of thirlage, yet their Lordships did not appear to have looked at the demand made by the pursuer in his summons, which was for thirlage on grana crescentia, and not merely upon grindable corn; that the former

was a species of burden which required to be established by the clearest evidence; but that there was no evidence in support of it satisfactory to his mind; and he therefore moved that the appeal should be sustained, to the effect that the defendant was liable only in thirlage of grindable corn, and that he was not liable for the costs in the Court below.

No. 9.—CLERK v. ADAM.—July 16.

Implied Condition—Title to Pursue.—A party having been requested to sit for his portrait as in reference to a public purpose, and having done so,—found that his son and representative was entitled to insist that it should not be diverted from that purpose. —IX. 708.

Reversed.

THE LORD CHANCELLOR concurred entirely in the interlocutor of Lord Corehouse, finding, that the property of the portrait was vested in the subscribers, at whose request the party had sat for his portrait, and, consequently, that they had the control over it; but he could not support the judgment of the Inner House, for although they found that the property belonged to the subscribers, yet they had also somewhat inconsistently found, that the subscribers were not

entitled to the enjoyment of the rights of property. The case of *Cadell v. Stewart*, as to Burns's Letters, had at first had some influence on his mind, but without considering whether that were a well-founded decision, it was sufficient that the judgment there went on the footing that there was no property in the party who held the letters, while here it went on the ground, that there was a right of property in the subscribers, and yet the exercise of the right was denied.

No. 10.—BAIRD v. ROSS.—July 16.

Servitude.—The proprietor of a house having access to it through a court belonging to another, held entitled to load and unload carts in the court. —VII. 766. —*Reversed.*

THE LORD CHANCELLOR stated, that he could not concur in the rationes assigned by Lord Fullerton, and adopted by the Court; the titles bestowed nothing more than a servitude of cart-road, and it was not sufficient to say that the loading and unloading of

cart was not inconsistent with the rights of the complainant. However unreasonable it might be in him to resist this, still a Court of law must give judgment, not on what was reasonable or unreasonable, but on what were the legal rights of the party complaining.

No. 11.—LYON v. REID.—July 16.

Trust.—Circumstances in which an assignation to a lease was held to be granted in security only, and to be redeemable on repayment to the assignee of certain advances by him. —VIII. 789. —*Affirmed.*

THE LORD CHANCELLOR observed, that although it was dangerous to enquire into the intention of parties alleged to be different from what appeared from the words of the deed, and particularly to take into consideration extrinsic evidence; yet,

in the circumstances of this case, and more especially as the intention was ascertained without travelling out of the deed, he thought the interlocutors right; but as the case was not free from doubt, no costs should be given.

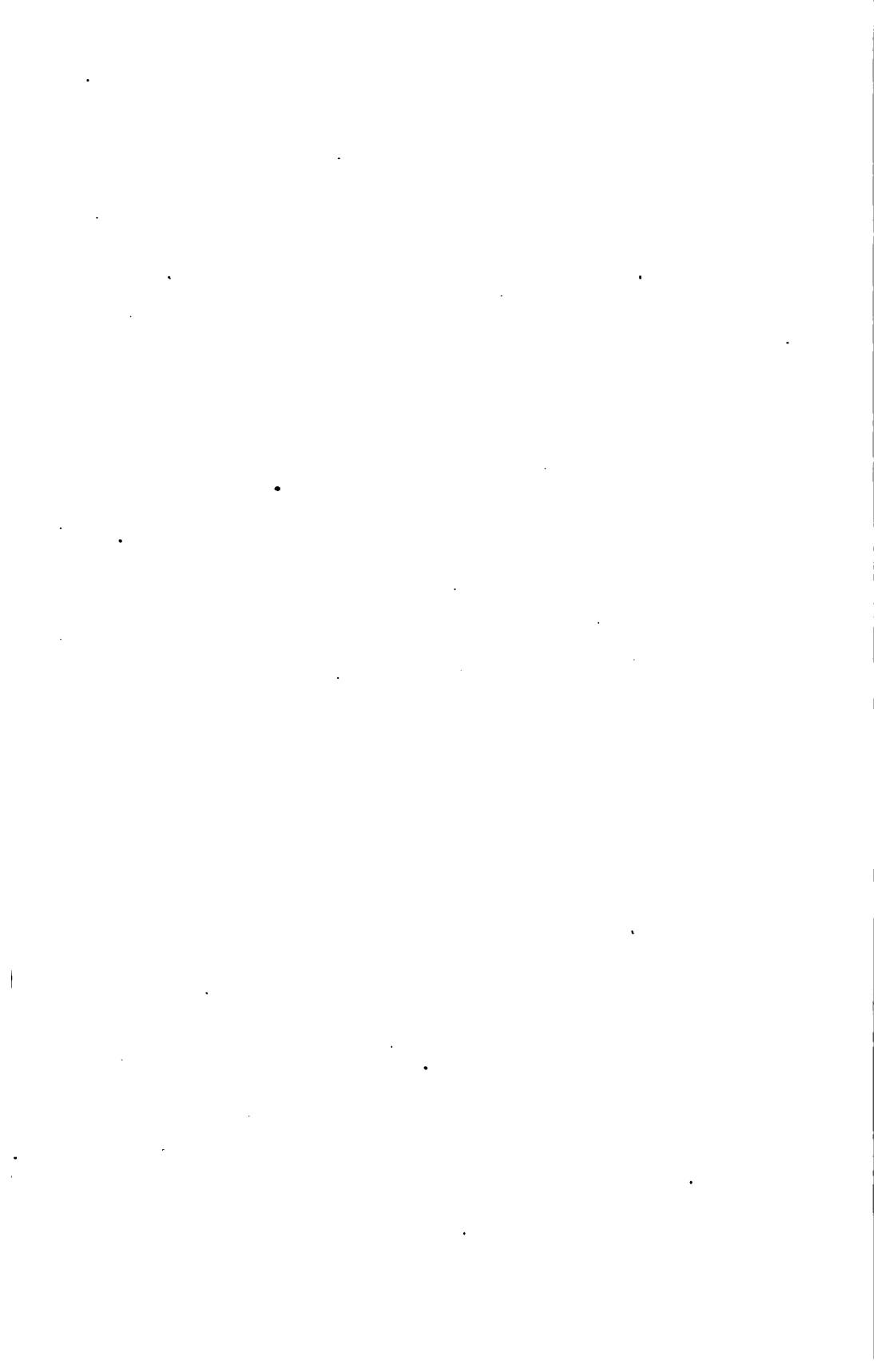
No. 12.—*Booth v. Booth.*—August 11.

Testament—Conditio si sine liberis.—Circumstances not sufficient to include a grandchild under the *conditio si sine liberis*, from the provision of his grandfather's settlement, in favour of his children.—IX. 406.—*Affirmed.*

THE LORD CHANCELLOR thought this an important question of law, but after carefully considering the cases of Wallace and of Christie, he was of opinion that the judgment was right.

THE Reporters have not hitherto had access to the judgments in the other cases decided on appeal, but they subjoin a list of those which they understand have received judgment.

Reddie <i>v.</i> Syme, IX. 413.—Aug. 11.	<i>Affirmed.</i>
Flowerdew <i>v.</i> Dundee Shipping Co., IX. 373.—Aug. 11.	<i>Affirmed.</i>
Ewing <i>v.</i> Wallace, IX. 385.—Aug. 13.	<i>Affirmed.</i>
Dixon <i>v.</i> Dixon, X. 209.—Aug. 13.	<i>Affirmed.</i>
Luke <i>v.</i> Hunter, X. 307.—Aug. 14.	<i>Affirmed.</i>
Turnley <i>v.</i> Watson, X. 29.—Aug. 16.	<i>Affirmed.</i>



INDEX OF MATTERS

IN

VOLUME X.

ACCOUNTING.

See Thomas, Nov. 22, 1831, p. 43.

See Fraser and Others, Dec. 9, 1831, p. 104.

See Moodie or Anderson, Dec. 19, 1831, p. 128. See *Officer, Public.*

ACQUIESCEANCE. See *Sale*, 5.

ACT OF GRACE. See *Jurisdiction*, 3.

ACT OF PARLIAMENT. See *Statute*.

ACT OF SEDERUNT, Feb. 1806. See *Agent and Client*, 4, 7, 8.

July 11, 1828. See *Process*.

July 10, 1832. To regulate the rotation and business of the five permanent Lords Ordinary in the Outer House. See p. 794.

ADJUDICATION.

1. Circumstances in which the Court dispensed with the inducement of a summons of adjudication, allowed it to be enrolled in the calling lists of the Outer House, limited the term for seeing it to eight days, authorized the Lord Ordinary to dispense with the reading in the minute-book of the decree of adjudication, and granted warrant to the clerks of Court to give out an immediate extract, reserving all objections contra executionem. Scott, Jan. 28, 1832, p. 253.

2. A first adjudication being intimated, and a second led thereafter in terms of the statute, and decree in the first being indefinitely postponed, and the second adjudicator having craved decree; held, that he could not take decree before the first adjudicator, but was only entitled to be conjoined. Forman, &c., Feb. 23, 1832, p. 365.

3. Where a trustee under a decree-arbitral executed a disposition of his property in favour of trustees, providing, inter alia, an annuity to his eldest son, (who was a party to the submission,) during the trustee's life, but to lapse thereafter, and the son in lieu thereof to be put in possession of certain farms rent-free—and the trust-deed contained a clause, that when the son or other heir of the trustee should require the trustees to denude, he or that other heir was to exonerate the trustees, but did not contain any clause binding the trustees to denude—and after the trustee died, a creditor of the son got a decree in absence, adjudging all right and interest which he had under the trust; and the son died shortly thereafter, without any steps being taken to vest him, independently of the terms of the deed, in his rights under the trust; held, in a question between the creditor and the trustees,

(1.) That nothing had vested in the son, which an adjudication could carry without a service; and,

(2.) That an adjudication was not a competent mode of attaching arrears of rent, or of the annuity. Broughton, Mar. 3, 1832, p. 418.

INDEX OF MATTERS.

ADMIRALTY CAUSES. See *Process, I.*

ADULTERY. See *Husband and Wife*, 5.

ADVOCATE. See *Auditor*.—*Agent and Client*, 2, 6.

ADVOCATION. See *Process, II.*

AGENT, COMMON. See *Ranking and Sale*.

AGENT AND CLIENT.

1. A law-agent is not entitled to the expenses of an application for decree under the act of sederunt 1806 against his client, (who makes no unnecessary opposition,) except those of extracting the decree. Brown, Nov. 24, 1831, p. 45.
2. Question whether a consent to a reference, which the agent was not authorized to give, being signed by counsel, binds the client in a question with the opposite party. Ballandene and Husband, Dec. 20, 1831, p. 168.
3. Where a party raised an action of count and reckoning, concluding for a balance of £.1280; and a record was made up, and a report obtained from an accountant exhibiting three views, under any of which the defender was indebted in a considerable balance; and the record was closed, and a debate ordered, when a discharge was granted by the pursuer, which was afterwards reduced by a creditor under the statute 1621, cap. 18; held, that the pursuer's agent was entitled to sist himself as a party in the action of count and reckoning, to the effect of recovering payment of his necessary disbursements as agent in the cause, with a reasonable remuneration for his professional services in conducting it. Cheyne, Jan. 18, 1832, p. 202.
4. A. S. Feb. 1806.—An agent allowed the expenses of an application for decree under A. S. Feb. 1806, against his client. Miller, March 10, 1832, p. 479.
5. It being alleged that false and calumnious allegations relative to the pursuer were made by the defender to his law-agents in a previous process with another party; held, that the pursuer was not entitled to prove such allegations by these agents. Cullen, or M'Kenzie, March 14, 1832, p. 497.
6. The expense of consulting counsel as to the propriety of bringing an advocacy, sustained as a charge against the opposite party. Osborne, May 26, 1832, p. 578.
7. An agent who presented an application under A. S. Feb. 1806, against his client, entitled to the expense of the application, the client having attended at the taxation, and very slight deductions being allowed. Pattison, June 1, 1832, p. 606.
8. A summary application for a remit to the auditor, under A. S. Feb. 1806, is not competent as to factorial claims by a factor against his constituents, though these parties also stand in the relation of agent and client to each other, in several processes. Howison, &c. June 9, 1832, p. 690.
9. Accounts incurred to an attorney in Exchequer, employed by the distillers of Scotland to attend to their interests, in regard to certain legislative measures affecting their trade; held to have arisen ex mandato, and not to fall under the triennial prescription of writers' accounts. Walker, June 19, 1832, p. 672. See Shand, Jan. 31, 1832, p. 269.—*Executor*, 2.—*Husband and Wife*, 1, 2, (2.)—*Obligation*, 1.—*Pactum illicitum*, 1.—*Prescription Triennial*, 2, 3.—*Process*, VI. 9; XV. 1.—*Reparation*, 1.

AGENT AND PRINCIPAL.

1. Executors, merchants in London, appointed by a merchant there, allowed, in accordance with the admitted usage in England, commission at the rate of one half per cent on payments made by them, by consignation, in a process of multiplepoinding, (of which they were raisers,) or otherwise. Bogle and Others, Dec. 6, 1831, p. 104.
2. Circumstances in which the breach of a commission-contract by a principal, held not justified by the embarrassed circumstances of the agent. Edinburgh and Leith Shipping Company, May 22, 1832, p. 557.
3. Circumstances in which the master of a vessel having gratuitously undertaken the charge of a consignment of goods on board, was held responsible for the value, in respect of insufficient execution of the charge. Gillies, June 9, 1832, p. 636.

AGENT AND PRINCIPAL (Continued.)

4. The agent of a foreign merchant having obtained consignments to him from a merchant in this country, on making advances on the goods consigned, and these having been sold, so that the foreign merchant could have remitted the full price, but not having remitted till the exchange fell so low that the proceeds did not cover the agent's advances ; held, that the agent was not entitled to recover the difference from the consigning merchant made. Alex. Brown and Co., June 28, 1832, p. 737.
5. Circumstances held sufficient to certiorate a purchaser that the seller was acting as agent merely, although the name of the principal was not mentioned, so as to exclude a plea of compensation on a debt due to the purchaser by the agent. Fleming, June 29, 1832, p. 739.
6. Stockbrokers, who carried on business on their own account as wine-merchants, on the employment of a third party, purchased stock, which was paid for out of the funds of the employer, but was allowed for some time to remain untransferred in the names of the sellers, under the control of the stockbrokers ; and the brokers caused transfers to be executed by the original sellers, in favour of bankers, in security of the stockbrokers' promissory-note, discounted to them by the bankers ; held, in a question between the bankers and the true owners of the stock, after the bankruptcy of the brokers, that the bankers were entitled to retain the stock in security of their advances. Attwood and Others, July 11, 1832, p. 817.

See *Bills of Exchange*, 6.—*Cautioner*, 3.—*Process*, VII. 15.—*Sale*, 2, 4.

ALIMENT.

1. Circumstances in which the Court dismissed an action of aliment by two children against their mother, and granted warrant to sell the estate of the deceased father. Drysdale, Dec. 3, 1831, p. 98.—See *Bankrupt*.
- 2.—(1.) Pending a declarator of marriage and legitimacy, the children are not to be treated as legitimate in regard to the matter of interim aliment. (2.) Circumstances in which £.15 a-year allowed to each child in such a case. C. and J. Menzies, May 26, 1832, p. 581.
3. The maternal grandfather of a bastard pauper not liable to aliment him. Nicoll, June 19, 1832, p. 670.
4. Question, whether a married daughter and her husband are equally liable with a son, to aliment their widowed mother, neither son nor daughter having derived any estate from their deceased father. Reynoldson, or Laidlaw, July 3, 1832, p. 745.
5. Circumstances in which an aliment of £.20 was awarded on account of an illegitimate child, blind and dumb. Marjoribanks, Nov. 30, 1831, p. 79.

APPEAL.

1. Under a petition for applying a judgment of the House of Lords in part reversing that of this Court, the Court, while they refused a motion for expenses prior to appeal, and subjected the petitioner in the expenses of discussing the motion, found him entitled to the expense of having the judgment applied. Brodie, Dec. 3, 1831, p. 99.
2. Where the House of Lords in part reversed a decree with expenses in favour of a pursuer on the merits, but was silent as to expenses, and remitted the cause "to proceed farther therein as is consistent with this judgment, and as is just"—expenses refused to the defender; but observed that it was competent to award expenses to the defender, if due under the circumstances. Torrance, Jan. 17, 1832, p. 198.

See *Process*, VI. 30.

APPEAL TO CIRCUIT COURT, see *Process*, XVI. 19.**APPRENTICE.** See *Diligence Legal*, 6.**APPROBATE AND REPROBATE.** See *Proof*, II.**ARBITRATION.**

1. A servant or overseer cannot, without special authority, bind his master as a party to a reference. Baird, Dec. 16, 1831, p. 146.
2. Question, Whether competent to require from referees explanation of an

INDEX OF MATTERS.

ARBITRATION (Continued.)

ambiguous award pronounced by them, waved in respect the Court thought there was no ambiguity in the award. Anderson, &c. May 16, 1832, p. 534.

3.—(1.) Two counter actions being judicially referred, and the referee having decided the claims raised under each summons, and having inserted a reservation of other claims,—held, that the Court should interpose its authority to the award, and plea repelled that the reference was not exhausted.

(2.) Circumstances in which the objection was repelled, that a party had not consented to a judicial reference. Edinburgh Oil Gas-Light Company, June 28, 1832, p. 723.

See *Husband and Wife*, 3.

ARRESTMENT.

Where a principal tenant granted a subtack, with a clause of warrandice from fact and deed only, and a general clause as to fulfilment of the mutual obligations; and the principal lease was reduced before the expiry of the subtack, and both tenants removed; and it was found that the subtenant had no claim of damages against the landlord, but that the principal tenant had, which he was bound to pursue, and communicate so much thereof to the subtenant; and the principal tenant pursued the landlord directly in his own name, founding on his obligation to account to the subtenant; and a creditor of the subtenant arrested in the hands of the principal tenant, pending the action of damages, but previous to their recovery; held, in a competition with another arrestment in the principal tenant's hands subsequent to the recovery of damages, that the prior arrestment was competent and preferable, in respect that the subtenant had, previous to the recovery of damages, a vested right in the damages for which the principal tenant was bound to account. Smyth, March 6, 1832, p. 433.

ASSIGNATION, INSTRUMENT OF. See *Proof*, IX. 6.

AUDITOR.

(1.) Circumstances in which a taxation by the auditor of the amount of fees to counsel was disallowed.

(2.) Question raised as to how far the auditor is entitled to cut down the amount of fees. Bell, Jan. 28, 1832, p. 265.

See *Process*, VI.

AUGMENTATION. See *Teinds*.

BALLOT. See *Police Act*. See *Burgh Royal*, 4.

BANKRUPT.

1. A trustee on a sequestrated estate having paid a dividend to a party who had no mandate from the creditor; and the creditor thereafter raised an action in the Inferior Court against the trustee's successor for payment of the dividend; and the trustee raised an action of relief against his predecessor, and the party to whom the dividend had been paid, which was conjoined with the other action; held, that the conjoined actions were not incompetent. How, Nov. 12, 1831, p. 7.

2. Where co-trustees separately, and in different proportions, advanced money to further the affairs of a trust; sold part of the trust property; and took heritable bonds, privatis nominibus, from the purchasers, on which infestment followed; and the estate of one of the trustees was sequestrated; an action by the solvent trustees against the trustee under the sequestration, to have it found that the bonds belonged to the trustees, and that they were entitled to be vested in them for the purpose of clearing off the outstanding obligations of the trust, and equalizing the advances of the trustees, sustained. Cook and Paul, Nov. 29, 1831, p. 75.

3.—(1.) The aliment of an illegitimate child, born before sequestration of the father's estate, is not affected by the statutory discharge, so far as arising after the date of sequestration.

(2.) Circumstances in which an aliment of £ 20 was awarded on account of a child blind and dumb. Marjoribanks, Nov. 30, 1831, p. 79.

4.—(1.) Circumstances in which the Court refused to recal a sequestration.

INDEX OF MATTERS.

BANKRUPT (Continued.)

(2.) Where the Lord Ordinary on the Bills, in vacation, awarded sequestration, and, within the reclaiming days, a 'reclaiming note, or petition,' was presented, craving to have the judgment reviewed, or to have answers ordered, and a recal of sequestration granted; held, that it could only be entertained as a petition for recal.

(3.) The sequestering creditor having made affidavit of a debt as against E. B. and Company, the Lord Ordinary refused to award sequestration, except against E. B. and Co. as a company. Bellis and Thundercliffe, Dec. 3, 1831, p. 96.

5.—(1.) An heritable creditor, who has obtained decree of poinding of the ground prior to sequestration, is entitled to proceed with the same, to the exclusion of the trustee on the sequestered estate.

(2.) Poindings of the ground are not included under the bankrupt act, or other enactments regulating poindings. Bell, Dec. 3, 1831, p. 100.

6.—(1.) Circumstances in which the Court reduced the discharge of a debt, on the statute 1621, c. 18.

(2.) Held by the Lord Ordinary, (1.) that a party who acted as tutor, curator, or trustee, for the illegitimate son of his deceased brother, was a conjunct and confident person; and, (2.) that the discharge of a debt was an alienation in the sense of the statute. Laing, Jan 18, 1832, p. 200.

7. A sequestered bankrupt having been discharged under a condition that he should pay the trustee's expenses, when ascertained by the commissioners,—

(1.) Held, that the certificate of the commissioners was conclusive as to the reasonableness, &c., of the trustee's claims, and prevented any discussion on their merits before the Court;

(2.) Notified that the Court would not in future grant discharges, without at the same time absolutely exonerating the trustee. Megget, &c., Jan 19, 1832, p. 207.

8. Circumstances in which the Court sustained a claim for the balance of a year's wages and board wages by a servant, who was hired chiefly as a gardener, as preferable on the sequestered estate of his master. M'Lean, Jan. 21, 1832, p. 217.

9. A party having lodged an affidavit and claim for a debt of L.1472, at the meeting for electing an interim factor; and being debtor to the bankrupt estate (unless he succeeded in reducing a decree-arbitral under a process which was then in dependence), and not being present at the meeting for electing a trustee, when a resolution was passed disallowing his claim and vote—the Court recalled the resolution. Henry, Jan. 24, 1832, p. 239.

10. A purchase by a creditor at a sale by public roup in the ordinary course of business by his debtor, who becomes bankrupt within sixty days, is not reducible under the act 1696, c. 5. Bruce (Rennie's Trustee), Jan. 27, 1832, p. 250.

11. Sequestration recalled on the ground that the concurring creditor's claim was contingent, being as indorsee of a current bill drawn by the bankrupt upon, and accepted by, a solvent third party. Morrison and Others, Jan. 28, 1832, p. 259.

12. An election of commissioners on a bankrupt estate declared null and void, on the ground of adverse interest. Turçan and Others, Feb. 17, 1832, p. 352.

13. A trustee on a sequestered estate having, without objection by the bankrupt, failed to report the acceptance of a meeting of creditors of an offer of composition, and having also, without objection by the bankrupt, devolved the management of the estate upon the cautioners, a petition and complaint by the bankrupt against the trustee, alleging delay and mismanagement, refused in so far as penal, but sustained to the effect of requiring the trustee to take the statutory steps. Kemp, Feb. 28, 1832, p. 389.

14. A father having maintained his daughter and her child during the dependence of a declarator of marriage, &c., at her instance, of which he advanced

BANKRUPT (Continued.)

the expense; and the daughter having succeeded in the declarator, and obtained decree of aliment against her husband, and assigned her pecuniary interest under the process against her husband to her brother, for behoof of her father, in payment of maintenance and advances; held, in a question with the creditors of the husband, that the assignation was not reducible. Smith and Others, March 6, 1832, p. 431.

15.—(1.) Circumstances in which a ranking by two separate parties on the sequestered estate of the drawer of two bills relating to one and the same debt, was sustained.

(2.) A payment made by one of two obligants posterior to the sequestration of the estates of one, does not preclude the creditor from ranking for his full debt to the effect of receiving full payment. Farquharson, May 15, 1832, p. 526.

16.—(1.) Creditors who have claimed on a sequestrated estate, but not attended meetings, are only responsible for the expenses of proceedings regularly undertaken.

(2.) Irregularities held sufficient to relieve such creditors.

(3.) Trustee must recover the funds of the estate before insisting against creditors personally for expenses incurred by him. Johnstone, June 16, 1832, p. 657.

17. Circumstances not sufficient to render an heritable creditor liable for the general expenses of a sequestration, or for charges incurred through the acts of the trustee for behoof of the personal creditors. Gibson (Wilson and Son's Trustee,) June 26, 1832, p. 711.

18. A London banker, who carried on business there by himself, and in Scotland by agents, stopped payment in London, and after this, but before the failure was known, various sums, chiefly in bank-notes, were delivered to his bank-agents in Scotland, to retire acceptances in London, and on the failure being known, interdicts were obtained from the Sheriff against the agents' away-putting such sums till farther orders of Court; thereafter, a commission of bankruptcy was issued in London, and the assignees obtained a warrant from the Court of Bankruptcy there, to enter all houses of the bankrupt, and 'all places belonging to him where any of his goods are suspected to be,' and to seize 'all money, &c., and all things whatsoever belonging to him,' and this warrant was backed by the Sheriff of Edinburgh; found, in a question between the assignees and the parties holding interdicts, that, as the question raised by the applications for interdict was not strictly or legally a question of vindication of property, but a question of preference on funds legitimately in the possession of the agent and manager for the bankrupt, and which would be most properly discussed and determined under the proceedings in bankruptcy in England, the assignees were entitled to delivery of the bank-notes, reserving to all parties their respective rights and claims of preference to be insisted on in England. Blyth, July 10, 1832, p. 796.

See *Partnership*, 1, 7.—*Process*, X. 1; XVI. 5.—*Proof*, I. 2.—*Title to Pursue*, 2.—*Trust*, 3—7.—Findlay, July 11, 1832, p. 813.

BASTARD. See *Aliment*, 2, 3.—*Husband and Wife*, 4.—*Succession*, 2.

BILL OF EXCEPTIONS. See *Process*, VII.

BILL OF EXCHANGE.

1.—(1.) Circumstances not sufficient to elide the necessity of drawers and indorsers establishing non-liability by writ or oath of the holder.

(2.) Accepting a renewal in security of a former bill retained, no discharge thereof.

(3.) Evidence held sufficient to establish notification of dishonour. Sandeman, &c., Nov. 12, 1831, p. 4.

2. The indorsee of bills past due, having raised action on them within the years of prescription, and no competent mode of proof of fraud or non-merit being offered—the representative of the acceptor found liable for their contents. Young, Nov. 15, 1831, p. 8.

BILL OF EXCHANGE (Continued.)

3. Where a committee of management, named by commissioners under certain statutes, exceeded their statutory powers, and purchased heritage from parties whom the statute compelled to sell on payment or consignation, but who agreed to take bills; and the committee caused the treasurer to subscribe these bills, which bore, that 'the commissioners' promised to pay their contents, and entered upon possession of the heritage; and several members of the committee, with the clerk and treasurer, retired the bills out of their private funds when due (there being a deficiency of funds belonging to the commissioners); held, that they were not entitled to have recourse, as bona fide and onerous assignees of these bills, against the payees, whose property had been taken from them. *Campbell and Others*, Nov. 25, 1831, p. 62.
4. Bill of suspension of a charge on a bill of exchange alleged to be forged, passed without caution, on an inspection by the Court of the bill charged on, along with documents not denied to be genuine. *Ross*, Dec. 2, 1831, p. 95.
5. A party having assigned his share in a Banking Company, by a deed obliging himself to relieve the assignee of losses and calls prior to a certain date, accompanied with a letter of guarantee to the same effect; and the Company having thereafter renewed their contract, and ultimately stopped payment; and the assignee having obtained from the cedent a promissory-note to the amount of a call upon him as a partner under the new contract, and bearing to be for value; but having admitted, on a reference to oath, that it was given solely in relation to the obligation of relief; held entitled to recover under the bill to the extent only to which he could instruct losses covered by that obligation. *Fortune*, Dec. 9, 1831, p. 115.
6. Diligence on a promissory-note sustained at the instance of the payee, for behoof of a cautioner who had paid the amount, although no assignation of the note and diligence thereon had been granted to the cautioner. *M'Kechnie*, Dec. 13, 1831, p. 126.
7. Circumstances in which the rule of law, that non-onerosity on the part of an indorsee to a bill of exchange can only be proved by his writ or oath, held not to apply. *Smith*, Dec. 16, 1831, p. 150.
8. A party, while under advance for a cargo of wood consigned to him, having granted a bill to one of the owners for the accommodation of all the owners, and the bill being indorsed to another owner, who gave a charge upon it; held, that he could not enforce payment as a bona fide onerous holder. *Bonsie (Wallace's Trustees)*, Feb. 18, 1832, p. 355.
9. Where all the three co-obligants in a bill are dead, it is competent, by facts and circumstances, to prove the genuineness of the signature of one of them by mark. *Craigie*, March 23, 1832, p. 510.
10. Circumstances in which an indorsee of a bill, found not to be an onerous bona fide holder. *Hunter*, May 24, 1832, p. 561.
11. Circumstances in which the Court required caution on passing a bill of suspension of a charge on a bill of exchange, although the bill charged on was ex facie vitiated in the date. *M'Kay (Thomas Miller) and Co.*, July 11, 1832, p. 813.
12. Circumstances in which the charger on a bill for L.487, alleging an actual advance by himself of only L.200; bill of suspension passed on caution for L.200. *Mortimer*, June 30, 1832, p. 743.

See *Pactum Illicitum*, 2.—*Young, or Thomson*, July 5, 1832, p. 769.

BONA FIDES.

1. Circumstances in which an eldest son, whose father had been infest under a contract of marriage destining the lands to the 'children' of the marriage, having passed by his father, and served heir of line to his grandfather in the whole lands, and possessed these for several years, both prior and subsequent to his making up titles, was held not to have been in bona fide, so as to entitle him to plead retention of the rents of that portion of the lands belonging to the younger children in satisfaction of alleged ameliorations. *Kibbles, &c.*, Feb. 16, 1832, p. 341.

BONA FIDES (Continued.)

2. Question raised, whether a party, bona fide insuring on the life of another, believed to be sound, and so stated, can recover, in respect of his bona fides, though the life is unsound. *Forbes and Co., March 9, 1832, p. 451.*

BURGH ROYAL.

1. The election of Magistrates and Council of a royal burgh being reduced on the last day before the Christmas recess, the Court, on a written application, made an appointment of interim managers of the burgh, with the usual powers, to subsist till the third sederunt day after the recess. *Philip, Jervis, and Others, Dec. 24, 1831, p. 192.*
2. The election of magistrates and counsellors of a royal burgh having been reduced, the Court named three managers to receive resignations, &c., and generally to exercise the functions of the magistracy and town-council until the corporate rights of the burgh should be restored. *Philip and Others, Jan. 18, 1832, p. 199.*
3. Circumstances held not to amount to actual service by a local militiaman, within the meaning of 42 Geo. III. c. 68, or 54 Geo. III. c. 19, so as to entitle him to exercise the trade of a blacksmith within the burgh of Perth. *Garvie, July 3, 1832, p. 755.*
4. Election of magistrates and counsellors of a burgh royal, by ballot, illegal. *Barclay, &c., June 7, 1817, p. 859.*

See Manse.—Process, XV. 8.

BURGH OF BARONY. See *Poinding*, 1.**CARRIER.**

A smack, belonging to a Shipping Company for the conveyance of goods, having been stranded in the course of her voyage, and the cargo landed in boats, and forwarded to a canal, and thence onward to the destination; held, that the Company were not relieved from responsibility for a package never delivered, and supposed to have been lost, by proving that all due care and attention was taken by the master and crew, there being no proof that it was lost at sea at the time of stranding. *Rae, Feb. 7, 1832, p. 303.*

CASUS AMMISSIONIS. See *Tenor, proving of the.***CAUTIONER.**

1. Circumstances held not sufficient to liberate a cautioner on the plea that the contract guaranteed had been innovated, or his relief injured. *Sorley's Trustees, Feb. 14, 1832, p. 319.*
2. Where a letter of guarantee for £200 was granted, in consideration of giving a party "a credit on your house," and the house afterwards spontaneously arranged with the party as to the details of operating on the credit, and some deviation from the arrangement eventually occurred; held that, as the letter of guarantee had no reference to the subsequent arrangement, the cautioner was not entitled to found on the deviation. *Ellice and Co., Feb. 17, 1832, p. 345.*
- 3.—(1.) Where the Crown appointed three tutors dative, and the Court had found that the tutores subsisted, notwithstanding the death of one of them; held, that the bond of caution granted for the tutors when the gift was obtained, subsisted also, and covered the whole intromissions of the surviving tutors or their factor.
 (2.) Two out of three tutors dative, having subscribed a deed of factory in favour of the third, and he having accepted, found caution, and acted, and one of the two subscribers having died before the end of the tutorship; held, that the factory did not fall by his death; that the cautioner for the factor remained liable, and that he was bound to relieve the cautioner for the tutors as to all the acts and intromissions of the factor. *Stewart, &c., Feb. 29, 1832, p. 392.*
4. Two parties signed a bond to a bank for a tenant's behoof, one of them being his landlord, and missives of lease were at the same time exchanged between the landlord and the tenant, under which a claim for meliorations was allowed at the end of the lease; the landlord's missive referred to the security provided

CAUTIONER (Continued.)

- in his favour in the tenant's missive, and the tenant's missive authorized the landlord to retain any sum which might be paid by him under the bond, against the claim for meliorations, and provided 'that the obligation for these meliorations shall not take place until the landlord is fully relieved' of such sum; held, that on the tenant's failure, the co-cautioner could not compel the landlord to communicate a share of the value of the meliorations made by the tenant. Murray and Hay (Murray's Trustees), June 26, 1832, p. 706.
5. Creditors on a property over which a judicial factor had been appointed, having had his accounts audited without intimation to the cautioner; held not to be thereby precluded from getting up the bond, to put it on record with a view to do diligence against him. Tate and Others, July 6, 1832, p. 772.

See Willis, Dec. 23, 1831, p. 185.

CESSIO BONORUM.

1. Circumstances in the conduct of a debtor warranting refusal of the benefit of cessio in hoc statu. Cameron, Nov. 19, 1831, p. 37.
2. Where the pursuer of a cessio imprisoned for payment of the aliment of a natural child has been alimed by the mother under the Act of Grace, the general rule for refusing the cessio, where such is the nature of the debt, will not be enforced. M'Fee, Jan. 20, 1832, p. 215.
3. Circumstances in which a party obtained the benefit of a cessio, although he failed to instruct the losses alleged. Macdonald, Feb. 4, 1832, p. 299.
4. Circumstances under which the Court refused to direct part of an officer's half-pay to be paid to his creditors on granting a cessio. Bell, March 10, 1832, p. 495.
5. Circumstances in which the Court refused the benefit of the cessio to a party who had been eighteen months in prison. Wilson, June 9, 1832, p. 631.
6. Circumstances in which the benefit of cessio was refused to a party who had been eighteen months in jail. Geikie, June 30, 1832, p. 744.
7. An annual sum of L.28 allowed to creditors out of a pension of L.70, payable to the widow of an officer, and a power of attorney directed to be granted to a party who should draw the full pension, and pay over to the creditors the sum assigned. A. B., July 6, 1832, p. 771.
8. The widow of an officer, having an allowance of L.40 per annum from a compassionate fund, and two of her daughters having an allowance of L.10 each from the same fund, and two grandchildren by a deceased daughter being dependent on her, and a son having been hitherto maintained by her, and her debts being L.230; held entitled to the benefit of the cessio, without assigning any part of her allowance to her creditors. Calder, July 10, 1832, p. 795.
9. Benefit of cessio refused to a party who, a year or two before his bankruptcy, had taken the titles to certain feus, on which he had erected several houses, in name of his son (a minor), and his brother. Mitchell, July 11, 1832, p. 811.

CHURCH.

1. (1.) Lands which belonged to the Dominicans at the Reformation, and were granted by James VI. to the burgh of Montrose for behoof of the hospital, held church lands.
(2.) A glebe being designed out of church lands, no claim of relief lies against the heritors of temporal lands in the parish. Magistrates of Montrose, Jan. 20, 1832, p. 211.
2. One of the ministers of a collegiate church, who was 85 years old, and in bad health, having applied to the Town-Council, the patrons, to nominate an assistant and successor, and the other minister having consented, and a presentation being made, which the church courts sustained—held, that the presentation was not liable to reduction. Luke and Others, Feb. 10, 1832, p. 307.

CHURCHYARD.

- A body of dissenters cannot be prevented, by the kirk-session or heritors of the parish, from establishing a place of sepulture of their own. Kirk-Session of Dunddington, Jan. 17, 1832, p. 196,

INDEX OF MATTERS.

CIRCUIT COURT, APPEAL TO. See *Process*, *XVI.* 13.

CITATION. See *Jurisdiction*, 9.—*Process*, *IV.*—*Proof*, *IX.* 8.

CLAUSE.

1. Circumstances in which the titles to a superiority for conferring a freehold qualification, were held not to carry the dominium utile of a small parcel of the lands, for a long time incorporated with another property, possessed by the grantor under different titles. *Duguid*, Dec. 16, 1831, p. 149.
2. Terms of a trust-deed, by which, trustees being enjoined to convey the residue of a trust-estate to Fergusson, "as his own property," on attaining the age of thirty-five years; but in case he "shall die without heirs of his body lawfully begotten, then the said residue shall pertain" to Shirleys; and the trustees being farther enjoined to make their conveyance to Fergusson, in the form of a deed of strict entail, so as to secure the interests of Shirleys; held, that although Fergusson had lawful children on attaining the age of thirty-five, the trustees were bound to make a conveyance to him, only, in the form of a strict entail. *Forsyth, &c.* (*Phillips' Trustees*), June 14, 1832, p. 646.
3. A testator directed his trustees to denude of the residuary estate, 'with such conditions that the heirs shall not dispose of the same, nor alter the succession thereof, either gratuitously or onerously'; and that, failing certain heirs-male, the same shall solely pertain to the eldest heir-female through the whole course of succession, who, as well as the heir-male, shall bear the name and arms of 'Cuming':—held, that the deed denuding the trustees 'must contain a clause enjoining the heirs to bear the name and arms of Cuming, and that heirs-female shall succeed without division, clauses prohibiting alienation, and alteration of the order of succession, either gratuitously or onerously, all fenced with proper irritant and resolutive clauses applicable thereto, but no other prohibitory clauses.' *Cuming*, July 10, 1832, p. 804.
- 4.—(1.) The valuation in the cess-books of Edinburgh being in Scots money, held that the qualification for persons under the Edinburgh Improvement Act, of the ownership of tenements valued in the cess-books at £.50, being expressed generally, must be understood to mean money Scota, and not money sterling.
 (2.) No disqualification from acting as a juror, that sequestration has been awarded against a party under the bankrupt act, but no trustee appointed; and,
 (3.) A clerical error in the entry in the cess-books of the name of a party, not held to disqualify or invalidate the verdict. *Archibald*, July 11, 1832, p. 815.

See *Entail*.—*Landlord and Tenant*, 9.—*Legacy*.—*Right in Security*, 4.—*Suc-cession*, 1, 2.—*Trust*, 5.

CLERGYMAN. See *Judicial Factor*, 6.

COGNITION AND SALE. See *Attirement*, 1.

COMMONTY.

Where a process of division of commonty under the statute 1695, c. 28, was brought in 1767, and submitted to arbiters, who divided it, except a part of a moss which they decreed to remain common, a second process of division of that part dismissed as incompetent, in respect of the decree-arbitral. *Johnson*, Nov. 29, 1831, p. 70.

Thomson v. Thomson, Feb. 4, 1832, p. 289.

CONFIDENTIAL COMMUNICATION. See *Proof*, *III.*

COMPENSATION. See *Reparation*, 7.—*Agent and Principal*, 5.

CONTRACT.

1. Where it was stipulated in a contract between a London tailor and his Edinburgh agent, that the latter should not exercise the trade of a tailor in Edinburgh for a period of twelve months after the agency should cease; "and for the punctual performance of all the articles, &c., on his part to be performed," the agent bound himself in the sum of £.200, "to be taken and considered as liquidated damages, and not as in terrorem, or by way of penalty;" and the agent openly exercised the trade within the twelvemonth.—*Bill of suspension passed*,

INDEX OF MATTERS.

xi

CONTRACT (Continued.)

- and interdict granted on caution, though the agent insisted that nothing but damages could be claimed. *Curtis and Mandatory*, Nov. 29, 1831, p. 72.
2. Circumstances in which one of several manufacturers, whose mills were driven by a stream requiring to be artificially supplied, and who were associated in reference to certain leases of reservoirs taken by them, was held not bound by new leases of these reservoirs, or for the expense of a new reservoir, to which he was no direct party, although he derived his full share of the benefit arising from the supply thus obtained, and his work required it, and the new contracts were not alleged to be injudiciously made. *Orr*, Dec. 15, 1831, p. 135.
3. Circumstances in which a minute of agreement was allowed to be resiled from. *Fergussons*, Dec. 15, 1831, p. 140.
4. Road-trustees stipulated in a contract with a road-contractor, "that no additional work should be done, with a view of extra payment, without a written order from the trustees or their surveyor;" the contractor made a claim for additional work for which no written order was produced, and offered to prove that the trustees lived near the road, took great interest in its progress, and went frequently amongst it during the time of these operations, without challenging them as unauthorized; held, that the trustees were not liable to pay the sum claimed. *Brown*, June 19, 1832, p. 667.

See *Obligation*.—*Ship*.

See *Gordon, &c. v. Lawrence*, June 19, 1832, p. 643.

CO-OBLIGANT. See *Cautioner*, 3, 4.

CORPORATION. See *Burgh*.

CURATOR BONIS.

1. Circumstances in which the Court appointed a curator bonis, with power to enter and receive vassals, and to grant charters and precepts of clare constat. *Pulteney and Others*, Feb. 21, 1832, p. 362.
- 2.—(1.) Under a petition for the recall of the appointment of a curator bonis, on the allegation that it had been made without personal intimation to the party who was to be put under curatary, that his condition had never rendered it necessary, and that at least he had since convalesced, the Court remitted to the Sheriff 'to enquire concerning the condition of intellect, and state of faculties of the party, and his abilities to manage and conduct his own affairs, and with power to examine medical men and witnesses on the subject, and to report.'
(2.) Parties being at issue, whether the curator had made an adequate allowance out of the rents of the estate, for the support of the family of the party under curatary, the Court remitted to the Sheriff to fix the allowance. *Gordon, &c.*, June 30, 1832, p. 742.

See *Judicial Factor*, 5, 7, 8.

CUSTOM (OF TRADE.) See *Sale*, 7.

DEATH-BED. See *Title to Pursue*, 3.

DELIVERY.

1. Circumstances in which British merchants at Aberdeen having ordered a cargo of timber from merchants at Rotterdam; Rotterdam was held to be the port of delivery, and the measurement and price to be regulated by the practices of it. *Schuurmans and Son*, July 18, 1832, p. 839.

See *Husband and Wife*, 2. (2.)—*Proof*, VI. 2; IX. 7.—*Sale*, 1, 8, 10.

DILIGENCE, LEGAL.

- 1.—(1.) Where a messenger's execution of a charge was ex facie regular, but the schedule of charge was not only at variance with the execution, but inconsistent in itself—question raised, but not decided, whether the charge could be suspended as irregular, without a reduction.
(2.) Circumstances in which notice of the dishonour of a bill payable in England, after the lapse of six days, was held sufficient. *Clarkson*, Nov. 17, 1831, p. 17.

2. Where a process of multiple poinding was raised, after the death of the party who was owner of the fund in medio; and a party was called who was designed

DILIGENCE, LEGAL (Continued.)

- executor nominate, but who had not taken up the succession ; and a final decree of preference was pronounced ; and afterwards a party to the decree took out a confirmation as executor creditor of the deceased ; held, that the latter diligence attached the estate of the deceased, being still in *bonis defuncti*, notwithstanding the decree of preference. Anderson and Others, Nov. 24, 1831,
3. Bill of suspension and liberation passed, on juratory caution, in respect of a blander in the charge. M'Donald, Jan. 24, 1832, p. 285.
 4. One of two copartners of a dissolved company, the affairs of which had not been wound up, having paid a debt under diligence, and taken an assignation thereto, held incompetent for him to proceed with the diligence against his copartner, for his alleged proportion thereof. Caven, May 18, 1832, p. 550.
 5. A party being designed in letters of horning, " Coalmaster, Provanchall, by Glasgow," and it being alleged that he had never been so, but was a "farmer near Shettleston,"—a proof of this allegation allowed. Hunter, May 26, 1832, p. 583.
 6. A master presented to the Sheriff a petition narrating an indenture with his apprentice, his desertion from service, and praying for warrant to apprehend and imprison him till he should find caution to return to his service, and "fulfil his engagement;" warrant was granted accordingly, and the apprentice imprisoned ; held, on a bill of suspension and liberation, that as the warrant must be construed as requiring caution, not merely to return to the service and continue therein, but also to implement all the particular conditions of the indenture, it was illegal, and could not be restricted so as to limit it to the returning to service and continuing therein, and, therefore, warrant of liberation granted. Stewart, June 21, 1832, p. 674.

See *Bill of Exchange*, 6.—*Meditatio Fuga*, 2.—*Process*, XV. 1.

DILIGENCE AGAINST HAVERS. See *Process*, XVI. 36.

DISCHARGE.

Circumstances in which a party found not entitled to avail himself of a condition of nullity of a discharge in a certain event, he not having complied with another relative condition. Osborne, May 18, 1832, p. 546.

DOMICILE. See *Jurisdiction*, 9.

DOVECOT. See *Landlord and Tenant*, 8.

ENTAIL.

1. Circumstances in which a power in an entail of contracting debt to a certain extent, and prohibiting it *quoad ultra*, was held to have been exhausted by the act of a single heir in possession. Innes, Dec. 20, 1831, p. 173.
2. Circumstances in which expenses were refused to a defender in an action of declarator, relative to improvements on an entailed estate, under 10 Geo. III. c. 51, although successful except to a small extent. Torrance, Jan. 17, 1832, p. 193.
3. An heir of entail having reduced a sale of lands, and allowed a tenant possessing under a missive from the purchaser, to continue in his farm for a part of the term, but without homologating the missive, which stipulated for an allowance out of the rents to the tenant for improvements for the first three years—held, in an action for repetition of a term's rent drawn by the purchaser after the period when *bona fides* was determined to have ceased, that he was not entitled to deduction of the allowance made to the tenant for improvements. Gracie, June 8, 1832, p. 628.
4. An estate being disposed to Robert Henry, and the heirs-male of his body ; whom failing, "to Robert Watt, and the heirs-male of his body ; whom failing, to his heirs and assignees whomsoever ;" and infestation being given to Henry, under the condition that he, and the heirs-male of his body, were prohibited from altering the order of succession, &c., or doing any deed "whereby the right of succession of Watt and his foressaids thereto, in the event of the failure of Henry, and the heirs-male of his body, may be prejudiced," &c. ; and the prohibition being fortified by irritant and resolutive clauses ; and Watt having died without heirs-male—held, that Henry was a proprietor in fee.

ENTAIL (Continued.)

simple, in any question with the heirs whatsoever of Watt. Henry, June 13, 1832, p. 644.

5.—(1.) Terms of an ungrammatical irritant clause in a deed of entail, which were held to constitute a valid and sufficient irritant clause; and observed that, ‘to supply an omission in a deed, by conjectures however plausible, or deductions however clear, with regard to the intention of the maker,’ is at variance with the principles of construction applied to entails; but that ‘to restore the syntax of the deed, defective in consequence of a clerical error, by means of a reference to the context itself,’ is consistent with principle and authority.

(2.) Question whether the want of a sufficient irritant clause in an entail, under which an heir who was not *aliо quи successus* has made up his titles, leaves such heir at liberty to dispose the entailed estate gratuitously, or to apply the price arising from the sale of it, without being subject to any claim at the instance of the substitute heirs. Sharpe, July 3, 1832, p. 747.

See *Clause*, 2, 3.—*Service*, 2.

EXCLUSIVE PRIVILEGE. See *Burgh*, 3.—*Churchyard*.**EXECUTOR.**

1. Executors, merchants in London, appointed by a merchant there, allowed, in accordance with the admitted usage in England, commission at the rate of one half per cent on payments made by them, by consignation, in a process of multiplepoinding, (of which they were raisers,) or otherwise. Bogle and Others, Dec. 6, 1831, p. 104.

2.—(1.) The executor confirmed, or the agent employed by him, is the only person entitled to uplift the funds, and to the possession of the documents of the deceased.

(2.) Circumstances in which part of the deceased's estate having been invested by an agent in bonds, conceived in terms of the settlement in favour of the widow in liferent, and the executor and his sisters in fee, the agent was justified in refusing to deliver these bonds to the executor, until the consent of the other parties was obtained. Barnet, Dec. 14, 1831, p. 128.

EXPENSES. See *Process*, VI.**FACTOR.**

Circumstances in which a transaction entered into by a factor and commissioner for trustees, was held to be beyond his powers. Bridges (*Manners's Trustee*), Nov. 22, 1831, p. 43.

See *Cautioner*, 3.—*Judicial Factor*.

— *LOCO TUTORIS.* See *Judicial Factor*.

FEE AND LIFERENT.

1. A testator having bequeathed certain provisions to his “daughters in liferent, for their liferent use allenarily, and to their children in fee,” adding the condition, “and I hereby declare, that the provisions above mentioned shall be in full to each of my daughters, their husbands' children or assignees, of all that they could ask or claim in and through my decease, legally and conventionally, or any other manner of way;” held, that an unconditional fee was thereby constituted in favour of the grandchildren, which was not defeasible by the daughter's repudiating the provision, and betaking herself to her legitim. Fisher and Others, Nov. 24, 1831, p. 55.

2. Bill of suspension and liberation passed, as to whether a widow, infest on a disposition by her husband to himself and her in conjunct fee and liferent, and a third party in fee, be entitled in a question with the fiar to the custody of the title-deeds. Bowes, or Wallace, Dec. 17, 1831, p. 164.

See *Possessory Judgment*, 1.—*Sale*, 4, (2.)

FOREIGN.

A deed executed by a party domiciled in England, disponing, according to the law of Scotland, a landed estate in Scotland, burdened with a sum of money in favour of parties then resident in England, must be construed according to the law of Scotland. Blackett and Others, &c. May 29, 1832, p. 590.

See *Bankrupt*, 18. *Trust*, 9.

FOREIGNER. See *Meditatio Fuga*, 1.

FRAUD.

Under an issue, whether a purchaser of bank stock had been induced to make the purchase by false and fraudulent representation, or fraudulent concealment on the part of the seller, "as to the credit and solvency of the bank," not necessary to prove actual insolvency, as at the date of the sale. Keith, March 24, 1832, p. 514.

FREEHOLD QUALIFICATION.

Circumstances where it was held,

(1.) That it was competent to found upon the combined evidence of two retours, to instruct a forty-shilling land of old extent.

(2.) That the retours proved the extent, notwithstanding an error calculi in one of the retours, which created a slight discrepancy betwixt the general valent clause, and the summation of the several parcels contained in the descriptive clause. Kincaid, March 9, 1832, p. 473.

GAMBLING DEBT. See *Pactum Illicitum*, 2.

GLEBE.

A glebe being designed out of church lands, no claim of relief lies against the heirs or temporal lands in the parish. Magistrates of Montrose, Jan. 20, 1832, p. 211.

HEIR AND EXECUTOR.

Circumstances in which held, that a sum of money had been specifically appropriated by a party deceased to the payment of a debt forming a real burden on a landed estate, so as to relieve the parties to whom he had destined the property from the burden in a question with his executor. Yates's Trustees, &c., May 24, 1832, p. 565.

See *Succession*, 1.

HERITABLE AND MOVEABLE.

Trustees, under a marriage-contract, empowered to lay out a sum of money provided to the wife, on security either real or personal, having lent it on an heritable bond, taken, not in terms of the destination in the contract, but to the husband in trust for the uses in the contract, and it not appearing that the wife had specially sanctioned or known of this investment; held, that it did not so alter the character of the fund in regard to the matter of succession, as to preclude her bequeathing it by will. Berford, June 1, 1832, p. 609.

2. The proprietor of lands really burdened with an annuity having conveyed them to a trustee to be sold, with a declaration, that out of the price to be obtained, a certain sum should be set aside, and made a real burden on the lands to answer the annuity, and having died after the lands were sold, but before any conveyance was executed in favour of the purchaser; held, in a question with the widow of the trustee, that this sum was heritable, and not subject to the *jus relictæ*. General Baillie's Trustees, June 2, 1832, p. 617.

HOMOLOGATION.

Circumstances in which the objection was repelled, that a party had not consented to a judicial reference. Edinburgh Oil Gas-Light Company, June 28, 1832, p. 723.

See *Contract*, 4.

HUSBAND AND WIFE.

1. Question raised, whether in an action of divorce, at a husband's instance, the account incurred by the wife to her law-agent, should be taxed against the husband, as between agent and client? Taylor, Nov. 17, 1831, p. 18.

2.—(1.) Where two spouses mutually disposed their estate to the survivor of them, 'reserving power to alter, at any time of our life, as either of us shall think fit'; and afterwards, when the husband was on his death-bed, the wife executed a deed conveying a portion of the estate, under burden of her liferent, to her husband's relations, which deed proceeded on the narrative that it was from a desire to obey and fulfil the expressed wish of her husband, —held,

(1.) That, after her husband's death, she could revoke the deed, because, if

HUSBAND AND WIFE (Continued.)

inter vivos, it was null without the husband's concurrence as a party, and, if testamentary, it was revocable *sua natura*.

(2) That although the deed was delivered to the agent for the husband, yet as he was also agent for the wife, it was not a delivered instrument as against her. Brownlee and Others, Nov. 22, 1831, p. 39.

3. Where a husband and wife entered into a deed of separation and relative submission, and the husband, pending the submission, intimated his revocation, and the wife insisted upon the separation, and the arbiters pronounced decree for aliment, &c. *quantum valeat*; held, in a reduction of the decree, and an action of adherence, that a separation *bona gratia* is not revocable if proceeding upon grounds sufficient to have sustained a judicial separation; and that the wife is entitled, in support of such a plea, to lead a proof, embracing the whole period of her married life, notwithstanding intervals of apparent reconciliation. Shand, Feb. 28, 1832, p. 384.
4. Where it was proved that a woman had had illicit intercourse with A. in summer 1823; was pregnant prior to the 18th September of that year; and was married to B. on the 28th, and could not have had connexion with B. earlier than the 18th; held that A. was liable in aliment to the child, reserving the question of its legitimacy. Jobson, May 31, 1832, p. 594.

- 5.—(1.) The defence of *remissio injuria* is not properly prejudicial, in an action of divorce on the head of adultery, and in general the pursuer is entitled to prove his libel, before any proof is led as to the *remissio*.

(2.) Circumstances in which a proof of *remissio* refused before allowing a proof of the libel. Taylor, June 22, 1832, p. 680.

See *Meditatio Fuga*, 1, (3).—See *Title to Pursue*, 7.

HYPOTHEC, LANDLORD'S. See *Sale*, 8.

IMPLIED ASSIGNATION.

A widow infest in an annuity out of lands, having consented to heritable bonds granted by her eldest son, which, to a certain extent, were ineffectual in respect of part of the property truly belonging to the younger children; held, that her consent was not equivalent to an implied assignation, and that the bonds being ineffectual, the creditors could not compete with her for the annuity so far as payable out of the younger children's portion. Kibbles, &c. Feb. 16, 1832, p. 341.

IMPLIED RIGHT. See *Property*, 2.

IMPRISONMENT, WRONGOUS. See *Diligence Legal*, 6.—*Process*, VII. 8.—*Reparation*, 6.

INDEFINITE PAYMENT.

See Hotchkis and Meiklejohn, Feb. 3, 1832, p. 289.

INHIBITION.

RECAL OF.

- 1.—(1.) It is competent for parties executing an inhibition to apply to have it recalled, and scored on the record; and,
-
- (2.) It is no sufficient objection to this being granted, that certain of the partners of a company, the pursuers of the action, on the dependence of which it had been used, were dead, and their representatives not stated. Caledonian Iron Company, Dec. 15, 1831, p. 141.
2. An inhibition against a trustee on a sequestrated estate, in virtue of an ordinary action against him and the bankrupt for a debt prior to the sequestration, is incompetent. But it being alleged that the bankrupt held an heritable bond without value, and that the trustee had taken infestment, the Court interdicted the trustee from conveying it away till the issue of an action of reduction of the bond. Greig, Feb. 28, 1832, p. 382.
3. Circumstances in which the Court recalled an inhibition and arrestment, executed on the dependence of an action by certain parishioners and residents in the parish of Dollar, against the trustees of the Dollar Institution. Mylne and Others, Mar. 6, 1832, p. 430.

See Fisher, Dec. 24, 1831, p. 192. Munro, July 11, 1832, 811.

INSURANCE, LIFE.

(1.) Where payment of a policy on a life was resisted on the ground that a dangerous habit of opium-eating was not disclosed ; and the Judge directed the jury to consider whether a question regarding habits remained unanswered, and if so, whether this did not imply a waiver, or abandonment of the enquiry into the habits ; held, that he should have told the Jury, that such implied abandonment or waiver did not relieve the assured from making a disclosure of every fact material to be known.

(2.) Question raised, whether a party, bona fide insuring on the life of another, believed to be sound, and so stated, can recover in respect of his bona fides, although the life is unsound. *Forbes and Co.*, Mar. 9, 1832, p. 451.

INTERDICT.

1. Where three brothers conveyed their estates, with powers of sale, to trustees, to realize funds and pay a debt of L.634, and the sale of the estates of two brothers produced above L.1300 of gross proceeds ; and the trustees, alleging the free proceeds of such sales to be only L.283, advertised the heritable estate of the third brother for sale, the Court passed a bill of suspension and interdict at his instance, in respect the accounts exhibited by the trustees required farther explanation as to the true amount of free proceeds arising from the sales. *Pender*, Nov. 17, 1831, p. 19.

2. Circumstances in which an interdict against the alleged violation of a contract refused. *Learmonth*, July 11, 1832, p. 810.

See *Contract*, 1.—*Nuisance*.

INTEREST OF MONEY.

In equalizing provisions to children, in terms of the father's obligation, where one of them had, during the life of the father, received payment of interest, the Court allowed to the other simple interest for the same period, but refused interest on interest. *M'Queen, &c.*, March 9, 1832, p. 470.

See *Lawrie*, July 5, 1832, p. 771.

INTEREST, IN ISSUE OF CAUSE. See *Proof*, VI. 3 (2.)—IX. 5, 11, (2.)**ISSUE.** See *Process*, VII.**JUDICIAL FACTOR.**

1. Circumstances in which the Court granted warrant to a factor, loco tutoris, to subset a farm held in lease by the pupil, and to grant such sub-lease or other deed as might be deemed necessary to vest the right in the sub-tenant to the occupancy of the farm, during the remainder of the lease. *Slade or Hammond*, Dec. 20, 1831, p. 167.

2. Circumstances in which the Court appointed a judicial factor to wind up a company concern, though the principal and last surviving partner (who was now dead) had appointed trustees, who accepted and acted. *Dixon and Others*, Dec. 22, 1831, p. 178.

3. Circumstances in which the Court granted authority to the judicial factor on a sequestered land estate, to let, by public roup or private bargain, certain grazings for a period of three years. *Morrison*, Jan. 19, 1832, p. 204.

4.—(1.) Circumstances in which the Court appointed a new judicial factor, although the previous factor, who held an interim appointment, contended that no cause was shown for it :

(2.) Observed, that an undischarged bankrupt cannot be named a judicial factor, at least if any party, having interest, object. *Dixon and Others*, Jan. 20, 1832, p. 209.

5. Circumstances in which the Court granted warrant to the curator bonis of a fatuous person, aged eighty years, to let a farm for a period not exceeding seven years, by public roup, or private bargain, on sealed offers, the tenant finding sufficient security. *Drummond*, Jan. 21, 1832, p. 216.

6. The Court declined to appoint a clergyman to be factor loco tutoris. *Whitson, &c.*, Jan. 31, 1832, p. 268.

See *Buchanan or Forbes*, Feb. 4, 1832, p. 309.

7. Circumstances in which the Court refused an application, at the instance of a husband and wife, for a judicial factor, and a curator bonis, with special powers

JUDICIAL FACTOR (Continued.)

to bring an action for denuding against trustees. M'Lellan and Husband, Feb. 25, 1832, p. 375.

8. Circumstances in which power granted to the curator bonis of a party insane, to borrow money on a heritable subject, and to grant a lease of it for twelve years. Borthwick, Petitioner, June 7, 1832, p. 620.

See *Ranking and Sale*, 3.—*Cautioner*, 5.

JUS QUÆSITUM TERTIO. See *Obligation*, 2.

JUS RELICTÆ. See *Heritable and Moveable*, 2.

JUSTICE OF THE PEACE. See *Process*, XVI. 20.

JURISDICTION.

1. A trustee on a sequestrated estate having paid a dividend to a party who had no mandate from the creditor; and the creditor thereafter raised an action in the Inferior Court against the trustee's successor for payment of the dividend; and the trustee raised an action of relief against his predecessor, and the party to whom the dividend had been paid, which was conjoined with the other action; held, that the conjoined actions were not incompetent. How, Nov. 12, 1831, p. 7.

2.—(1.) Inferior Admiralty jurisdictions, independent of the Great Admiral, not cut down by the act 1681.

(2.) Question raised, how far the Magistrates of Edinburgh, having an Admiralty jurisdiction with reference to the port of Leith, can exercise it in their own persons, and sitting in the city of Edinburgh. Magistrates of Edinburgh, Nov. 18, 1831, p. 25.

3.—(1.) Opinion given by a majority of the whole Court, "that a party being incarcerated, in virtue of Exchequer process, for non-payment of a duty or tax, the Court of Session has no jurisdiction in regard to any question touching either the justice or amount of such duty or tax, the right of the party incarcerated to aliment during his confinement, or the mode that may be competent to him for effecting his liberation;" and,

(2.) Question whether the Act of Grace is applicable to persons incarcerated for duties or debts due to the Crown. Pool, Dec. 17, 1831, p. 152.

4. Penalties being imposed by a road act for evasion of tolls on conviction "before one or more Justices of the Peace," with leave to parties considering themselves aggrieved to apply by summary complaint to the Court of Session for redress—Held,

(1.) That an advocation was a competent form of complaint;

(2.) That the Court had no jurisdiction to convict and find offenders liable in the penalties; and,

(3.) That there must be a conviction by the Justices. Mitchell, Jan. 21, 1832, p. 230.

5. The jurisdiction of the Admiral-depute of Leith, sustained over Edinburgh and Canongate. M'Intyre, March 2, 1832, p. 414.

6. Circumstances in which an action, which set forth that a lease, although in name of the pursuers, was held by them for beboof of them and the defenders, and concluding for a pro rata relief from its obligations, was competent in the Sheriff Court. Murdoch, &c., March 8, 1832, p. 445.

7. The Magistrates of a burgh are not entitled to exercise jurisdiction in a question between the treasurer and other parties, relative to an alleged violation of the rights of the burgh, and where the question resolves into the legal construction of the deeds conferring these rights, and possession of these rights by use and wont is not specifically alleged. Guthrie, May 12, 1832, p. 515.

8. Held by the Lord Ordinary, after advising with the Inner House, that where a libel concludes for a sum above L.25, the action is competent in the Court of Session, though the defender alleges that he had previously offered payment of the whole, except L.4, 16s. 8d. Young and Co. June 13, 1832, p. 643.

9.—(1.) Circumstances which held not sufficient to maintain a previously subsisting domicile to the effect of giving jurisdiction.

JURISDICTION (Continued.)

(2.) A decree by the Sheriff under the small debt act, liable to review when the defender has not been legally subject to his jurisdiction. Scott and Curators, July 3, 1832, p. 760.
See *Poinding*, 1.—*Poor*.—*Process*, XVI. 33.—*Bankrupt*, 18.

JURY TRIAL. See *Process*, VII.

KING.

Incompetent to award expenses against the King, even as to questions regarding the hereditary estates of the Crown. King's Advocate v. Magistrates of Kirkwall, Feb. 14, 1832, p. 328.

See *Succession*, 2.

LANDLORD AND TENANT.

1. The principal tenant in a lease under reduction, containing a power to sublet, and clause of absolute warrandice, having sublet the farm for a part of the period still to run, with an obligation to communicate to the sub-tenant, if ejected before the expiry of the sub-lease, a proportion of the damages to be recovered under the warrandice "effeirng to his possession,"—Held,

(1.) That the representatives of the grantor of the lease were liable to pay to the principal tenant such damage as the sub-tenant could instruct he had sustained by premature removal; and,

(2.) That the sub-tenant was thereupon entitled to recover the amount from the principal tenant. Dick, Nov. 17, 1831, p. 19.

2.—(1.) A consent to remove without warning, when given within the time when warning might legally have been executed, is effectual against the tenant.

(2.) Such consent does not require to be written on stamped paper. McLaren, Dec. 17, 1831, p. 163.

3. Circumstances in which the assignee to a lease was found not liable for arrears of rent during a period when he had acquired right, but before he had taken possession. Drysdale and Others, Jan. 17, 1832, p. 198.

4.—(1.) Circumstances in which the tenant of a stone quarry was held not entitled to plead retention of rent to compensate an illiquid claim of damage.

(2.) The amount of rent made up from the tenant's books in a certain proportion to the gross output, in terms of the lease, and not impugned, held to be a liquid claim of rent. Johnston, junior, Jan. 28, 1832, p. 260.

5. A party who is not the settler of the tack, and not infest, is not entitled to decree in an action of removing on the Act of Sederunt 1756, nor is a decree validated by his being infest subsequently thereto. Scott, Feb. 2, 1832, p. 284.

6. Question whether a party had violated the terms of a lease. Young v. Cunningham, March 15, 1832, p. 502.

7. A stipulation that a tenant should, in case of deviating from a prescribed system of rotation, pay an additional rent of £10 yearly, sustained. Lawson, May 16, 1832, p. 591.

8. Held, in passing a bill of suspension and interdict, that it is not relevant to justify a tenant in shooting his landlord's pigeons, to allege that they are destructive to his farm. Easton v. Longlands, May 18, 1832, p. 542.

9. Where parties had entered into missives of lease, in which the rent was fixed at a half boll of wheat, three firlets of barley, and six pecks of oats, for each Scotch acre, payable by the fairs' prices, but the proportions not expressed which these several measures bore to the imperial standard measure; and the landlord, under whose direction the missive of lease had been framed, raised an action, after the tenant had entered into possession, to reduce the lease, libelling upon act 5 George IV. c. 74, for uniformity of weights and measures, Held,

(1.) That the statute was not applicable to the case;

(2.) Opinion expressed that, at any rate, the landlord having drawn the missive himself, was barred, personali exceptione, from pleading the statutory objection. Henry v. M'Ewan, May 25, 1832, p. 572.

LANDLORD AND TENANT (Continued).

10. In estimating violent profits payable to an heir of entail, by a tenant whose lease had been set aside, no deduction can be allowed for the interest of money expended by the tenant in ameliorations on the property. Duke of Gordon's Trustees v. Innes, June 2, 1832, p. 616.
11. Where lands partly entailed and partly unentailed, but belonging to the same proprietor, were let as one farm for a rent, (the proportions of which referring to the entailed and unentailed parts, were specially set forth;) and the proprietor's right to the different parts was attached by separate creditors, and separate sequestrations as to each part used by the creditors, with concurrence of the landlord, and the whole effects on the farm were included in the inventories in each sequestration; held, in a question with a poinding creditor, that although the whole effects sequestered had been at the execution of the sequestration situated on the entailed portion of the farm, they were effectually attached, not merely for the rent of that portion, but for the rent of the whole farm. Meek v. Smith, &c. June 15, 1832, p. 662.
12. A landlord having in a lease reserved right to work coal, &c., on payment of damages occasioned by his operations—held, that the tenant was not entitled to damage for injury by unauthorized trespasses by the colliers. Young v. Colt's Trustees, June 16, 1832, p. 666.
13. Question, whether the pasture in two belts of planting was included in a lease. M'Leod v. Dudgeon, June 21, 1832, p. 674.

See *Cautioner*, 4.—*Process*, XVI. 17.—*Sale*, 8.—*Prescription Quinquennial*.

LEGACY.

A party having conveyed his whole property, mortis causa, to trustees, with instructions to sell part of his lands specially enumerated, for payment of debts and legacies, and thereafter "to employ the surplus, if any shall be, of my personal estate, and the produce of my land estate, in the purchase of lands," to be entailed in favour of the heirs of his body, &c., and the fund set apart proving insufficient to cover the legacies—found, that the provision of tailzie was not of the nature of a special bequest to the effect of disappointing the legatees, but was merely residuary. Hamilton, Feb. 14, 1832, p. 380.

See *Testament*.

LOCUS PENITENTIAE. See *Contract*, 3.

LORD LYON. See *Officer, Public*.

LYON-DEPUTE. See *Officer, Public*.

MANDATORY.

Trust-deed for creditors as to heritage alone, not a sufficient mandate to carry on an action for payment of an ordinary personal debt raised by the trustee who had gone abroad. M'Neill, July 10, 1832, p. 806.

See *Agent and Client*, 2.—*Title to pursue*, 4, (2.)

MANSE.

(1.) In a parish partly landward, and partly burgh, the Magistrates, as representing the community of the burgh, are primarily liable, along with the heirs of the proper landward district, in the expense of maintaining a manse, and the burden cannot be laid directly on the individual proprietors within the burgh territory.

(2.) Right of the Magistrates to try the question of relief against such proprietors, or the inhabitants of the burgh, reserved. Lockhart and Others, Jan. 24, 1832, p. 248.

MASTER-AND SERVANT.

1. Circumstances in which the Court sustained a claim for the balance of a year's wages and board wages by a servant, who was hired chiefly as a gardener, as preferable on the sequestered estate of his master. M'Lean, Jan. 21, 1832, p. 217.
2. Where a vessel arrived at a port in a leaky condition, and the master entered into a written agreement with three seamen to assist in working her to another port for a stipulated sum, to be paid on arrival; held, that although they subscribed the ship's articles, regulating the conduct of the seamen, and bearing that wages were not to be payable till twenty days after arrival, they were

INDEX OF MATTERS.

MASTER AND SERVANT (Continued.)

entitled, on the vessel arriving safely, to immediate payment of the stipulated sum; and observed, that they were also entitled to wages and board wages till payment was tendered. Henderson, March 9, 1832, p. 467.

See *Diligence Legal*, 6.—*Proof*, IX. 2.—*Reparation*, 8.

MEDITATIO FUGÆ.

1. Where a domiciled Englishwoman was brought to Scotland under a criminal warrant to stand trial for a robbery, and was acquitted; but immediately apprehended on a meditatione fugæ warrant at the instance of the party whose money had been stolen; and a bill of suspension and liberation was passed, on an alleged irregularity in the warrant, which was passed from, and a second warrant obtained, under which she was incarcerated,—Held,

(1.) That she was not protected from apprehension, as being a foreigner about to return to her own country, nor as having been brought to Scotland under a criminal warrant.

(2.) That the creditor was not barred from executing the second warrant, in respect that her being then in Scotland had been occasioned by the previous alleged irregular proceedings.

(3.) That she was not protected by an allegation of her being a married woman; and,

(4.) That the oath of the creditor was not objectionable on the grounds of his not setting forth his belief of her participation in the robbery, to be founded on his own personal knowledge. Crowder or Turnley, Nov. 18, 1831, p. 29.

2. Debtors under a bill past due having taken refuge in the Sanctuary, and a warrant being obtained against them, as in meditatione fugæ, “to incarcerate them within the tolbooth of Holyroodhouse, until they find caution de judicio sisti, in any action to be brought,” &c., “or to abide the diligence on the bill, any time within six months from this date”—held a regular warrant. M’Ra and Others, Feb. 7, 1832, p. 300.

3. Held, in passing a bill of suspension, that an oath of verity by a party applying for a meditatione fugæ warrant, is an essential requisite. King, May 18, 1832, p. 544.

MILITIA, LOCAL. See *Burgh*, 3.

MULTIPLEPOINDING. See *Process*, VIII.

NAUTÆ CAUPONES, &c. See *Carrier*.

NOTARY PUBLIC.

Question whether a law-agent, who, as seller, disposed land, and was employed by the dispees to act as notary to the instrument, was entitled to do so. Sim, Dec. 2, 1831, p. 85.

See *Proof*, IX. 6.

NUISANCE.

Circumstances in which a remit was made to men of science, with the aid of practical men, to judge by experiment whether the operations of certain public works under interdict were a nuisance or not. Trotter and Others v. Farnie, March 3, 1832, p. 423.

OATH, REFERENCE TO. See *Proof*, IV.—*Process*, XVI. 11.

OBLIGATION.

A party having lent money, and received the title-deeds of the borrower, under an assignation in an heritable bond; and the agent of the borrower, for the purpose of effecting a new loan, subsequently got the titles, on an obligation to return them on demand; held, that the agent was not relieved of his obligation to return the titles by the bond being paid up, but that the party (who, as a writer, made a claim of hypothec for business done by him) was entitled to have the titles restored to him without discussing the validity of that claim. Crawfurd, Nov. 15, 1831, p. 11.

2. Two parties feued adjoining building stances under articles of roup, by which each feuar was bound to bear half the expense of the mutual gables; one of them erected a house on his stance, and the other thereafter gave up his feu, which the superior accepted; held that he was not thereby relieved from the

OBLIGATION (Continued.)

obligation, in a question with the adjoining feuar, of paying one-half of the gable which had been erected by him. Thorburn, July 11, 1832, 822.

ONUS PROBANDI. See *Proof*, IX. 3.

OFFICER, PUBLIC.

Circumstances in which a claim by an interim Lyon-Depute against the Lord Lyon for extra duties, was remitted to a jury, and a verdict returned, finding a sum due to the Depute. Clyne, July 14, 1832, p. 836.

See *Burgh Royal*, 1, 2.—*Police Act*.—*Process*, XV. 3, 6.—*Reparation*, 6.

PACTUM ILLICITUM.

1. An agreement, by which a country agent undertook to employ an agent in Edinburgh in the business of his clients, and make advances to him, and stipulated for a share of the profits, and that the agreement should be kept secret ; held illegal, and not actionable. A. B. v. C. D., May 12, 1832, p. 523.

(2.) Plea of vitium reale sustained against the bona fide onerous indorsee to a bill granted for a gambling debt, though he was ignorant of the circumstances under which it was granted. Hamilton, May 18, 1832, p. 549.

PARENT AND CHILD.

1. A party, employed by the concealed parent of a child, having come under an obligation to pay aliment to a nurse, with whom the child was placed ; and, after paying it up to a certain date, having demanded delivery of the child from the nurse, who refused to give it up to any one without authority from the mother ; held, in an action founded on the obligation for the subsequent aliment, that the party was not liable. Forbes, March 2, 1832, p. 410.

2. Pending a declarator of marriage and legitimacy, the children are not to be treated as legitimate, in regard to the matter of interim aliment. C. and J. Menzies, May 26, 1832, p. 581.

3. The maternal grandfather of a bastard pauper, not liable to aliment him. Nicoll, June 19, 1832, p. 670.

See *Aliment*.—*Bankrupt*, 3.—*Husband and Wife*, 4.—*Trust*, 13.

PARISH. See *Manse*.

PARTNERSHIP.

1. Circumstances in which a creditor of a company was found entitled to rank for his debt upon the bankrupt estate of that company, trading under a new denomination, and with an additional partner. Ridgway, &c. Dec. 6, 1831, p. 105.

2. Liability as partners of a company held to be constituted rebus ipsis et factis, although the parties had signed no contract. Dundee Railway Co., &c. Jan. 31, 1832, p. 269.

3. An action incompetent at the instance of a company firm, without libelling the individual partners. Aitchison and Co., Feb. 4, 1832, p. 296.

4. A company, consisting of two individuals, having assumed four partners, without any stipulation or entries in the books to instruct a distinction betwixt the old and new firms, or to separate their claims and liabilities ; held, in a question of accounting among the partners, that the four assumed partners were not entitled, under the circumstances, to charge the two original partners with the whole loss arising out of a transaction which commenced with the original firm. Mercer, Feb. 29, 1832, p. 405.

5. One of two copartners of a dissolved company, the affairs of which had not been wound up, having paid a debt under diligence, and taken an assignation thereto, held incompetent for him to proceed with the diligence against the copartner, for his alleged proportion thereof. Caven, May 18, 1832, p. 550.

6. It being provided in a contract of copartnery, that all the agents should be obliged to find security, and certain of the partners having been employed as agents under a special agreement, which contained no stipulation to that effect ; held, that these agents were not bound to find security. Edinburgh and Leith Shipping Company, May 22, 1832, p. 557.

7. Circumstances in which the Court reduced a trust-conveyance of the estates of a Scottish Company, granted in 1812, for behoof of the creditors, and at

INDEX OF MATTERS.

PARTNERSHIP (Continued.)

their desire, by one of three partners. Douglas, &c., (Stein's Assignees,) June 15, 1832, p. 647.

8. One of the partners of a company, who in the contract was appointed manager, with a certain commission for his trouble, having been employed by the others, but without any special agreement as to remuneration, to wind up the affairs of the concern on the expiry of the partnership—remuneration allowed him for his trouble by a commission, only at the same rate as was stipulated for in the contract during the subsistence of the company. Berry, July 7, 1832, p. 792.

9. Circumstances in which the jury found, that a pursuer was not a partner with the defender. Mack, July 19, 1832, p. 850.

See *Bankrupt*, 4, (3).—*Judicial Factor*, 2.—*Pactum illicitum*, 1.—*Process*, IV. 1.

See *Balerno Distillery Company v. Brown*, Dec. 22, 1831, p. 177.

PENALTY. See *Contract*, 1.—*Landlord and Tenant*, 7.

PERSONAL OBJECTION. See *Landlord and Tenant*, 9, (2).—*Meditatio Fugae*, 1, (2.)

POINDING.

1. Magistrates of a burgh or barony, independent of the baron, are entitled to act under the bankrupt statute as 'Judges Ordinary' in regard to the execution of poindings proceeding on letters of horning. Scotta, Nov. 16, 1831, p. 16.

2. Where a party craved interdict of a sale under a poinding, and produced written evidence of his having purchased the effects; and the poinder offered to prove that the purchase was fictitious, that the effects had never been out of the possession of his debtor, and remained his property; held competent to prove this by parole, without a reduction of the documents. Cantach or McDonald, March 10, 1832, p. 477.

See *Landlord and Tenant*, 11.

— OF THE GROUND. See *Right in Security*, 2.

POLICE ACT.

At a meeting of statutory Police Commissioners, held for the purpose of filling up the vacant office of Superintendent of Police, a candidate having been preferred by a majority of votes taken by ballot, with the addition of the casting vote of the chairman—Circumstances in which the Court considered this mode of voting illegal. Watson, March 10, 1832, p. 481.

See *Barclay*, &c. June 17, 1817, p. 859.

POLICE OFFICER. See *Reparation*, 9.

POOR.

Action of recourse by a third party, who was maintaining a pauper infant, against the alleged parish of its settlement, competent *prima instantia* before the ordinary Civil Courts. Matheson, Dec. 22, 1831, p. 188.

See Nicoll, June 10, 1832, p. 670.

POOR'S ROLL.

1. An unmarried labouring man, with an annuity of £.52 in addition to the profits of his labour, not entitled to the benefit of the poor's roll. Leslie, Feb. 10, 1832, p. 315.

2. Circumstances in which the Court granted warrant to cite two elders who had declined granting any certificate to a party applying for the benefit of the poor's roll, to give evidence at the bar as to their knowledge of the applicant's condition, &c. Craigie, Feb. 10, 1832, p. 315.

3. Circumstances in which one of the agents for the poor was found entitled to charge only for the business performed by him: and that another agent who was not authorized to act for the poor, but was the actual agent, was entitled to all the other charges. Barr, March 1, 1832, p. 408.

4. A gentleman's servant, whose income was stated to be £.24 per annum of wages, out of which he had to support a child, found entitled to the benefit of the poor's roll, chiefly on the ground of the precarious nature of his income. A.B., March 3, 1832, p. 425.

Poor's ROLL (Continued.)

5. Circumstances in which the Court remitted a cause to the counsel for the poor, although the certificate signed by the clergyman was rested solely on the statement of the applicant, and the applicant was not personally known to the clergyman. A.B. Petitioner, June 21, 1832, p. 673.

See *Garvie*, July 3, 1832, p. 758, foot-note.

POSSESSION.

1. Effect given to the rule, *in casu melior est conditio possidentis*. Mitchell, June 27, 1832, p. 716.
2. Where a party had been in peaceful possession of garden ground from Martinmas 1827, and had dressed the fruit-trees, and planted and cultivated the potatoes, and a charge was given to him on a judgment of an inferior Court, as guilty of a spulzie in removing fruit and potatoes from the ground, in October 1828—letters suspended simpliciter, and charger found liable in expenses. Sloan, June 27, 1832, p. 716.

See *Agent and Principal*, 6.

POSSESSORY JUDGMENT.

1. The Judge Ordinary having regulated the state of possession of a vacant piece of ground used as a dunghill for a neighbouring tenement, in a question with the far, who, jointly with the liferentrix, his mother, occupied the premises; held conclusive as to the possession in a process subsequently raised by the liferentrix. Denovan, Jan. 19, 1832, p. 206.
2. Where a passage between two streets of a burgh had existed for above a century, and though of irregular width, was defined by buildings on either side; and a party, having right of free ish and entry by that passage, and alleging himself to have a common property in its solum, had been in the use of the passage for a long term of years; held, that he was entitled to an interdict against encroachments on the passage by a conterminous proprietor, who alleged that he held the exclusive property of the solum of the passage, and that he had left ample space for the ish and entry of the first party. Ferrier, Feb. 14, 1832, p. 317.

PRESCRIPTION, LONG. See *Superior and Vassal*, 1.—*Tenants*, 3.

————— **DECENNIAL.** See *Tutor and Curator*, 1.

————— **QUINQUENNIAL.**

A tenant who had retained rents in his hands to answer an alleged claim for ameliorations, having, several years after he left his farm, brought an action for payment of this claim; held not entitled to object to the counter-claim for rents retained being set off against it, on the ground that the five years prescription of rents had taken place. Nicolson, July 3, 1832, p. 759.

————— **TRIENNIAL.**

1. Where a party had received furnishings in 1823, and again in 1825; and these last were proved to have been paid in 1826; and action was raised against him, in 1828, for the balance of the account-current,—held, that the furnishings in 1825, having been paid, could not form an item in the account between the parties; and, therefore, that the furnishings in 1823 were prescribed. Beck, Nov. 30, 1831, p. 81.
2. Circumstances in which a party was held not to be the employer of law-agents in a process which was conducted, with his sanction, in his name, and towards which he contributed information at different times, and party entitled to plead the triennial prescription. Scott and Livingston, Dec. 8, 1831, p. 107.
3. The triennial prescription applies to the ‘commission charges for payment of money,’ as well as to the other articles of business in a law-agent’s account. Scott, Feb. 24, 1832, p. 875.

PRESUMPTION.

- Parties having bought a debt on a sequestered estate, and given a bill therefor, and written a letter to the trustee, agreeing that the first dividend should be paid to the original creditor towards payment of the bill; and having got up the bill before any dividend fell due on payment of a sum much within the amount of the bill, but not having recalled the letter to the trustee, the presumption held to be that this dividend formed part of the consideration for

PRESUMPTION (Continued.)

getting up the bill, and was a security still available to the original creditor.
Dougall, June 27, 1832, p. 719.

PRINCIPAL AND AGENT. See *Agent and Principal*.

PRISONER. See *Imprisonment, wrongful*.—*Jurisdiction*, 3.

PROCESS, I. ADMIRALTY CAUSES.

1. (1.) Inferior Admiralty jurisdictions, independent of the Great Admiral, not cut down by the act 1681.
(2.) Question raised, how far the Magistrates of Edinburgh, having an Admiralty jurisdiction with reference to the port of Leith, can exercise it in their own persons, and sitting in the city of Edinburgh. Magistrates of Edinburgh, Nov. 18, 1831, p. 25.
2. In a suspension of a decree in a maritime cause, pronounced by the Sheriff as coming in place of the Judge Admiral, the charger is bound, on the death of his original cautioner, to find new caution *de damnis et impensis*. Gillies, Jan. 19, 1832, p. 209.
3. The jurisdiction of the Admiral-depute, Leith, sustained over Edinburgh and Canongate. M'Intyre, March 2, 1832, p. 414.

II. ADVOCATION.

1. In an advocation on the ground, *inter alia*, of the alleged incompetency of the action, the Lord Ordinary has power to decide upon the competency previous to making up and closing the record. Black, Jan. 19, 1832, p. 205.
2. A party, who had sisted himself in an action in the Inferior Court, in which he had not been cited, and containing no conclusions against him, but to which he had been ordered to sist himself as a party—found barred from stating in an advocation the plea of the incompetency of giving decree against him, not having put a plea to that effect on either record. Boyd, Jan. 20, 1832, p. 213. Penalties being imposed by a road act for evasion of tolls on conviction “before one or more Justices of the Peace,” with leave to parties considering themselves aggrieved to apply by summary complaint to the Court of Session for redress—Held,
 - (1.) That an advocation was a competent form of complaint;
 - (2.) That the Court had no jurisdiction to convict and find offenders liable in the penalties; and,
 - (3.) That there must be a conviction by the Justices. Mitchell, Jan. 21, 1832, p. 230.
4. Although a Sheriff had expressly found no expenses due, and the party, unsuccessful on the merits, brought an advocation, and there was no counter-advocation as to expenses; held (contrary to Pollock, Gilmour, and Co., ante, VI. 913,) on consulting all the Judges, that it was competent to award the expenses of the Sheriff Court in favour of the respondents. Murdoch, &c., March 8, 1832, p. 445.
5. An advocation of a judgment by the Sheriff under the general road act, 4 Geo. IV. c. 49, and a local act, incompetent. Neilson, March 9, 1832, p. 466.
6. An advocator having failed to proceed after expediting the letters of advocation; held incompetent for the respondent to extract the letters and enrol the cause. Jardine, March 10, p. 479.
- 7.—(1.) Where a proof on certain points of a cause had been taken in an inferior court, and judgment pronounced, and thereafter in an advocation a remit made with special instructions to allow a further proof, and the Sheriff had allowed a proof in terms thereof; held, that it was not competent to advocate the cause, under the provision of the act 6 Geo. IV. c. 120, § 40, with regard to the advocation of interlocutors allowing a proof.
(2.) Not competent to present a bill of advocation of a Sheriff's interlocutor, under the provision above referred to, after the expiry of fifteen days from the date thereof. Gill and Others (Birtwhistle's Trustees), May 18, 1832, p. 552.
8. Where a party who was decerned executor, presented an incidental petition to the commissioners, craving leave to examine two individuals, and such others as might be afterwards condescended on, and a condescendence of a number of individuals was afterwards lodged, and the commissioners refused to allow them

PROCESS, II.—ADVOCATION (Continued.)

- to be examined ; and a second incidental petition for leave to examine them was also refused, and a bill of advocation being presented ; held that the advocation was competent, and a remit made with instructions to allow the examination under the second incidental petition. Henderson, &c., June 9, 1832, p. 632.
- 9.—(1.) A bill of advocation, which contained a summons and defences, with three interlocutory judgments, the last of which gave leave to advocate, accompanied by a certificate of caution being found, having been past de plano—held, that the bill was irregularly passed.

(2.) Observed that, though the interlocutor of a Lord Ordinary passing or refusing a bill of advocation of an interlocutory judgment is final, where the procedure is regular, it may be brought under review if the procedure be irregular. Walker and M'Williams, July 5, 1832, p. 766.

See *Process, VI.* 28.

III. BILL-CHAMBER.

1. Where a bill of suspension and interdict on caution, against certain parties for salmon-fishing, was offered on 10th May 1830, and after discussion, passed on 12th May 1831 ; and a certificate was afterwards issued that no caution had been found, and that the letters had not been duly expedite ; and another bill was offered on 22d June 1831, against the same parties, concluding with the same prayer as the first, but complaining of continued proceedings down to the date of its presentation ; held, that this was not ‘a new bill to the same effect,’ in the sense of the A.S. ; and that it was not imperative on the Lord Ordinary to require the complainer to pay to the chargers the expenses of the first bill before having the second received. M'Kenzie, Nov. 17, 1831, p. 24.
2. The Lord Ordinary on the bills, in refusing a bill of suspension of a charge on a decree by an inferior judge proceeding on a proof, ought to specify in his interlocutor the facts material to the case, which he found to be established by the proof, and otherwise observe the A.S. 11th July, 1828, § 7. Laird, Dec. 2, 1831, p. 84.
- 3.—(1.) Bill of suspension of a charge on a bill of exchange alleged to be forged, passed without caution on an inspection by the Court of the bill charged on, along with documents not denied to be genuine.
- (2.) A reclaiming note against an interlocutor refusing a bill of suspension allowed to be received, though the diligence had been previously executed, in respect of an arrangement by the parties. Ross, Dec. 2, 1831, p. 95.
4. Whether it be competent to complain in one and the same bill of suspension and liberation of a decree *ad factum præstandum* in favour of a party, and also for expenses in name of his agent, although the incarceration be not relative to the expenses. Bowes or Wallace, Dec. 17, 1831, p. 164.
5. Circumstances in which a bond of caution was allowed to be received in the Bill-Chamber after the fourteen days from the interlocutor passing the bill, and after certificate of no caution had been granted. Harper, Jan. 26, 1832, p. 248.
6. An application to discuss a suspension and interdict on the bill, after the letters had been expedite, refused as incompetent. Forth and Clyde Canal Co., Feb. 28, 1832, p. 389.
7. Question whether a judge, acting as ordinary on the bills in vacation, having advised a cause on the 11th of May, can sign it on the 12th, the vacation having expired. Henderson, &c., June 9, 1832, p. 632.
8. The Court will not interfere with the discretion exercised by the Clerk of the Bills, in judging of the sufficiency of caution. Gow, July 11, 1832, p. 812.

See *Process, X.* 1.

IV. CITATION.

1. In an action against “John and William Wordie,” citation having been executed by leaving a copy of the summons with John, who entered appearance for himself and William, but without any evidence of authority from William ; and

PROCESS, IV.—CITATION (Continued.)

- John having died, whereupon decree was taken against William individually—decree suspended in respect of the irregular citation, and held not capable of being supported by proof that John and William were copartners. Wordie, Dec. 15, 1831, p. 142.
2. Where a petition and complaint was ordered on 9th July to be served, and answers lodged on the first box-day; and within four days *prior to the first box-day* it was served, and the petitioners prorogated the time for lodging of the answers to the second box-day; held, that the service was inept. Duke of Northumberland and Others, Feb. 28, 1832, p. 366.
 3. Circumstances in which the jury found that a party had been cited to an action in 1797. Kay, June 25, 1832, p. 881.

See *Process, II. 2.—XII. 4.—XVI. 22.*

V. CONSISTORIAL CAUSES.

After a proof had been allowed in an action of divorce by the commissioners, prior to the statute 1 William IV. c. 69, the process having fallen asleep, and a summons of wakening being brought before them, after the statute was passed; held, that they had jurisdiction to waken the process, and proceed with the proof. Campbell, Feb. 24, 1832, p. 378. See *Process, XVI. 22.*

VI. EXPENSES.

1. A law-agent is not entitled to the expenses of an application for decree under the act of sederunt 1806 against his client, (who makes no unnecessary opposition,) except those of extracting the decree. Brown, Nov. 24, 1831, p. 45.
2. Under a petition for applying a judgment of the House of Lords in part reversing that of this Court, the Court, while they refused a motion for expenses prior to appeal, and subjected the petitioner in the expenses of discussing the motion, found him entitled to the expense of having the judgment applied. Brodie, Dec. 8, 1831, p. 99.
3. Circumstances in which, after an appeal which was dismissed, the expense of one half of a report which had been ordered by the Court, prior to appeal, from the Solicitor of Stamps, &c., was decreed for against one agent, at the instance of the opposite party, whose agent had paid the whole. Forrest, Dec. 10, 1831, p. 181.
4. Circumstances in which expenses prior to appeal were found due, subject to modification. Clyne, Dec. 14, 1831, p. 182.
5. Where cases were ordered by a Lord Ordinary to be lodged by the box-day, and one of the parties previous to it lodged a note, praying for a prorogation, in respect of the absence of his counsel, and the necessity of employing a new counsel; and the Lord Ordinary pronounced decree against the party in consequence of his failure to lodge his case by the box-day, found that the party was entitled to be reponed without payment of previous expenses. Minto, &c., Dec. 23, 1831, p. 190.
- 6.—(1.) Circumstances in which the Court refused expenses to a defender, in a declarator relative to improvements on an entailed estate, under 10 Geo. III. c. 51, although successful except to a small extent.
(2.) Where the House of Lords in part reversed a decree with expenses in favour of a pursuer on the merits, but was silent as to expenses, and remitted the cause “to proceed farther therein as is consistent with this judgment, and as is just”—expenses refused to the defender; but Observed, that it was competent to award expenses to the defender, if due under the circumstances. Torrance, Jan. 17, 1832, p. 193.
7. Where an arresting creditor was not cited in a multiplepoinding, and decree in his absence was pronounced, preferring another party; held, that he was entitled to be reponed simpliciter. Johnston, Jan. 17, 1832, p. 195.
8. Where a party raised an action of count and reckoning, concluding for a balance of L.1280; and a record was made up, and a report obtained from an accountant exhibiting three views, under any of which the defender was indebted in a considerable balance; and the record was closed, and a debate ordered, when a discharge was granted by the pursuer, which was afterwards reduced by a creditor under the statute 1621, cap. 18; held, that the pursuer's agent

PROCESS, VI.—EXPENSES.

- was entitled to sit himself as a party in the action of count and reckoning, to the effect of recovering payment of his necessary disbursements as agent in the cause, with a reasonable remuneration for his professional services in conducting it. Cheyne, Jan. 18, 1832, p. 202.
9. Circumstances in which a verdict of 1s. damages being returned in favour of a party, the Court found him entitled to his expenses. Young, Jan. 27, 1832, p. 248.
- 10.—(1.) Circumstances in which a taxation by the auditor of the amount of fees to counsel was disallowed.
 (2.) Question raised as to how far the auditor is entitled to cut down the amount of fees. Bell, Jan. 28, 1832, p. 265.
11. A defender, who had failed to obtemper an order in an inferior Court for depo-ning on a reference to his oath, having been reponed, and, after considerable delay, having failed again, and decree being in consequence pronounced—entitled in a suspension to be reponed, on paying the whole previous expenses in the Inferior Court and Court of Session. Drummond, Jan. 28, 1832, p. 266.
12. A party allowed to amend his libel without being subjected in the expense of the condescendence and answers already prepared, he agreeing to abide there-by without alteration. Miller, Feb. 4, 1832, p. 295.
13. Incompetent to award expenses against the King, even as to questions re-garding the hereditary estates of the Crown. King's Advocate v. Magistrates of Kirkwall, Feb. 14, 1832, p. 328.
14. An unsuccessful party held chargeable with fees,
 (1.) To the junior counsel of his opponent, for advice as to closing the record.
 (2.) To the senior and junior counsel at adjusting issues.
 (3.) To a junior for advising as to a precognition; and,
 (4.) To a senior and junior moving for the expenses of the trial, the party having intimated an intention to oppose the motion. Stevenson, Feb. 15, 1832, p. 337.
15. A party having petitioned for the removal of a judicial factor on his estates, and, in the course of the discussion, several of his creditors having sisted themselves in support of the petition; and the original petitioner remaining a party till the petition was dismissed with expenses; held, that the creditors were not liable for any of the expenses prior to their appearance, but were liable for all sub-sequent expenses occasioned by them, or in relation to proceedings in which their names were used as parties. Glas, Feb. 17, 1832, p. 351.
16. A suspender not having produced his accounts, till after a charge, though often required before; held entitled to his expenses only after the date of producing his accounts. Bousie (Wallace's Trustee), Feb. 18, 1832, p. 355.
17. Circumstances in which the auditor having disallowed the expense of a search in a burgh record as not necessary to the decision of a cause, the Court sustained the claim, and directed him to tax the items. Kay, &c., Feb. 25, 1832, p. 378.
18. After a judgment by the Inner House, exhausting the merits, without any find-ing as to expenses—the Lord Ordinary cannot award expenses. Hamilton, March 3, 1832, p. 426.
19. Although a Sheriff had expressly found no expenses due, and the party unsuc-cessful on the merits brought an advocation, and there was no counter-advo-cation as to expenses; held (contrary to Pollock, Gilmour, and Co., ante, VI. 918,) on consulting all the Judges, that it was competent to award the expen-ses of the Sheriff Court in favour of the respondents. Murdoch, &c., March 8, 1832, p. 445.
20. An agent allowed the expenses of an application for decree under A. S. Feb. 1806, against his client. Miller, March 10, 1832, p. 479.
21. Where a wholesale dealer raised an action against a retail dealer for the price of goods, within six months from the date of the invoice, and the defender pleaded that he was entitled, by invariable custom of the trade, to a longer credit, and proved an usual, but not an invariable custom—Found (the price having been paid pending process) that he was entitled to expenses, subject to modification. Burbidge, &c. May 12, 1832, p. 520.

PROCESS, VI.—EXPENSES (Continued.)

22. Circumstances where a party having been allowed a proof that certain trustees would have had a free fund in their hands wherewith to satisfy claims, if they had managed the trust funds properly, and having failed to establish the fact, found liable in the expenses. Aitken and Others, May 16, 1832, p. 535.
23. Expenses awarded against a party unsuccessfully defending a judgment of an inferior Judge. Buchanan, May 22, 1832, p. 555.
24. The expense of consulting counsel as to the propriety of bringing an advocacy, sustained as a charge against the opposite party. Osborne, May 26, 1832, p. 578.
25. In an action by a creditor of a defunct against his trustees as intromitters; held, that as the trustees opposed decree of constitution, (to which the creditor was entitled,) they were liable in expenses. Jackson's Trustees, May 31, 1832, p. 597.
26. Circumstances in which the assignee of a bankrupt pursuer was ordained to find caution for the expenses of process. M'Ghie, June 1, 1831, p. 604.
27. An agent who presented an application under A. S. Feb. 1806, against his client, entitled to the expense of the application, the client having attended at the taxation, and very slight deductions being allowed. Pattison, June 1, 1832, p. 606.
28. Observed, that in an advocacy from a judgment in an inferior Court regarding preliminary defences, it is competent for the Lord Ordinary, while he remits to repel them, to decide the question of the expenses of the advocacy, though the defender intimate his acquiescence in the judgment. Lieut-Col. Henry, June 1, 1832, p. 615.
29. An action to recover on a life policy having been abandoned on correspondence being obtained from the papers of the party effecting it, tending to show knowledge and concealment on his part, of facts which would invalidate the policy—Expenses awarded to the defenders. Paul (Inglis's Trustee), June 5, 1832, p. 618.
30. Where an action was raised for repetition of a sum, and relief from another action, and the Lord Ordinary assailed, and found no expenses due, and the Court altered and decerned with expenses in the repetition, and remitted to the Lord Ordinary to hear parties on the conclusions for relief; and the defenders appealed against the judgment of the Court, and also against that of the Lord Ordinary, in so far as it did not find expenses due to them; and the House of Lords reversed the interlocutors complained of—held, that it was incompetent to award the expenses of this Court in applying the judgment, the question being no longer open after the cases of Reid and M'Taggart. Wilson, &c. June 12, 1832, p. 640.
31. A party, illegally imprisoned, found entitled to expenses. Binnie, June 12, 1832, p. 642.
32. Where a witness who had been adduced at a Jury trial, objected to the auditor's report at taxing his account, and his objections were repelled; held not necessary to subject him in expenses, as there was no imperative rule to that effect in the Jury Court, prior to 1 William IV. c. 69. M'Leod, June 23, 1832, p. 704.
33. In corresponding before raising an action, one agent having founded on an opinion of counsel, and having refused to communicate it and the memorial to the opposite agent; held, under the circumstances, that this was a ground for modifying expenses. Raeburn, July 5, 1832, p. 761.
34. Fee for opinion of counsel as to propriety of raising an action, sustained as a good charge against the opposite party; likewise a fee to senior as well as junior counsel, to advise whether it was safe to close the record in an advocacy on the Inferior Court record, with additional pleas; as also the charge for a memorial to counsel for the Inner House advising, when the debate in the Outer House had been conducted without a memorial. Brown, A. and Co. July 10, 1832, p. 806.

PROCESS, VI.—EXPENSES (Continued.)

35. After a reduction of a promissory-note was conjoined with a counter action for payment of the note, and a record was closed, and notice of trial given of two issues; 1st, whether the note was genuine; and, 2d, whether the grantor was liable for its contents; and the first issue was given up by the pursuer of the reduction—trial postponed, and a new plea allowed to be stated by him, ‘on payment of the expenses incurred by the defender, so far as not necessary and available for the further proceedings in the action for payment. Smith, July 11, 1832, p. 808.

See *Ralston v. Farquharson and Others*, March 1, 1832, p. 410.

See *Auditor.—Process, VIII. 2.—XII. 4.—XV. 2.—Title to pursue, 2.*

VII. JURY TRIAL.

1. A demand for an issue, on a question of special authority, or acquiescence, at the latest stage of a cause, refused. *Bridges (Manners's Trustee)*, Nov. 22, 1831, p. 48.
2. Application for a new trial incompetent, after six days have elapsed from the commencement of the Session ensuing after the trial. *Allan*, Nov. 24, 1831, p. 46.
3. An issue allowed on a general averment of partnership, without any specification on the record of the facts from which partnership was to be inferred. *Wilson*, Dec. 9, 1831, p. 110.
4. A pursuer having averred that he received an anonymous letter through the Post-Office, on or about the 8th of December 1830, and after quoting the letter, and stating it to be false, malicious, and injurious, having averred that it “was composed and sent, or written and sent, or was sent, in the knowledge of its contents,” by the defender; held, that these averments were sufficiently specific to afford matter for an issue. *Lundie or Compton*, Dec. 13, 1831, p. 125.
5. Circumstances in which a verdict of 1s. damages being returned in favour of a pursuer, the Court found him entitled to his expenses. *Young*, Jan. 27, 1832, p. 248.
6. Opinion expressed, that in bills of exceptions it is discretionary either to except in general terms, or to state the legal doctrine contended for; and, that it is unnecessary to take an exception to a Judge’s charge before the close of the trial, but that it may be competently taken afterwards. *Forbes and Co.*, March 9, 1832, p. 451.
7. (1.) Issues being taken specially whether slanderous words were used in each of three several conversations with A,—held that the pursuer was not entitled to examine B as to the use of these expressions in a conversation with him alone, and on a different occasion.
 (2.) An issue being taken whether the defender, “on or about 18th November 1828, lodged a paper in process,” containing slanderous words, and the paper produced, bearing date the “18th February 1828,”—direction given that there was no evidence to support a finding for the pursuer under this issue.
 (3.) Circumstances in which, under an issue whether slanders were uttered falsely, calumniously, and maliciously, in a paper entitled “Answers to Condescension,” the pursuer having produced the answers, but not the rest of the process, and the defender having produced no part of the process, and objected that the jury could not try the issue, and particularly the pertinency of the statements in the answers, upon such partial production,—direction given that the slanderous statements were to be held irrelevant. *Cullen or M’Kenzie*, March 14, 1832, p. 497.
8. Terms of an issue, where the pursuer alleged conspiracy by certain defenders to imprison him, and imprisonment in a lunatic asylum, and unwarrantable re-ception and detention by the keeper. *M’Cosh*, May 26, 1832, p. 579.
9. New trial granted in respect of surprise as to the evidence led at the former trial. *Gye and Co.* June 26, 1832, p. 710. See *Reparation*.
10. Bill of exceptions refused against the directions given by the Lord Pre-

PROCESS VII.—JURY TRIAL (Continued.)

- sident, (*ante*, p. 501,) in charging the jury. Cullen or M'Kenzie, June 30, 1832, p. 743.
11. A motion for a new trial, on the ground that excessive damages had been awarded, refused. Smith, July 11, 1832, p. 807.
 12. Not competent to except in general terms against a judge's charge, that it did not contain sufficient information in point of law, but necessary to specify what law was erroneously omitted to be stated. Keith, July 11, 1832, p. 824.
 13. Observed, that the condescendence and answers, being part of the record in the Court of Session, may be referred to at a Jury trial, without being specially put in. Schuurmans and Son, July 18, 1832, p. 839.
 14. Observed, that the condescendence and answers, being part of the record in the Court of Session, may be referred to by all parties at a Jury trial, without requiring to be specially put in by either party at the trial. Ralston or Alison, July 18, 1832, p. 848.
 15. Under an issue whether A knew the fact of an assignation, the Court directed the jury, that knowledge by A's agent or trustee was not A's knowledge within the sense of the issue, and that it was the fact of A's individual knowledge which they were to try. Balfour, July 28, 1832, p. 853.
 16. Terms of issues sent to a jury, under a declarator of property, and of the servitude of eaves-drop. Steele, July 25, 1832, p. 857.

See *Process*, VI. 9, 35.—*Proof*, VI. 3.—*Sale*, 6.

VIII. MULTIPLEPOINDING.

1. The raiser of a multiplepoinding as to a sum due by him under a decree, is bound to convey the full amount without deduction of illiquid claims on his own part. Ewing, Dec. 8, 1831, p. 109.
2. The actual raiser of a multiplepoinding, whose claim was repelled, and whose objections to the nominal raiser's condescendence of funds were overruled, held liable to the nominal raiser in expenses. Ewing, Jan. 27, 1832, p. 249.
3. The raiser of a multiplepoinding as to arrears of feu-duty, &c. having allowed an interlocutor approving of a condescendence of the fund in medio given in for him by another party to become final; and having put his objections to the state of arrears condescended upon into the shape of a separate condescendence and claim of his own upon that fund; and another party being preferred in the competition, and a remit made to the Lord Ordinary "to hear parties as to the present amount of the said arrears,"—held, that this remit only applied to the state of arrears subsequent to the date of that approved of as the fund in medio. Balfour, March 9, 1832, p. 427.

IX. PARTIES TO A SUIT.

1. Action sustained against the grantor of a letter of guarantee of a bill accepted by a cautioner, without calling the representatives of the original debtor, or the cautioner, he having been discussed. Forrest, Nov. 15, 1831, p. 10.
2. Where a principal debtor wrote a letter acknowledging a balance to be due, and granted a bill for it, which he failed to retire, and was forth of the kingdom; and an action was brought against his cautioner—held not necessary to call the principal debtor as a party. Ellice and Co., Feb. 17, 1832, p. 345.
3. Where a party, alleging that in May 1829, he had, by the negligence of road trustees, sustained damage on a road; and the act constituting the trust was repealed in June, and a new one, differing in many particulars, was passed; and the party, in November, raised an action, libelling the injury, and concluding for damages against the road trustees, but not specifying which set of trustees, nor setting forth distinctly the grounds of action—the Court dismissed the action. Coldstream, &c., Feb. 18, 1832, p. 356.
4. During the dependence of an action by a tenant against his landlord, the landlord having executed a voluntary trust-conveyance of his estates, and the trustee being made a co-defender by a supplementary action, and having corresponded with the tenant's agent relative to a compromise; held, that he was inadmissible as a witness for the defence. Smith, June 18, 1832, p. 339.

See *Process*, II. 2.—XVI. 21, 26.

PROCESS, X. RECLAIMING NOTE.

1. Competent to reclaim against interlocutors, in matters of sequestration, pronounced by the Ordinary officiating on the Bills during vacation. Cox, Dec. 10, 1831, p. 122.
- 2.—(1.) In actions of constitution, the want of the summons not fatal to a reclaiming note.
 (2.) Where an interlocutor was pronounced of consent, decerning for a sum of money, and interponing the Judge's authority to a judicial reference, and allowing an extract, as of an interim decree; held, that although an extract had been taken out, a reclaiming note against the interlocutor, so far as regarded the reference, was competent. Balandene and Husband, Dec. 20, 1831, p. 168.
3. In an advocation on the ground, *inter alia*, of the alleged incompetency of the action, the Lord Ordinary has power to decide upon the competency, previous to making up and closing the record. Black, Jan. 19, 1832, p. 205.
4. The 18th section of 6 Geo. IV. c. 120, in so far as it orders the delivery of six copies of a note to the agent of the opposite party, does not apply to a reclaiming note against a decree pronounced in respect of no defences. Williams and Co. Feb. 2, 1832, p. 283.
5. A reclaiming note, containing no prayer, is incompetent. Gracie, Feb. 23, 1832, p. 363.
6. Where a bill of suspension was refused on 31st January, and the Lord Ordinary, on 6th February, prohibited the certificate from being issued for fourteen days, in order to enable the party to reclaim; and a note was lodged within fourteen days from the 6th of February, but beyond that time from 31st January—found, that the note was incompetent. Fyffe, Feb. 28, 1832, p. 381.
7. Reclaiming note not marked by the principal clerk in proper time, refused as incompetent. Workman, &c. May 12, 1832, p. 525.
8. Papers, which afterwards, and without alteration, formed the record in a cause, having been appended to a reclaiming note presented before closing the record, held sufficient in a second note, presented after closing, to refer to the papers as previously appended to the first note. Gibson, May 19, 1832, p. 554.
9. The Lord Ordinary having sustained a preliminary defence, and the pursuers having reclaimed, and papers being appended to the reclaiming note, which were not in process before lodging the note, these papers ordered to be withdrawn, though they consisted of a correspondence, part of which had been read to the Lord Ordinary. McCallum and Dalgliesh, July 7, 1832, p. 770.

See Process, XII. 2.—XVI. 89.

XI. RECORD.

1. (1.) Where a pursuer, after closing the record, recovered from his secretary under a diligence, a writing, not *noviter veniens*, and the record was opened up "to make such additions thereto as may be necessary by production of the said writing,"—held competent for the defender to lodge amended revised answers, "although changing, to a certain extent, the statement of facts contained in his former answers."
 (2.) By the Lord Ordinary, that such production, if allowable at all, could only be received after paying the whole previous expenses.
 (3.) Held that, though from the terms of an interlocutor, former revised answers might continue to form a part of the record, yet no statement there would bind the defender, which was inconsistent with that made in amended answers. Gordon, Nov. 24, 1831, p. 47.
2. The Lord Ordinary, on a closed record, having allowed production of books, previously within the power of the party; the Court, of consent, allowed the record to be opened up, that the opposite party might amend his statement, to meet the new production. Turnbull, Jan. 21, 1832, p. 228.

PROCESS, XI.—RECORD (Continued.)

3. Circumstances in which productions, previously in possession of the party, were received after the record was closed. Smitton, Feb. 4, 1832, p. 298.
4. A record having been closed in one process, the Court conjoined it with a relative process advocated ob contingentiam, in which no record had been prepared, and allowed a record to be made up therein. Shand, Feb. 28, 1832, p. 384.
5. Circumstances in which a record was allowed to be opened up, on payment of expenses. Crawford and Others, May 17, 1832, p. 537.
6. Observed, that it is irregular to make up a record upon revised condescendence and answers, defender's statement and answers, and pursuer's counter statement and answers; but that the averments of both parties should be stated in one connected series of averments by the pursuer, with relative answers by the defender, followed, if necessary, by one connected series of averments by the defender, with relative answers by the pursuer. Allan, June 7, 1832, p. 619.
7. Abandonment of a cause, before closing the record, not regulated by the judicature act. Caledonian Iron and Foundery Company, Dec. 14, 1831, p. 133.
8. An averment, on the record, of no possession, not being contradicted,—party held to be foreclosed. Drysdale and Others, Jan. 17, 1832, p. 198.

See *Process, II. 1.—VI. 35.—VII. 13, 14.—X. 8.—XVI. 3.*

XII. REPONING.

- 1.—(1.) Circumstances in which the Court reponed a party against a second judgment by default.
(2.) Question raised whether the Court have a discretionary power, in ordinary actions, in so reponing. M'Gill, Nov. 26, 1831, p. 69.
- 2.—(1.) A petition craving a remit to be reponed in the usual terms against a decree pronounced in respect of no defences, allowed to be altered to a reclaiming note. Williams and Co. Feb. 2, 1832, p. 283.
3. A petition to be reponed against an Inner House interlocutor in absence incompetent. Tough, &c. June 5, 1832, p. 619.
4. Where an arresting creditor was not cited in a multiplepoinding, and decree in his absence was pronounced preferring another party; held that he was entitled to be reponed simpliciter. Johnston, Jan. 17, 1832, p. 195.

See *Process, VI. 5, 11.*

XIII. RES JUDICATA.

1. Where a party was called as defendant in one action as factor on a trust estate, and a defence, rested on an averment in fact, was finally repelled; and another action was brought against him personally, held competent to plead the same defence in the second action. M'Nab, Dec. 22, 1831, p. 180.
2. The Judge Ordinary having regulated the state of possession of a vacant piece of ground used as a dunghill for a neighbouring tenement, in a question with the ffar, who, jointly with the liferentrix, his mother, occupied the premises,—held conclusive as to the possession in a process subsequently raised by the liferentrix. Denovan, Jan. 19, 1832, p. 206.
3. Circumstances in which an interlocutor of a Lord Ordinary was held to have repelled a plea not specially therein referred to. Knox, Jan. 20, 1832, p. 215.

See *Process, XVI. 25.*

XIV. SUMMONS.

1. An objection, that the summons did not libel upon a trust-deed, repelled, in respect there was no preliminary objection taken debito tempore, and that the summons founded on the existence of a trust which was more particularly condescended on thereafter. Cook and Paul, Nov. 29, 1831, p. 75.
2. A pursuer having libelled on a bill as "drawn by him," but admitted on the record that the drawer's name was not written by him, and stated, that "it was filled up by the writer of the bill at the same time with writing it, and was so filled up when delivered to the pursuer by the acceptor"—action dismissed, reserving to bring an action on the bill in a competent shape. Muir, Nov. 30, 1831, p. 83.

PROCESS, XIV.—SUMMONS (Continued.)

3.—(1.) Where a pursuer libelled that two defenders had conceived groundless malice against him, and taken every opportunity of defaming him; and (after stating certain procedure by both defenders jointly) subsumed that they, or either of them, had been in the constant practice of defaming him to ruin him, and, in particular, that each of them had done several separate acts specially libelled, in furtherance of their design; and concluded for a sum of damages against each of them severally, or against both, conjunctly and severally,—held a competent form of libel.

(2.) Case where falsehood, malice, and injury being averred,—held not necessary to libel the want of probable cause. M'Kenzie, Dec. 2, 1831, p. 89.

4. Competent to conclude for decree against principal and cautioner in the same summons, "either conjunctly and severally, or each respectively in terms of their several obligations." Sorley's Trustees, Feb. 14, 1832, p. 319.
5. A summons and relative condescendence held to be irrelevant to sustain a claim for the price of a vessel, in respect that the missives of sale libelled did not recite the certificate of registration in terms of the statute 6 Geo. IV. c. 110, and the conclusion for the price was disconform to the narrative of the circumstances; but a remit made as to whether the summons could be sustained to the effect of entertaining an alternative conclusion of count and reckoning. Inglis, Feb. 23, 1832, p. 368.
6. Circumstances in which a summons, concluding for payment of a legacy, and for count and reckoning as to the residuary estate of a testator, was dismissed as irregular and informal. Tait, July 10, 1832, p. 803.

See *Process, VI. 12.—IX. 3.—Reparation, 6.—Tenor, Proving of the.*

XV. SUSPENSION.

1. Circumstances in which a bill of suspension of a process caption was passed, upon caution being found for all the expense and damage occasioned to the party litigant by the loss of the process. Livingston, Nov. 24, 1831, p. 52.
2. Where defenders in a Sheriff Court were assailed with expenses, and gave a charge of horning on the decree, and a bill of suspension was offered, and an action of reduction raised by the pursuers—the Court, in the circumstances, refused the bill. Scott, Nov. 26, 1831, p. 67.
3. One of the bailies of a royal burgh, elected at the Michaelmas annual election, having a few months thereafter left the burgh, and (as was alleged) gone abroad; and the Town-council assuming the office to have thereby become vacant, having gone through the form of electing another in his place,—held, that a bill of suspension and interdict, presented by a minority of the council, against such party's acting as baily, was incompetent; and that the proceeding could only be by them challenged in the form of petition and complaint, or reduction; but observed that such bill would have been competent, if presented by the original baily himself. Orr and Others, Dec. 2, 1831, p. 93.
4. A certificate that letters of suspension have been duly lodged in order to calling, for the purpose of having a protestation scored, may be granted by the clerk, although no Reasons have been lodged prior to the time of calling. Burntisland Whale-Fishery Company, Dec. 22, 1831, p. 181.
5. Where a Sheriff granted interdict, and found expenses due, and allowed decree for expenses to go out in the agent's name, and a charge for expenses was given by the agent,—held, that the party was entitled to suspend both as to the interdict and the expenses. Cantach or M'Donald, March 10, 1832, p. 477.
6. Competent to suspend, and not necessary to reduce, an election, where the party elected has not been fully inducted by taking the necessary oaths. Watson, March 10, 1832, p. 481.

See *Process, III.—Proof, V. 2.—Sale, 3.*

XVI. VARIOUS.

1. In an ordinary action against the representative of a party, founded upon a decree in absence of the Sheriff against the deceased for payment of a bill—it is

PROCESS, XI.—RECORD (Continued.)

3. Circumstances in which productions, previously in possession of the party, were received after the record was closed. Smitton, Feb. 4, 1832, p. 298.
4. A record having been closed in one process, the Court conjoined it with a relative process advocated ob contingentiam, in which no record had been prepared, and allowed a record to be made up therein. Shand, Feb. 28, 1832, p. 384.
5. Circumstances in which a record was allowed to be opened up, on payment of expenses. Crawford and Others, May 17, 1832, p. 537.
6. Observed, that it is irregular to make up a record upon revised condescendence and answers, defender's statement and answers, and pursuer's counter statement and answers; but that the averments of both parties should be stated in one connected series of averments by the pursuer, with relative answers by the defender, followed, if necessary, by one connected series of averments by the defender, with relative answers by the pursuer. Allan, June 7, 1832, p. 619.
7. Abandonment of a cause, before closing the record, not regulated by the judicature act. Caledonian Iron and Foundry Company, Dec. 14, 1831, p. 193.
8. An averment, on the record, of no possession, not being contradicted,—party held to be foreclosed. Drysdale and Others, Jan. 17, 1832, p. 198.

See *Process, II. 1.—VI. 35.—VII. 13, 14.—X. 8.—XVI. 9.*

XII. REPOSING.

- 1.—(1.) Circumstances in which the Court reponed a party against a second judgment by default.
- (2.) Question raised whether the Court have a discretionary power, in ordinary actions, in so reposing. M'Gill, Nov. 26, 1831, p. 69.
- 2.—(1.) A petition craving a remit to be reponed in the usual terms against a decree pronounced in respect of no defences, allowed to be altered to a reclaiming note. Williams and Co. Feb. 2, 1832, p. 283.
3. A petition to be reponed against an Inner House interlocutor in absence incompetent. Tough, &c. June 5, 1832, p. 619.
4. Where an arresting creditor was not cited in a multiplepoinding, and decree in his absence was pronounced preferring another party; held that he was entitled to be reponed simpliciter. Johnston, Jan. 17, 1832, p. 195.

See *Process, VI. 5, 11.*

XIII. RES JUDICATA.

1. Where a party was called as defendant in one action as factor on a trust estate, and a defence, rested on an averment in fact, was finally repelled; and another action was brought against him personally, held competent to plead the same defence in the second action. M'Nah, Dec. 22, 1831, p. 180.
2. The Judge Ordinary having regulated the state of possession of a vacant piece of ground used as a dunghill for a neighbouring tenement, in a question with the ffar, who, jointly with the liferentrix, his mother, occupied the premises,—held conclusive as to the possession in a process subsequently raised by the liferentrix. Denovan, Jan. 19, 1832, p. 206.
3. Circumstances in which an interlocutor of a Lord Ordinary was held to have repelled a plea not specially therein referred to. Knox, Jan. 20, 1832, p. 215.

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XIV. SUMMONS.

1. An objection, that the summons did not libel upon a trust-deed, repelled, in respect there was no preliminary objection taken debito tempore, and that the summons founded on the existence of a trust which was more particularly condescended on thereafter. Cook and Paul, Nov. 29, 1831, p. 75.
2. A pursuer having libelled on a bill as "drawn by him," but admitted on the record that the drawer's name was not written by him, and stated, that "it was filled up by the writer of the bill at the same time with writing it, and was so filled up when delivered to the pursuer by the acceptor"—action dismissed, reserving to bring an action on the bill in a competent shape. Muir, Nov. 30, 1831, p. 83.

PROCESS, XIV.—SUMMONS (Continued.)

3.—(1.) Where a pursuer libelled that two defenders had conceived groundless malice against him, and taken every opportunity of defaming him ; and (after stating certain procedure by both defenders jointly) subsumed that they, or either of them, had been in the constant practice of defaming him to ruin him, and, in particular, that each of them had done several separate acts specially libelled, in furtherance of their design ; and concluded for a sum of damages against each of them severally, or against both, conjunctly and severally,—held a competent form of libel.

(2.) Case where falsehood, malice, and injury being averred,—held not necessary to libel the want of probable cause. M'Kenzie, Dec. 2, 1831, p. 89.

4. Competent to conclude for decree against principal and cautioner in the same summons, “either conjunctly and severally, or each respectively in terms of their several obligations.” Sorley's Trustees, Feb. 14, 1832, p. 319.

5. A summons and relative condescendence held to be irrelevant to sustain a claim for the price of a vessel, in respect that the missives of sale libelled did not recite the certificate of registration in terms of the statute 6 Geo. IV. c. 110, and the conclusion for the price was disconform to the narrative of the circumstances ; but a remit made as to whether the summons could be sustained to the effect of entertaining an alternative conclusion of count and reckoning. Inglis, Feb. 23, 1832, p. 368.

6. Circumstances in which a summons, concluding for payment of a legacy, and for count and reckoning as to the residuary estate of a testator, was dismissed as irregular and informal. Tait, July 10, 1832, p. 803.

See *Process, VI. 12.—IX. 3.—Reparation, 6.—Tenor, Proving of the.*

XV. SUSPENSION.

1. Circumstances in which a bill of suspension of a process caption was passed, upon caution being found for all the expense and damage occasioned to the party litigant by the loss of the process. Livingston, Nov. 24, 1831, p. 52.

2. Where defenders in a Sheriff Court were assailed with expenses, and gave a charge of horning on the decree, and a bill of suspension was offered, and an action of reduction raised by the pursuers—the Court, in the circumstances, refused the bill. Scott, Nov. 26, 1831, p. 67.

3. One of the bailies of a royal burgh, elected at the Michaelmas annual election, having a few months thereafter left the burgh, and (as was alleged) gone abroad ; and the Town-council assuming the office to have thereby become vacant, having gone through the form of electing another in his place,—held, that a bill of suspension and interdict, presented by a minority of the council, against such party's acting as baily, was incompetent ; and that the proceeding could only be by them challenged in the form of petition and complaint, or reduction ; but observed that such bill would have been competent, if presented by the original baily himself. Orr and Others, Dec. 2, 1831, p. 98.

4. A certificate that letters of suspension have been duly lodged in order to calling, for the purpose of having a protestation scored, may be granted by the clerk, although no Reasons have been lodged prior to the time of calling. Burntisland Whale-Fishery Company, Dec. 22, 1831, p. 181.

5. Where a Sheriff granted interdict, and found expenses due, and allowed decree for expenses to go out in the agent's name, and a charge for expenses was given by the agent,—held, that the party was entitled to suspend both as to the interdict and the expenses. Cantach or M'Donald, March 10, 1832, p. 477.

6. Competent to suspend, and not necessary to reduce, an election, where the party elected has not been fully inducted by taking the necessary oaths. Watson, March 10, 1832, p. 481.

See *Process, III.—Proof, V. 2.—Sale, 3.*

XVI. VARIOUS.

1. In an ordinary action against the representative of a party, founded upon a decree in absence of the Sheriff against the deceased for payment of a bill—it is

PROCESS, XVI.—VARIOUS (Continued.)

competent to admit objections to the bill appearing *ex facie*, without a reduction of the decree. Craigie, Nov. 12, 1831, p. 6.

2.—(1.) Circumstances in which the Court refused to recal a sequestration;

(2.) Where the Lord Ordinary on the Bills, in vacation, awarded sequestration, and, within the reclaiming days, a 'reclaiming note, or petition,' was presented, craving to have the judgment reviewed, or to have answers ordered, and a recal of sequestration granted,—held, that it could only be entertained as a petition for recal.

(3.) The sequestrating creditor having made affidavit of a debt as against E. B. and Company, the Lord Ordinary refused to award sequestration, except against E. B. and Co. as a company. Bellis and Thundercliffe, Dec. 3, 1831, p. 96.

3. Circumstances in which a Lord Ordinary having pronounced decree absolvitor, which, *ex facie*, appeared to dispose of the cause on the merits, and no record having been made up—the Court recalled the interlocutor, and remitted to the Lord Ordinary to hear parties on a special defence. Lowrey or Maxwell, Dec. 3, 1831, p. 98.

4. Circumstances in which a Sheriff's judgment was reversed, and the case remitted back, in respect of irregularities. M'Iver, Dec. 9, 1831, p. 119.

5. Where a disputed election of commissioners on a sequestreated estate has taken place, it is incompetent for the trustee to apply by "petition and report" to have it determined which set of commissioners were duly elected. Cox, Dec. 10, 1831, p. 122.

6. Diligence on a promissory-note sustained at the instance of the payee, for behoof of a cautioner who had paid the amount, although no assignation of the note and diligence thereon had been granted to the cautioner. M'Kechnie, Dec. 13, 1831, p. 126.

7. (1.) Abandonment of a cause before closing the record not regulated by the judicature act;

(2.) Circumstances not sufficient to relieve a pursuer abandoning his cause from expenses. Caledonian Iron Company, Dec. 14, 1831, p. 133.

8. Where mutual minutes were ordered, the Court would not allow a verbal answer to a minute lodged. Wright and Others, Dec. 15, 1831, p. 139.

9. Circumstances in which a summary application to the Sheriff, by a party who had sold sheep, which were to remain his property till the price was paid, and who craved warrant to roup as much of the stock of sheep as would satisfy an alleged balance of the price, was sustained. Baird, Dec. 16, 1831, p. 146.

10. The prayer of a petition for interim execution against a trustee *qua* such, not allowed to be amended after answers had been lodged, so as to crave decree against him personally. Kirkland and Sharpe, Dec. 20, 1831, p. 167.

11. After a cause has been decided by the Court, and a reference is made to oath, an incidental petition is requisite. Scott and Livingston, Dec. 22, 1831, p. 174.

12. Circumstances where a party having been allowed, and having taken a proof, and failed to establish his averment, a farther proof refused, although a ledger was produced bearing marks of erasures, made apparently for the purpose of concealing the fact, but new action on fraud, &c. reserved. Menzies, Jan. 18, 1832, p. 203.

13.—(1.) A notice of intention to appeal from the Sheriff Court to the Circuit, given verbally by the agent of the party in open Court, immediately after judgment, and entered by the clerk in the minute-book of Court; but without any bond of caution being given in at the time, though lodged within ten days thereafter,—held not to be an appeal taken in open Court in terms of the statute 20 Geo. II. c. 43.

(2.) Service of appeal upon the opposite party in terms of the statute, does not imply the *actus legitimus* of an officer of Court or king's messenger, for whom there is no warrant in such cases; but,

(3.) There must be a probative attestation of the fact, by delivery before witnesses, or a notarial instrument to satisfy the Judge; and neither a certi-

PROCESS, XVI.—VARIOUS (Continued.)

- ficate of the appellant's agent that he delivered the copy, nor the admission of the respondent's agent that he received it, is sufficient for that purpose. M'Millan, Jan. 21, 1832, p. 220.
14. Held by the Lord Ordinary, on a verbal report to the Court, that where a pursuer's procurator in a Sheriff Court has failed to mark his name on the copy of the summons left for the defender, in terms of the Sheriff Court A. S., this does not entitle the defender to plead no process, but merely subjects the pursuer in an amand. Buchanan, &c. Jan. 24, 1832, p. 235.
15. Circumstances in which the Court authorized a Lord Ordinary to score out part of an interlocutor pronounced by them, remitting a cause to him to prepare, and granting diligence,—as having been written *per incuriam*. Palmer and Co., Jan. 28, 1832, p. 252.
16. Circumstances in which the Court dispensed with the inducere of a summons of adjudication, allowed it to be enrolled in the calling lists of the Outer House, limited the term for seeing it to eight days, authorized the Lord Ordinary to dispense with the reading in the minute-book of the decree of adjudication, and granted warrant to the clerks of Court to give out an immediate extract, reserving all objections *contra executionem*. Scott, Jan. 28, 1832, p. 253.
- 17.—(1.) Where a landlord petitioned for sequestration for arrears of rent, public burdens, “and other stipulations to be afterwards specially condescended on and proved in the course of this process, all in terms of the foresaid missive of lease,” held competent, on lodging replies, to restrict the petition to the money-rent, and that it then remained unobjectionable in form.
 (2.) Where a party makes a reference to oath, and an interlocutor sustaining it is pronounced, it is competent to retract the reference, on paying expenses incurred since the date of the interlocutor. Bennie, Jan. 28, 1832, p. 255.
18. Debtors under a bill past due having taken refuge in the Sanctuary, and a warrant being obtained against them, as in *meditatione fugæ*, “to incarcerate them within the tolbooth of Holyroodhouse, until they find caution de judicio sisti, in any action to be brought,” &c., “or to abide the diligence on the bill, any time within six months from this date,”—held a regular warrant. M'Ra and Others, Feb. 7, 1832, p. 300.
19. Circumstances in which the Court granted warrant to cite two elders who had declined granting any certificate to a party applying for the benefit of the poor's roll, to give evidence at the bar as to their knowledge of the applicant's condition, &c. Craigie, Feb. 10, 1832, p. 315.
20. A Justice of Peace, acting under a commission to take a party's deposition on a reference, having, after putting him on oath, declined to proceed, and granted a certificate that he considered him not in a condition of mind to undergo an examination,—held competent to investigate, in the process in which the commission had been granted, averments that this certificate was false, and granted collusively, to prevent the deposition actually emitted being taken down. M'Laurin, Feb. 14, 1832, p. 393.
- 21.—(1.) Where a petition and complaint was ordered on July to be served, and answers lodged on the first box-day; and within four days *prior to the first* box-day it was served, and the petitioners prorogated the time for lodging of the answers to the second box-day—held, that the service was inept.
 (2.) A petition for breach of interdict, with penal conclusions, inept, without the concourse of his Majesty's advocate. Duke of Northumberland and Others, Feb. 23, 1832, p. 366.
22. Where the defender in an action of divorce lived in America, and had received personal intimation under the original process, held not necessary to repeat personal intimation under the summons of wakening. Campbell, Feb. 24, 1832, p. 373.
23. A party having succeeded in an action against a trustee on a sequestered estate, and obtained execution pending appeal against him *qua* trustee for expenses, but not as to the principal sum—a supplementary petition, praying for execution for the principal, interest, and expenses, against creditors on the

PROCESS, XVI.—VARIOUS (Continued.)

- estate as the trustee's constituents, dismissed as incompetent. Kirkland, &c., Feb. 25, 1832, p. 377.
24. Under a summons concluding for payment of rent, in terms of a lease, and pending the discussion of which the Court ordained the subjects to be let, found competent to allow an account of expenses incurred in letting them, to be deducted from the new rents, before the defender could impute them to the extinction of the claim against him. Douglas, Feb. 25, 1832, p. 379.
25. Where, pending an action against certain partners of a company for a debt, a supplementary action was raised to ascertain the liability of a latent partner, which was ultimately decided against him; and in the meanwhile decree was taken, in terms of an accountant's report in the original action, against the other partners,—held, that this decree did not preclude the latent partner from being heard on objections to the accountant's report and the decree. Edinburgh and Leith Shipping Co., Feb. 29, 1830, p. 404.
26. Circumstances in which an objection that a petition in a ranking and sale was by the common agent, not by creditors, was disregarded; and a party ordained to consign, or find security for a large amount of interest, which had accrued on the purchase of land. Goldie, &c., March 7, 1832, p. 437.
- 27.—(1.) In an action for the aliment of a natural child, the defences, consisting chiefly of extracts from medical certificates regarding the alleged impotency of the defender, and comments on them, ordered to be withdrawn, and the defender subjected in the expenses of the replies.
 (2) On failure to lodge defences anew, decree being given, and an advocacy brought—a remit made to the Sheriff to adhere to his order, but to proceed in common form to prepare a record; and the advocator found liable in the expenses of the advocacy. Ure, March 9, 1832, p. 450.
28. Circumstances in which, under an issue whether slanders were uttered falsely, calumniously, and maliciously, in a paper entitled "Answers to Condescension," the pursuer having produced the answers, but not the rest of the process, and the defender having produced no part of the process, and objected that the jury could not try the issue, and particularly the pertinency of the statements in the answers, upon such partial production,—direction given that the slanderous statements were to be held irrelevant. Cullen or M'Kenzie, March 14, 1832, p. 497.
29. An omission to put the name of the pursuer's agent on the service copy of a summons in the Inferior Court, does not infer nullity of the process, but only a fine on the pursuer. Buchanan, May 22, 1832, p. 555.
30. Where a party brought an action of reduction of several deeds, and a record was closed, issue joined, and verdict found as to one of the deeds, and the case, *quoad ultra*, was depending, and the pursuer thereupon brought a reduction-improbation of the deeds not falling under the verdict on the head of falsehood, &c.; found that this process must be sisted till either the original one was decided or abandoned. Dun, or Mason, May 22, 1832, p. 555.
31. A petition craving the rectification of an Inner-house interlocutor, as ultra vires of the Court—refused. Hunter, June 1, 1832, p. 604.
32. Circumstances in which the ordinary procedure in a ranking and sale was sisted till it should be determined whether the lands to which it related were held in fee-simple, or under entail. Ferrier (White's Trustee,) June 2, 1832, p. 616.
33. Incompetent for parties, even by a series of repeated enrolments before a Lord Ordinary, to prorogate his jurisdiction in a cause not regularly depending before him. Kirk, June 16, 1832, p. 655.
34. Commission to examine witnesses abroad renewed to a pursuer, on payment of prior expenses, although his agent had neglected for a year to extract the original commission, the defender not being exposed to any risk of injury, and the witnesses being essential to the pursuer's case. Bignal, June 21, 1832, p. 679.
35. (1.) The defence of *remissio injuriae* is not properly prejudicial, in an action

PROCESS; XVI.—VARIOUS (Continued.)

- of divorce on the head of adultery, and in general the pursuer is entitled to prove his libel, before any proof is led as to the remissio.
- (2.) Circumstances in which a proof of remissio refused before allowing a proof of the libel. Taylor, June 22, 1832, 680.
36. In an action for recovery of stolen property from two parties alleged to be accomplices with a third who had been convicted and executed, the Court granted diligence for recovery of all letters written to the party convicted with reference to the robbery, without requiring any specification of the dates, or the parties by whom they were written. National Bank, June 22, 1832, p. 694.
37. Observed that the Court cannot interfere to stay extract of a protestation for not insisting till an enrolling day should arrive, where the delay has not been occasioned by any act of the defender. Creightons, June 22, 1832, p. 695.
- 38.—(1.) Where there were no relations on the mother's side in Scotland, (except as undermentioned,) and a petition was presented by tutors, craving the Court to find that they complied with the statute 1672, c. 2, if they made up inventories with the consent of two of the next of kin residing in England, or failing the concurrence of these parties, if a summons was raised against them citing them to concur, and therefore craving authority to cite—the Court found it unnecessary to cite the next of kin resident in England.
- (2.) One of the pupil's next of kin on the mother's side being the wife of a tutor, not cited to concur in making up inventory, though no other cognates were in Scotland. Lady Blantyre and Others, June 23, 1832, p. 702.
39. A petition for rectification of an interlocutor refused as incompetent. Richardson, June 30, 1832, p. 744.
40. In an action in an inferior court against a woman for payment of the price of furnishings made to her deceased husband, more than three years before the action was brought, she admitted a partial payment by her within the three years, but alleged that this was in the erroneous belief that the goods had been truly furnished, which she now denied, and further pleaded prescription; the inferior judge having pronounced an interlocutor allowing the pursuer a proof of the delivery, against which she did not reclaim; and a proof having been taken, and judgment pronounced against her—held, that she was precluded from resorting in an advocation to the defence of prescription. Kerr and Ingles, July 6, 1832, p. 774.
41. A petition having been allowed to be seen for so many days, but without the interlocutor specially bearing an order "*to answer*,"—held, that the party against whom it was directed ought to have lodged answers if he had any, and delay to put in answers refused. Manson and Goldie, July 11, 1832, p. 811.
- See Millar, Nov. 29, 1831, p. 70.—Lawrie or Graham and Others, Jan. 17, 1832, p. 196; p. 770, foot-note.—Wark, Feb. 11, 1832, p. 317.—Forbes, Feb. 16, 1832, p. 341.
- PROCURATOR FISCAL.** See *Reparation*, 6 (3.)
- PROOF, I.—EXAMINATION OF PARTY, &c. ADMISSION, &c.**
1. Circumstances admitted in a judicial declaration emitted "before answer," held not sufficient to exclude a proof. Wilson, Dec. 9, 1831, p. 110.
 2. In an action at the instance of the parties claiming to be ranked on a sequestered estate, against the trustee for reduction of a composition-contract and discharge granted by them to the bankrupt,—held, (without deciding the general question of law,) that, in the circumstances, the statutory declarations of the bankrupt were not admissible in evidence. Kirkland and Others, Dec. 20, 1831, p. 169.
 3. Where a nephew admitted that he had received advances of money from his uncle; and on the uncle's death, an acknowledgment, apparently subscribed by the nephew, for the money, was found in the uncle's repositories, and relative to an adjustment of accounts; and the nephew refused to admit, but did

PROOF, I.—EXAMINATION OF PARTY, &c. (Continued.)

not deny, his signature to be genuine, and alleged that the money had been given as a gift,—held, that he was liable for the money, with interest. Stephen, &c., Feb. 1, 1832, p. 279.

II.—JUDICIAL REMIT.

Where a defender objected to an account of plumber-work as overcharged, and a remit was made to a plumber to "examine the account, and report his opinion as to the charges;" and a report was returned, stating a variety of items as overcharged, and others as undercharged,—held, that the defender could not reject the report as to the partial undercharge, if he founded on it in proof of the partial overcharge. Thomson, Dec. 13, 1831, p. 124.

III.—CONFIDENTIAL COMMUNICATION.

An objection to the examination of an accountant on the plea of confidential communication, repelled. Wright and Others, Dec. 15, 1831, p. 139.

See *Agent and Client*, 5.

IV.—OATH ON REFERENCE.

Incompetent, after a reference to oath and deposition emitted, to refer to and connect the statements of the deponent in the record with the deposition, but competent to order a re-examination. Young, May 25, 1832, p. 570.

See *Process*, XVI. 11. 17 (2).

V.—PAROLE.

1. A verbal bargain to commute certain ladle-dues for a sum of £5, held proved, and defender assailed from a larger claim accordingly. Craig, Jan. 21, 1832, p. 219.

2. In a suspension of a charge on a decree in absence, proof by parole admitted to establish that a bill alleged to have been given on a compromise in extinction of the debt contained in the decree, was so given, and not merely in payment of a claim of bygone interest. Flockhart, March 9, 1832, p. 472.

See *Poinding*, 2.—*Proof*, IX.

VI.—WRITTEN.

1. An unstamped missive, acknowledging receipt of "bills and cash to the amount of £55, 4s. 6d., which shall be placed to account of your rent," and the amount being afterwards stated to be erroneous as to the cash, but the bills being admitted to have been received of the date of the missive, and the missive being ultimately stamped with a £1 agreement stamp—held good evidence that the bills were to be specially imputed to the rent. Bennie, Jan. 28, 1832, p. 255.

2. A deed purporting to be a declaration of intention, as expressed in a prior delivered deed, not allowed to affect the proper legal construction of the previous deed. Florence, Feb. 14, 1832, p. 326.

3. (1.)—Circumstances in which a verdict set aside as contrary to evidence.

(2.) An account rendered by a person having an interest in the issue of a cause, not allowed to be produced in evidence, as the party tendering it, by passing from the objection on the head of interest, might have examined him as a witness as to the point intended to be established by the document. Paul (Inglis's Trustee), &c., March 10, 1832, p. 486.

See *Proof*, IX.

VII.—CIRCUMSTANTIAL.

A party having uttered several judicial slanders against another, this held sufficient corroboration of a single witness deposing to similar extrajudicial slanders to go to the jury. Cullen, or Mackenzie, March 14, 1832, p. 497.

VIII.—ON COMMISSION.

1. A witness having been examined on commission, and the evidence sealed up to lie in retinence until the day of trial; and a motion being made in the interval for a renewal of the commission to re-examine the witness, who, it was alleged, would now depone more distinctly upon certain points than at the previous examination—motion granted, under special instructions, to submit the proposed interrogatory to the Court, and reserving all objections to the competency of the new evidence when used on trial. Paul, March 10, 1832, p. 496.

2. Circumstances in which the Court refused to grant warrant for taking the

PROOF, VIII.—ON COMMISSION (Continued.)

testimony of two aged witnesses, in an action of damages for alleged slanderous words said to have been addressed by a clergyman from the pulpit, in presence of the congregation. Dudgeon, July 11, 1832, p. 810.

See *Process, XVI.* 34.

IX. VARIOUS.

1. Terms of instructions given to a party to act as shower to viewers, which were found to disqualify him afterwards as a witness. Young, March 15, 1832, p. 502.
2. Held, under a general issue of indebted and resting owing, in a question between a merchant and his manager, 1. That in order to prove the manager's defence that a deficiency in the stock arose from mistakes or accidental losses, it was necessary to prove that these occurred in that particular house, before general evidence could be led to show that they were usual in the same business elsewhere. 2. That where the power of a manager was fixed by contract, no general evidence to show the practice as to the nomination of inferior servants by the manager was competent. Gye and Company, March 24, 1832, p. 512.
3. The transfer of certain shares in a Company established by Act of Parliament, which declared the entry in the Company books the only test of property, having been entered in the books, and being there specified as a transfer in security,—held that it lay on the party in whose favour it had been granted, to prove that the security was general and not special, by production of the deed of transfer itself, and interdict granted against a sale, till he should so produce it. Brock (Colin Gillespie's Trustee), May 24, 1832, p. 562.
4. In a building contract, instalments having been agreed to be paid on a certificate by the architect and superintendent of works, that work to the value had been executed; and a question having arisen at a distance of time as to whether an instalment had been due at a particular date; and the architect and superintendent having declared that they had no materials for determining whether they would then have been justified in granting a certificate, a proof allowed in their presence to satisfy them on this head. M'Cartney, June 23, 1832, p. 705.
5. In an action to establish a letter containing several bequests as part of the will of a party deceased, the defender waved on the first trial an objection to the admissibility as a witness of one of the legatees, his counsel stating in Court that it was the defender's intention to pay the legacy to that individual. On a second trial the objection being insisted on, the Court held that the interest was not removed by the declaration on the former trial. Buchan, July 16, 1832, p. 838.
- 6.—(1.) Where a notarial instrument of assignation of sub-rents was extended on paper inadequately stamped, and after several years a new instrument was extended on paper properly stamped, and both documents were tendered at a jury trial,—held, that both were admissible, the first being a memorandum which supplied such materials to the notary as enabled him to extend the second, and the second being duly stamped.
 (2.) Instrument admissible, though notary not called to support it.
 (3.) Although letters had passed through the post-office, and were recovered under a diligence from the person to whom they were addressed, yet it seems that if a party wish to prove to the jury the fact of their having reached that person, it must be proved otherwise than by diligence. Balfour, July 23, 1832, p. 853.
- 7.—(1.) Under an issue whether Rotterdam or Aberdeen was the port of delivery, a witness desired by the Court to read the letter ordering the cargo, and say if the port of delivery was Rotterdam or Aberdeen.
 (2.) An agent having received written instructions relative to a transaction, and, after completing it, having returned them to the party who gave them, and by whom they were eventually lost—that party not allowed to examine the agent as to their tenor.
 (3.) Observed that the condescendence and answers being part of the record

PROOF, IX.—VARIOUS (Continued.)

of the Court of Session, may be referred to at a jury trial without being specially put in. Schuurmans and Son, July 18, 1832, p. 839.

8.—(1.) Circumstances in which the jury found, that a party had been cited as a party to an action in 1797.

(2.) Circumstances in which, question raised, whether a proof that a party was not personally cited could competently be adduced, without first producing the execution, and also the messenger and witnesses, if alive.

(3.) A certified extract from the books of the War Office being produced, and the handwriting and signature being proved,—held inadmissible, the clerk who made and certified the excerpts not being produced to depone to their accuracy, and not having been examined on commission to that effect.

(4.) Observed, that in weighing a conflicting parole proof of a date occurring above 30 years ago, most reliance is due to those witnesses who connect the date, either with some remarkable incident in their own experience, or with some event, the precise date of which is proved aliunde. Kay, June 25, 1832, p. 831.

9. A clerk in the Sheriff-clerk's office being asked whether he knew the tenant's crop and stocking to have been sold by a former landlord—question not allowed, it being objected that, if the tenant had been sequestrated, the judicial proceedings in the sequestration, and judicial roup, should have been produced. Smith, June 18, 1832, p. 829.

10. In a process of division of a commonalty, where an issue was sent to a jury, whether lands had been possessed as common property for forty years; held,

(1.) That it was competent to ask a herd upon the common, what directions he received from his master as to the boundaries of the common, though the master was not proved to be dead, and was not called.

(2.) That a deposition, although taken without objection under a commission of perambulation, was inadmissible, in respect that the witness was a feuar, and as such interested.

(3.) That a minute of an ex parte riding of the marches was not receivable, being merely the averment of party.

(4.) That as the question which emerged on the trial was one of law, the jury were bound to find according to the direction of the Court. Hunter, July 12, 1832, p. 833.

11.—(1.) Circumstances in which a reduction of a deed being brought on the several grounds of forgery, fraud, and death-bed—the Jury found for the defendant.

(2.) Circumstances in which a witness was held inadmissible to give evidence for a party pursuing a reduction on the head of death-bed, the witness conceiving himself to be a nearer heir to the deceased than the pursuer was, and having taken various steps with a view to prove his claim, but without having hitherto been able to prove it. Ralston or Alison, July 18, 1832, p. 848.

12. An offer of proof being made that an auctioneer declared orally at a sale by public roup, that on the lots being knocked down, they were to be held as delivered to the purchasers,—held by the Lord Ordinary, and approved of by the consulted judges, that such proof was incompetent, there being written articles of sale containing no such provision. Lang, July 6, 1832, p. 777.

See *Bill of Exchange*, 7. 9.—*Process*, IX. 4.—XVI. 12.

PROPERTY.

1. Circumstances in which a right of eavesdrop was found not to prevent a co-terminous proprietor from building on the space on which the drop fell. Scoulter, Jan. 24, 1832, p. 241.

2. Where, under a special agreement, a dam-dyke was built, and a run of water thence made through the lands of adjoining proprietors to supply their mills; and each proprietor was to keep the water-course in good repair within his own grounds; and the expense of upholding the dam-dyke was common; and the

PROPERTY (Continued.)

superior proprietors were prohibited from injuriously interrupting the water-course,—held, that although no right of passage was expressly stipulated, a tenant of a mill belonging to one of the inferior proprietors, had a right to go along the water-course to the dam-dyke as often as necessary, to examine the condition of, and to repair, the water-course or dam-dyke. Weir, Feb. 4, 1832, p. 290.

3. Where a party who had a reserved right of coal in an estate, carried an existing level under the bed of a stream into adjoining lands, (to the coal of which he had also right,) so as to drain the coal of these lands, brought the water thereof within the estate by means of a steam-engine, and there raised it and threw it on part of the surface of the estate,—found that he was not entitled to do so. Turner, March 3, 1832, p. 415.

4. Question as to whether a house had been built in the bona fide belief, that the site, which was truly the property of another, belonged to the builder. Ritchie, June 7, 1832, p. 621.

See *Obligation*, 2.—*Process*, VII. 16.

PROTESTATION. See *Process*, XV. 4.

PROVISIONS TO CHILDREN. See *Interest of Money*.—*Succession*, 1, 2.—*Trust*, 10.

PUBLIC OFFICER. See *Officer, Public*.

RANKING AND SALE.

1. An objection to a vote at an election of a common agent in a ranking and sale, that it was given by one of two acting tutors as being the "sole acting, accepting, and surviving tutor and curator,"—sustained.

2. Another objection, that the oath of verity as to a debt due to a chartered bank was taken by a party designing himself teller in the bank per procuration of the treasurer, but that neither the bank charter nor procuration were produced, and that the treasurer could not so delegate his powers—repelled, it not being denied that the party was a sworn officer of the bank. Thorburn, Feb. 25, 1832, p. 380.

3. Interim warrant granted on a judicial factor, for payment of a preferable annuity out of the arrested rents of lands the subject of a ranking and sale, before any common agent was appointed, or a state of the debts made up, or a proof of rental taken. Wood's Trustees, &c., July 5, 1832, p. 773.

See *Process*, XVI. 32.—*Right in Security*, 1.

RECORD. See *Process*, XI.

RECORDS, PUBLIC.

A specification of letters patent for Scotland, having been enrolled in Chancery,—an application to have it delivered up, to be produced in Parliament, on occasion of applying for an extension of the term of the patent, refused, in respect of the danger to the public records, and because certified extracts of recorded deeds are probative by the law of Scotland. Morton, Dec. 17, 1831, p. 162.

RECLAIMING NOTE. See *Process*, X.

REDUCTION. See *Process*, XV. 3, 6.

RELIEF. See *Bill of Exchange*, 5.—*Cautioner*.

REMISSIO INJURIAE. See *Husband and Wife*, 5.

REMIT. See *Proof*, II.

REMOVING. See *Landlord and Tenant*, 2, 5.

REMUNERATION. See *Contract*, 2.—*Partnership*, 8.

REPARATION.

1. Circumstances in which the Court found an agent liable for the amount of a sum lent, in consequence of the unusual and defective form of security. Sim, Dec. 2, 1831, p. 85.

2. A horse having been killed during the night into an old ironstone pit, which lay within a yard of the public highway, and was insufficiently fenced—held, that an action lay directly against a judicial factor on the estate in which the pit was situated, without calling the tenant to whom the minerals were let, though it was alleged he had formerly worked the pit for several

REPARATION (Continued.)

years, and might still be using it, for any thing known to the judicial factor. Mack, Feb. 17, 1832, p. 949.

3. Question, whether a party had suffered injury by the fault, negligence, or want of skill of another. Edinburgh and Glasgow Union Canal Company, March 15, 1832, p. 505.
4. Circumstances in which the keeper of a livery and sale stable was found liable in the value of a horse which died while under his charge on sale. Hagart, March 16, 1832, p. 506.
5. Damages found due for falsely alleging that a party was the author of a calumnious letter. Home, March 19, 1832, p. 508.
- 6.—(1.) Circumstances of alleged irregular procedure by magistrates of a burgh, in punishing a party for disorderly behaviour in the streets, held relevant to infer damages against them, without libelling malice, notwithstanding the statute 43 Geo. III. c. 141, as extended by 9 Geo. IV. c. 29, and 1 Wm. IV. c. 37, § 13.
 (2.) Held that the summons was relevant, notwithstanding the exception in 1701, c. 6, as to riots.
 (3.) The procurator-fiscal of the burgh having voluntarily acted as clerk of the magistrate, and written out the procedure and sentence, in virtue of which the imprisonment was inflicted—held, that he was jointly and severally liable. Richardson, &c. June 1, 1832, p. 607.
7. A landlord entitled to set off against the tenant's claim of damages, a claim for repairing fences, so as to enable him to let certain parks, on the desertion of the tenant before the expiry of the lease. Young, June 16, 1832, p. 666.
8. Circumstances in which a tutor claiming damages for wrongous dismissal and alleged slander—the Jury found for the defender. Matheson, June 4, 1832, p. 825.
9. Circumstances in which a verdict was found for the defenders in an action of damages against the Superintendent of Police, and against several police-officers, and against the Commissioners of Police, as liable for the officers in their employment, accused of culpable negligence and wilful oppression in the execution of their duty. Nimmo, July 18, 1832, p. 844.
10. Circumstances in which a tenant, whose landlord refused him access to his farm, after having granted him a minute of tack for twelve years, was found entitled to damages. Smith, June 18, 1832, p. 829.
11. Circumstances in which, verdict returned that a canal and a dam-dyke across a river were to the injury and damage of upper heritors, as proprietors of salmon fishings on the river. Forbes (Lord) and Others, July 21, 1832, p. 851.

REOPENING. See *Process, XII.***REPUTED OWNERSHIP. See *Agent and Principal*, 5, 6.****RES JUDICATA. See *Process, XIII.*****RETENTION. See *Sale, 1.—Agent and Principal*, 6.****RIGHT IN SECURITY.**

1. The institution of a ranking and sale does not operate as an interruption to a sale by an heritable creditor, under powers in his bond. Simson and Others, Nov. 25, 1831, p. 66.
- 2.—(1.) An heritable creditor, who has obtained decree of poinding of the ground prior to sequestration, is entitled to proceed with the same, to the exclusion of the trustee on the sequestered estate.
 (2.) Poindings of the ground are not included under the bankrupt act, or other enactments regulating poindings. Bell, Dec. 3, 1831, p. 100.
- 3.—(1.) Where commissioners take property under the compulsory clauses of a statute, and the whole value is awarded by a Jury to heritable creditors—the commissioners are not entitled to withhold the price till the creditors shall furnish a feudal title; but are bound to pay on receiving a valid discharge disburdening the property.
 (2.) Question raised whether the terms of the statute did not per se afford a sufficient title. Hamilton, Jan. 28, 1832, p. 262.

RIGHT IN SECURITY (Continued.)

4. Construction of a clause regarding the extent of claims to be covered by a right in security, constituted by an ex *facie* absolute disposition to one party, and a relative correspondence with the creditor. Tierney, June 16, 1832, p. 664.

See *Presumption.—Proof*, IX. 3.

RIVER. See *Contract*, 2.—*Reparation*, 11.

ROAD.

- (1.) Circumstances in which the Court intimated an opinion that a party was entitled to shut up one of two short roads, leading from a highway to a ford, and leaving the highway about 180 yards distant from each other; and,

(2.) A remit made before answer to a surveyor to report on the line of communication most convenient for all concerned. Macdonald, Jan. 24, 1832, p. 236.

ROAD ACT. See *Process*, II. 3.; IX. 3.—*Title to Pursue*, 6.

SALE.

1. Where a storekeeper made advances to the owner of a lot of grain deposited in the storehouse; and the owner sold the grain, and granted an order of delivery to the purchaser; and the order was intimated to the storekeeper, and several parcels of the grain were subsequently delivered to the purchaser's order; but no transfer was made in the storekeeper's books to the name of the purchaser; nor the grain measured over to him,—held, that the storekeeper was not entitled to withhold delivery of the remainder, on the ground of a lien for the advances to the original owner. Laurie, Nov. 12, 1831, p. 1.

2. Where an agent bought wheat "for a friend," and the seller took the agent's own bill for the price, and the agent refused to part with money belonging to the principal in respect of the bill, and became insolvent while the bill was in the circle,—held, that the seller could not claim payment of the price of the wheat from the principal. Young, Dec. 14, 1831, p. 130.

3. A party having granted a bill at six months as the price of the materials of a house, of which he immediately took delivery, and not having objected during the currency that he had not received every thing truly included in his bargain, but having asked farther indulgence—a bill of suspension, on the ground that certain parts of materials not delivered were included in his purchase, refused. Campbell and Others, Jan. 21, 1832, p. 229.

- 4.—(1.) Circumstances under which a party who purchased property was held liable for the price, although it was known to the seller that the purchase was for a company, of which the buyer was the secretary.

(2.) Where a party purchased property, under a declaration that he should not be entitled to withhold the price in respect of any defect in the progress of titles; and one of the titles was a disposition by a daughter as fief, while the parent (who was the true fief) consented as *liferentrix*, and for all right, title, and interest in the subject; and the daughter predeceased her,—held, that as such conveyance would found an action of constitution, and an adjudication in implement, the purchaser was not entitled to object. Sorley's Trustees, Feb. 14, 1832, p. 319.

5. A party to whom furnishings were made, and an account rendered, having used the articles, and made a partial payment to account, and been repeatedly pressed for payment for some years, without objecting to the rates of charge, —not allowed afterwards to object to them. George, March 7, 1832, p. 443.

6. Under an issue, whether a purchaser of bank stock had been induced to make the purchase by false and fraudulent representation, or fraudulent concealment on the part of the seller, "as to the credit and solvency of the bank," not necessary to prove actual insolvency, as at the date of the sale. Keith, March 24, 1832, p. 514.

7. Where a wholesale dealer raised an action against a retail dealer for the price of goods, within six months from the date of the invoice; and the defender pleaded that he was entitled, by invariable custom of the trade, to a longer credit, and proved an usual, but not an invariable custom,—found (the price

SALE (Continued.)

having been paid pending process) that he was entitled to expenses, subject to modification. *Burbridge, &c.* May 12, 1832, p. 520.

8. Intimation of a sale and order of delivery of spirits to the Excise storekeeper of a warehouse, situated within the premises of a distiller, in which spirits have been deposited under the 4 Geo. IV. c. 94, does not affect the landlord's hypothec for the rent of the premises. *Wyld, &c.* May 17, 1832, p. 538.

9. Circumstances under which a delay of six months in completing the title to an heritable subject, after selling it, was held not to authorize the purchaser to resile. *Raeburn*, July 5, 1832, p. 761.

10.—(1.) Cattle, specifically distinguished, were bought on the seller's premises by public roup; by the articles of roup, the seller was bound to keep them for a certain period after the sale; the cattle were with this view driven by servants of the seller, at the desire and with the assistance of the buyer, to the seller's unlocked parks; bills were granted for the whole price, and retired; part of the cattle were carried away from the parks by the buyer, who lived at a distance; and after the seller had called a meeting of his creditors, but before it was held, and while they were in cursu of rendering him bankrupt, the buyer, within the period during which the seller was bound to keep the cattle, sent a servant to take delivery of the rest of them, which being resisted, he applied to the Sheriff for an order of delivery, which was opposed by the creditors, and during the discussion the estates of the seller were sequestered under the bankrupt act,—held (after the whole Court had been equally divided, and one Judge agreed not to vote, so that a decision might be pronounced), that the buyer had right to the stock preferably to the trustee; but ordained to find caution to repeat the value, in the event of reversal on appeal. *Lang*, July 6, 1832, p. 777.

SALE OF LANDED ESTATE. See *Aliment*, 1.—*Ranking and Sale*.—*Stamp*.—*M'Lellan and Son*, July 5, 1832, p. 771.

SASINE.

A crown charter of resignation in favour of a series of heirs of entail, containing a clause of dispensation in favour of the heirs, for taking infestment in diverse lands at the principal manor-place, held to warrant the granting a bond of annuity with a similar dispensation. *Wood's Trustees*, July 6, 1832, p. 773.

See *Notary Public*.—*Service*, 1.

SEQUESTRATION, under *Bankrupt*. See *Bankrupt*.—See p. 770, foot note.

SEQUESTRATION, JUDICIAL.

Circumstances in which the Court granted sequestration of executry funds without a depending action. *Anstruther and Husband*, Dec. 23, 1831, p. 185.

SERVICE.

1. Sasines proceeding on charters neither granted by the Crown, nor by a subject-superior deriving right from the Crown, are not sufficient to establish that lands in Orkney, once held by udal tenure, were feudalized so as to prevent them passing from father to son without service. *Beattion, &c.* Feb. 2, 1832, p. 286.

2.—(1.) Service as heir-male in general of tailzie and provision, effectual to establish the general character of heir-male.

(2.) An ancestor resigned his lands for new infestment to himself in life-rent, and his son A, and the heirs-male of his body, whom failing, any other son to be procreated, and the heirs-male of his body, under the fetters of an entail, reserving full power to sell, alter, &c.; his son A predeceased him, leaving a son, B, who served heir-male of tailzie to A, and thereon executed the procuratory in the entail; thereafter, the heirs-male of the body of A failed, and a party, alleging himself to be heir-male of the body of a younger son of the entailer, served himself heir-male of tailzie and provision to the entailer himself,—question whether this was a competent mode of making up titles under the entail. *Anderson*, June 22, 1832, p. 696.

SERVICE OF APPEAL. See *Process*, XVI. 13.

SERVITUDE. See *Property*, 1, 2, 3.—*Process*, VII. 16.

SHERIFF'S SMALL DEBT ACT. See *Jurisdiction*, 9.

SHIP.

Where a vessel arrived at a port in a leaky condition, and the master entered into a written agreement with three seamen to assist in working her to another port for a stipulated sum, to be paid on arrival,—held, that although they subscribed the ship's articles regulating the conduct of the seamen, and bearing that wages were not to be payable till twenty days after arrival, they were entitled, on the vessel arriving safely, to immediate payment of the stipulated sum ; and observed, that they were also entitled to wages and board wages till payment was tendered. Henderson, March 9, 1832, p. 467.

SLANDER. See *Reparation*, 5, 8.

SLANDER, JUDICIAL. See *Process*, XVI. 24.

SOCIETY. See *Contract*, 2,—*Partnership*.

SPUILZIE. See *Possession*, 2.

STAMP.

A conveyance of heritage and moveables by a debtor to his creditor, for the purpose of the creditor selling the estate, and applying its proceeds in extinction pro tanto of his debt, is not a sale within the meaning of the stamp act. Robertson, Nov. 19, 1831, p. 35.

See *Landlord and Tenant*, 2.—*Proof*, VI. 1.—IX. 6.

STATUTE. See *Clause*, 4.

STAT. 1621, c. 18. See *Bankrupt*, 6.

— 1672, c. 2. See *Tutor and Curator*, 2, 3.

— 1695, c. 38. See *Commonalty*.

— 1696, c. 5. See *Bankrupt*, 10.—*Partnership*, 7.

— 1696, c. 9. See *Tutor and Curator*, 1.

— 1701, c. 6. See *Reparation*, 6.

— 20 Geo. II. c. 43. See *Process*, XVI. 13.

— 43 Geo. III. c. 141. See *Reparation*, 6.

— 54 Geo. III. c. 137. See *Bankrupt*.

— 55 Geo. III. c. 184. See *Stamp*.

— 3 Geo. IV. c. 78. See *Reparation*, 9.

— 4 Geo. IV. c. 49. See *Process*, II. 5.

— 4 Geo. IV. c. 94. See *Sale*, 8.

— 5 Geo. IV. c. 74. See *Landlord and Tenant*, 9.

— 6 Geo. IV. c. 120. See *Process*.

— 7 Geo. IV. c. 101. See *Title to Pursue*, 4.

— 7 and 8 Geo. IV. c. 76. See *Right in Security*, 3.

— 9 Geo. IV. c. 29. See *Reparation*, 6.

— 1 Wm. IV. c. 37. See *Reparation*, 6.

— 1 Wm. IV. c. 69. See *Process*, IV. V.

— 1 and 2 Wm. IV. c. 45. See *Right in Security*, 3.

SUBMISSION. See *Arbitration*.

SUCCESSION.

1. A party having settled his moveable estate on his younger children, and executed a personal bond, whereby he made additional provisions to them, payable by the heirs succeeding him in two estates, whereof one was held in fee-simple, and the other under entail, but which allowed provisions to the extent thereby imposed ; and the heir first succeeding having died intestate after possessing the estates for some time, without having paid the provisions,—held, in question with the next heir, that he was liable to pay the provisions without relief out of the executry of the heir first succeeding. Macdonald, &c. May 29, 1832, p. 584.

2. A party having provided £10,000 to his only lawful child in full of all claims, and by a trust-deed of settlement appointed the residue of his estate to be paid to two natural children, "equally betwixt them, share and share alike, and their heirs and assignees," but not payable till the marriage or majority of each respectively ; and one of them died in minority and unmarried—held,

(1.) That the bequest had not vested in him.

SUCCESSION (Continued.)

- (2.) That the *jus accrescendi* did not take effect in favour of the surviving natural child.
- (3.) That the Crown could not take as included under the conditional institution to "heirs;" and,
- (4.) That the legitimate child, as his father's executor at law, was entitled to one-half of the residue, (in addition to his provision,) as lapsed. *Torrie, &c. May 31, 1832, p. 597.*
3. Trustees, under a marriage-contract, empowered to lay out a sum of money provided to the wife, on security either real or personal, having lent it on an heritable bond, taken, not in terms of the destination in the contract, but to the husband in trust for the uses in the contract, and it not appearing that the wife had specially sanctioned or known of this investment,—held, that it did not so alter the character of the fund in regard to the matter of succession, as to preclude her bequeathing it by will. *Berford, June 1, 1832, p. 609.*

SUMMONS. See *Process, XIV.*

SUPERIOR AND VASSAL.

1. Where a party disponed a portion of lands belonging to him, with a double manner of holding for a penny Scots feu-duty, if asked only, and relieving him of a proportionate part of the feu-duty payable for the whole lands to the overlord, which was also to be paid under the public manner of holding; and infestment was taken base; and the whole lands were thereafter disponed to a singular successor without any exception from the dispositive clause in the disposition, but with merely an exception from the clause of warrandice of "feu-rights," including that above mentioned; and this singular successor completed his right by confirmation from the over superior, and more than 40 years' possession followed, during which the feu-duty for the whole lands was paid by him and his successors to the overlord, and the proportion thereof laid upon the part disponed was drawn by them from the owners, but not the penny Scots,—held, that the latter parties were still entitled to obtain an entry from the overlord, and were not bound to hold under the singular successors of the original disponer. *Cheyne, June 7, 1832, p. 622.*
2. (1.) Where a vassal had feued out his property in different parcels with untaxed entries, for feu-duties merely equalling that paid by himself to the superior, and grassums, which, with the duties, were a fair consideration for the property at the time,—held, that on the entry of a singular successor, the superior was only entitled to a year's feu-duty, and a year's interest of the grassums, and not to a year's actual rent of the lands.

(2.) Question reserved as to the case of a composition for entry falling due to the vassal from his subvassals during the year when the entry of the former was required. *Sir Archibald Campbell, June 28, 1832, p. 734.*

SURRENDER. See *Teinds, 3.*

SUSPENSION. See *Process, XV.*

TEINDS.

1. A decree-arbitral, under a submission by the proprietor and titular, to which the minister of the parish was no party, cannot be the foundation of a valuation by the High Commission, the minister objecting thereto. *Gordon, Feb. 15, 1832, p. 338.*
2. Two augmentations having been modified prior to the act 1808, but no final scheme of locality made up for several years after,—held, that the rates of conversion for virtual stipend were the fairs prices for the seven years preceding each augmentation respectively, and not those for the period subsequent thereto. *Earl of Hopetoun, Feb. 18, 1832, p. 361.*
3. Where a final decree of locality was pronounced in 1726, localling an overpayment beyond a decree of valuation of the High Commission in 1636; and the decree of 1726 was reduced in 1764, and the overpayment restricted to the amount in the decree of valuation; and the overpayment was, nevertheless, continuously made by singular successors in the lands down to 1824,—held

TEINDS (Continued.)

still competent to the heritor to surrender his valued teind, in terms of the decree 1636. Baird, July 3, 1832, p. 752.

TENOR—PROVING OF THE.

In proving the tenor of a back bond, an allegation in the libel that the defendant had privately obtained possession of it, and had destroyed or away put it, or that it had fallen aside and was lost,—held a relevant *causus amissionis*. Miller, Feb. 21, 1832, p. 362.

TESTAMENT.

1. Where a testatrix by a codicil bequeathed a legacy of "£1000, presently vested in the five per cents," declaring, that in the event of not being possessed of such stock at her death, then "the sum of £1000 sterling," with interest thereafter, should be a burden on her general estate, and that the codicil should be valid, unless revoked by a writing under her hand; and the testatrix, after the five per cents were converted into new four per cents, transferred £1000 of the new stock to the legatee, who ordered payment of the dividends to be made to the testatrix during her life; and the testatrix left no five per cent stock, and executed no written revocation,—held that the legatee was entitled to the additional sum of £1000 sterling, with interest, from her death. Watson and Others, Nov. 16, 1831, p. 12.

- 2.—(1.) Circumstances in which a double legacy of the same sum was held to have been made.

(2.) A testator, by his deed of settlement, having declared that all legacies should be effectual which he should bequeath by separate writings or memorandum, "although the same be not formally executed, provided the same express my will and intention, and are written, dated, and signed by me;" and having left two holograph documents, bequeathing legacies, one consisting of a single sheet, the first page of which was dated, but not signed, and the second page, bearing a subsequent date, was signed; and the other document set forth his name and designation, and was dated but not subscribed,—held, that the first page of the former of these documents was in law signed by the signature attached to the second page; and that the insertion of his name and designation in the other document, was a sufficient compliance with the declaration, and therefore the several legacies were due. Gillespie and Others, Dec. 22, 1831, p. 174.

TITLE TO PURSUE.

1. A party, designating himself "the eldest son and heir" of a marriage, and libelling on a disposition to children in fee, found entitled to pursue a reduction of a disposition to his prejudice, although objected that he had an elder brother and a sister, who had an interest, and they were not pursuers—Reserving the effect of the clause on the conclusions of the action. Wilson, Nov. 26, 1831, p. 66.
2. A discharged bankrupt is entitled to sue without finding caution for expenses, although he has conveyed his estates to a private trustee, such trustee having authorized him to sue in his own name for the recovery of the sum in question, and to apply the same when recovered to his own use, and having renounced all right to sue for the debt in his favour, and all claims upon the fund to be realized therefrom. Megget, Jan. 24, 1824, p. 233.
3. A party who held heritage under a disposition to herself and her donees, and (failing her disponing) to certain substitutes, having executed a conveyance, alleged to be on death-bed—Found, that her titles were not exclusive of the substitute heir of provision's title to pursue reduction of it *ex capite lecti*. Cogan, Jan. 28, 1832, p. 267.
- 4.—(1.) An Act of Parliament incorporating a Joint Stock Company, with a conditional provision, that it should not come into force until a subscription contract to a certain amount was entered into and signed; and this having been done to the precise amount, and no more; and a party having signed as mandatory, but without authority,—held, that the signature, though it did not bind the alleged mandant, afforded, from the terms of the contract, sufficient *ex facie*

TITLE TO PURSUE (Continued.)

evidence of liability against the subscriber to put the act in operation, and the Company in titulo.

(2.) Circumstances held not to infer mandate. Dundee Railway Co., Jan. 31, 1832, p. 269.

5. An action incompetent at the instance of a company firm, without libelling the individual partners. Aitchison and Co., Feb. 4, 1832, p. 296.

6. The provision in the turnpike act, that the road trustees may legally sue or be sued in name of their clerk, is not applicable to district clerks, but only to the clerk under the general trust. Williamson, &c. March 2, 1832, p. 413.

7. A married woman, whose husband had been abroad for several years, found entitled to sue with a curator ad litem an action of alimony against the alleged father of her child begot before, but born after marriage—the husband being called for his interest, and not appearing. Jobson, May 31, 1832, p. 594.

TRUST.

1. Circumstances in which the Court refused to permit a trustee, under a posterior voluntary trust, to interfere with the collection of rents by a prior trustee, acting under an onerous disposition and assignation. Renton, Nov. 22, 1831, p. 38.

2. Circumstances in which a transaction entered into by a factor and commissioner for trustees, was held to be beyond his powers. Bridges (Manners's Trustee), Nov. 22, 1831, p. 48.

3. Where co-trustees separately, and in different proportions, advanced money to further the affairs of a trust; sold part of the trust property; and took heritable bonds, privatis nominibus, from the purchasers, on which infestation followed; and the estate of one of the trustees was sequestrated; an action by the solvent trustee against the trustee under the sequestration, to have it found that the bonds belonged to the trustees, and that they were entitled to be vested in them for the purpose of clearing off the outstanding obligations of the trust, and equalizing the advances of the trustees, sustained. Cook and Paul, Nov. 29, 1831, p. 75.

4. Circumstances in which private trustees of a bankrupt, declared liable only for actual intromissions, were found not liable to account for part of the trust funds intromitted by the bankrupt. Wallace, Feb. 23, 1832, p. 364.

5. Where a trustee under a decree-arbitral executed a disposition of his property in favour of trustees, providing, inter alia, an annuity to his eldest son, (who was a party to the submission,) during the trustee's life, but to lapse thereafter, and the son in lieu thereof to be put in possession of certain farms rent-free—and the trust-deed contained a clause, that when the son or other heir of the trustee should require the trustees to denude, he or that other heir was to exonerate the trustees, but did not contain any clause binding the trustees to denude—and after the trustee died, a creditor of the son got a decree in absence, adjudging all right and interest which he had under the trust; and the son died shortly thereafter, without any steps being taken to vest him, independently of the terms of the deed, in his rights under the trust,—held, in a question between the creditor and the trustees,

(1.) That nothing had vested in the son, which an adjudication could carry without a service; and,

(2.) That an adjudication was not a competent mode of attaching arrears of rent, or of annuity. Broughton, Mar. 3, 1832, p. 418.

6.—(1.) Construction of a trust-deed, under which trustees were found entitled to sell heritage generally conveyed to them, though such power was not given in express words. (2.) Where it was for the benefit of the trust that a question regarding trustee's powers should be judicially settled—expenses of all parties allowed out of the trust estate. Robertson and Others, Mar. 7, 1832, p. 438.

7. A trustee under a deed of settlement, who became bankrupt, and whose estates were sequestrated, ordered to denude of the trust estate (in which

TRUST (Continued.)

- he was infest) in favour of a judicial factor. Smith, &c., May 15, 1832, p. 531.
8. Circumstances where a party having been allowed a proof that certain trustees would have had a free fund in their hands wherewith to satisfy claims, if they had managed the trust funds properly, and having failed to establish the fact, found liable in the expenses. Aitken and Others, May 16, 1832, p. 535.
9. Circumstances in which trustees, resident in England at the date of the trust, were held personally liable for trust-funds paid over to them, without referring the question of their liability to the law of England. Blackett and Others, May 29, 1832, p. 590.
10. Trustees having profitably employed the trust-funds of a defunct, out of which a child was provided by marriage-contract in a certain sum; held, that the child was entitled to the accumulated profits thereon, and not merely to legal interest. Torrie, &c. May 31, 1832, p. 597.
11. A sum of money taken to a party, "her heirs and assignees," not heritable, destinatione. Berford, June 1, 1832, p. 609.
12. Trustees for creditors disputing the claim of one creditor not allowed to charge the expenses connected with their opposition to him, so as to diminish his share of the trust-funds. Carswell, &c. June 21, 1832, p. 677.
13. A father, in reference to the antenuptial contract of his daughter, having disposed his estate to three trustees without naming a quorum, or conferring any power of devolution to be held for behoof of his daughter and husband in life-rent, and their children in fee; and two of the trustees, without the consent of the other, (who had never acted, but declined to renounce till satisfied on a particular point,) having disposed, with consent of the spouses for themselves and children, a part of the trust-estate to a trustee, for behoof of the creditors of the father; held, that this trust-deed was incompetent, that the spouses were not barred from insisting in a reduction of it, and that their consent could not affect the interests of the children. Freen, &c. June 28, 1832, p. 727.
14. Trustees entitled, before denuding, to a discharge of an annuity, payable out of the trust-fund, which had been assigned to a third party, or to retain sufficient funds to answer it. Scheniman, &c., July 3, 1832, p. 759.

See *Clause, 2, 3.—Mandatory.*

TUTOR AND CURATOR.

- 1.—(1.) A curator neglecting to make up inventories, does not forfeit the benefit of 1696, c. 9, establishing the decennial prescription.
 (2.) An extrajudicial consent, after the years of prescription, to afford information respecting the affairs of the curatory, does not bar the plea of prescription. Gowans, Dec. 16, 1831, p. 144.
2. Tutors appointed under a deed which declared each liable only for his actual intromissions, having failed to give up inventories, in terms of 1672, c. 2; held liable for omissions, as well as intromissions, and singuli in solidum. Murray, Feb. 1, 1832, p. 276.
3. Dispensation granted, in an action for making up tutorial inventories, from citing the next of kin on the mother's side, who lived beyond the jurisdiction of the Court. Shields and Others, (Shields' Trustees,) Feb. 2, 1832, p. 282.
- 4.—(1.) Where the Crown appointed three tutors dative, and the Court had found that the tutoiy subsisted, notwithstanding the death of one of them; held, that the bond of caution granted for the tutors when the gift was obtained, subsisted also, and covered the whole intromissions of the surviving tutors or their factor.
 (2.) Two out of three tutors dative, having subscribed a deed of factory in favour of the third, and he having accepted, found caution, and acted, and one of the two subscribers having died before the end of the tutoiy; held, that

INDEX OF MATTERS.

TUTOR AND CURATOR (Continued.)

the factory did not fall by his death ; that the cautioner for the factor remained liable, and that he was bound to relieve the cautioner for the tutors as to all the acts and intromissions of the factor. Stewart, &c., Feb. 29, 1832, p. 392.

5. Incompetent to appoint a tutor ad litem for a pupil called as defender, for whom no appearance has been entered. Calderhead, May 26, 1832, p. 582.

USAGE (of trade.) See *Sale*, 7.

See *Graham and Others v. Aitken and Others*, Nov. 25, 1831, p. 65.

Hume v. Stewart, Dec. 2, 1831, p. 95.

Darling and Others v. Adamson and Watson, Dec. 9, 1831, p. 119.

Ramsay v. Roberts, Dec. 24, 1831, p. 192.

Ranking and Sale, Thorburn, Feb. 25, 1832, p. 380.

Lady Blantyre and Others; June 29, 1832, p. 702.

VERDICT. See *Process VII.—Proof VI.* 3.

VIOLENT PROFITS. See *Landlord and Tenant*, 10.

WARRANTICE.

1. A party whose life was proposed for insurance, having signed a declaration that he was in perfect health, and the general state of his health was good ; and the party proposing his life having made the truth of that declaration a fundamental condition of the policy ; held, that an express warranty was undertaken, that the life was not more than usually hazardous. Forbes and Co., March 9, 1832, p. 451.
2. Land having been evicted as glebe, found, under a clause of warrantice, that the party warranting was liable for the value both of the land and of the trees thereon. Ramsay, June 30, 1832, 745.

See Johnstone, Feb. 14, 1832, p. 380.

See Buchanan, Feb. 17, 1832, p. 352.

WRIT. See *Proof, VI., Testament*, 2.

WRONGOUS IMPRISONMENT. See *Diligence Legal*, 6.—*Process VII.* 8.—*Reparation*, 6.

ERRATA.

P. 168, heading of Case No. 87, line 5, for " Held, that," read " Question, whether."

P. 169, line 13, for " the two preliminary objections," read " the first preliminary objection."

— line 19, before the words, " their Lordships," insert " a majority of."

P. 177, for " Lord Craigie was understood to dissent," read " Lord Craigie concurred with the other Judges."

